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CATHOLIC RIGHTS DISCOURSE IN NINETEENTH-CENTURY GERMANY:
BISHOP KETTELER PROTECTED RELIGIOUS AND SOCIAL FREEDOMS
FROM THE EQUAL THREATS OF SECULARIZING LIBERALISM
AND ANTI-CATHOLIC ABSOLUTISM

Dissertation

By

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Abstract

“Catholic Rights Discourse In Nineteenth-Century Germany: Bishop Ketteler Protected Religious And Social Freedoms From The Equal Threats Of Secularizing Liberalism And Anti-Catholic Absolutism”

by Martin J O'Malley

advised by David Hollenbach

Wilhelm Emmanuel von Ketteler, a prominent nineteenth-century German Catholic bishop, used a language of rights that was essentially rooted in Catholic traditions. He used rights language, articulated a forward-looking social teaching, and ‘performatively’ acknowledged the value of representational politics, while nevertheless rejecting the individualism and atomism often associated with rights, liberalism, and democracy. Supporting his rights language, Ketteler’s social theory was based on (1) an aristocratic/Romantic worldview, (2) German jurisprudence, (3) the Catholic theologians of Tübingen and Munich, and (4) the specific politics of the German states.

This intellectual archeology argues:

(1) that rights language was part of the German legal landscape and non-controversial in Ketteler’s context, including subjective rights language referring specifically to the freedoms of individual persons. A language of rights was used and recognized by most Germans in the mid-nineteenth century, including Roman Catholics, to protect fundamental freedoms and to insure basic material goods necessary for dignified human life;

(2) that Ketteler’s use of rights was firmly rooted in Roman Catholic traditions of natural law, relying directly upon St. Thomas Aquinas, and was embedded in the

nineteenth-century Romantic conception of the 'organic social theory.' Ketteler referenced these traditions for both corporate and subjective rights with theoretical constancy;

(3) that along with natural law, Ketteler's creative articulation of rights incorporated the methodological insights of secular legal traditions of nineteenth-century German jurisprudence, especially Savigny's historical school, and that the juristic (legal) realm of discourse influenced his political discourse;

(4) that in challenging the foundations of German liberalism and the absolutist elements of German conservatism, he also creatively adapted their constructive insights to strengthen his own natural law system, and that this creativity was possible because of the central importance of practical reason in his teleological natural law system;

(5) that Ketteler's life, work, and implicit philosophy of rights demonstrate a continuing relevance for the natural law, and the rich potential for the church in public life.

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Abbreviations

Wilhelm Ketteler's collected works are referenced by *SWB I* and *SWB II*, followed by the volume number and page. The specific work and year are listed when they are not clear from the text.

<i>SWB I, 1</i>	<i>Sämtliche Werke und Briefe I, Volume 1 Schriften, Aufsätze und Reden 1848–1866. (1977)</i>
<i>SWB I, 2</i>	<i>Sämtliche Werke und Briefe I, Volume 2: Schriften, Aufsätze und Reden 1867–1870. (1978)</i>
<i>SWB I, 3</i>	<i>Sämtliche Werke und Briefe I, Volume 3: Schriften, Briefe und Materialien zum Vatikanum I 1867–1875. (1982)</i>
<i>SWB I, 4</i>	<i>Sämtliche Werke und Briefe I, Volume 4: Schriften, Aufsätze und Reden 1871–1877. (1984)</i>
<i>SWB I, 5</i>	<i>Sämtliche Werke und Briefe I, Volume 5: Nachgelassene und anonyme Schriften. (1985)</i>
<i>SWB II, 1</i>	<i>Sämtliche Werke und Briefe II, Volume 1: Briefwechsel und öffentliche Erklärungen: 1825–1850. (1984)</i>
<i>SWB II, 2</i>	<i>Sämtliche Werke und Briefe II, Volume 2: Briefe und öffentliche Erklärungen: 1850–1854. (1988)</i>
<i>SWB II, 3</i>	<i>Sämtliche Werke und Briefe II, Volume 3: Briefwechsel und öffentliche Erklärungen: 1855–1860. (1991)</i>
<i>SWB II, 4</i>	<i>Sämtliche Werke und Briefe II, Volume 4: Briefwechsel und öffentliche Erklärungen: 1861–1865. (1994)</i>
<i>SWB II, 5</i>	<i>Sämtliche Werke und Briefe II, Volume 5: Briefwechsel und öffentliche Erklärungen: 1866–1870. (1997)</i>
<i>SWB II, 6</i>	<i>Sämtliche Werke und Briefe II, Volume 6: Briefwechsel und öffentliche Erklärungen: 1871–1877. (2001)</i>
<i>Ederer</i>	<i>The Social Teachings of Wilhelm Emmanuel Von Ketteler: Bishop of Mainz (1811-1877). Translated by Rupert J. Ederer. Washington, DC: University Press of America, 1981.</i>

INTRODUCTION:
Ketteler's Rights Language Offered The German Church A
'Corduroy Road'—A Prudent Path Faithful To The Catholic
Tradition That Protected Religious And Social Freedoms From
The Equal Threats Of Secularizing Liberalism And Anti-Catholic
Absolutism

Practical theology, i.e., consciously theological *praxis*, is the concrete expression of belief in the world.¹ It concerns the engagement of the church within the complexity of the real world on the level of action. When studied as a matter of history, practical theology offers the advantage of examining not only the conceptual systems of practical theologians, but also the lives of people inspired by such theology. During times of intellectual transition and political uncertainty, practical theology as 'theology in action' may precede, generate, and clarify theory, since practical necessity tends to focus the mind.

In the months before the (first) Vatican Council, Bishop Ketteler wrote to his friend Moufang in Rome to complain about the editors of *Civiltà Catholica*:

It appears to me that these gentlemen are like men who, if stuck in the wild forests of America, would refuse to build corduroy (log) roads for their most vital needs because they have the crazy idea in their heads that they can only travel by train on polished rails. As insane as that would be, it seems to me that the actions of the gentlemen of *Civiltà* are just as insane. They are indeed the theoreticians who have never experienced the practical battles of daily life.²

Ketteler himself, who lived at the very center of his era's ideological and political battles, understood the essential need for prudence in public life. As a political and religious

¹ I am referring to 'practical theology' as applied theology or theological ethics. I understand that some religious traditions use this term to describe pastoral disciplines of preaching and worship—this is not what I am intending here (thanks are due to Arthur Sutherland for this point).

² *SWB I*, 3:71, Ketteler Letter to Moufang, Mainz, April 1, 1869.

leader, he used that prudence with a language of rights to build ‘corduroy roads’ of justice in the midst of a complex nineteenth-century political, religious, and economic landscape. Those rights were influenced by liberal theories and by liberal constitutional aspirations, but Ketteler drew most essentially from German Catholic intellectual traditions to articulate a social theory in opposition to liberalism. In doing so, he used rights language and entered the democratic process while rejecting the individualism and atomism often associated with rights and democracy in the modern era. The social theory that underpins Ketteler’s understanding of rights was influenced by (1) his aristocratic worldview, (2) his legal training, (3) the theology of Tübingen and Munich scholars as well as a direct reading of St. Thomas Aquinas, and (4) the specific politics of the German states, as opposed to the political situation in Rome and the Vatican states.

1.1. Thesis:

Wilhelm Emmanuel von Ketteler (b. 1811), the Roman Catholic bishop of Mainz (Germany) from 1850 until his death in 1877, was a man who embodied a practical theology during the profound political and economic transitions of the mid-nineteenth century. His practical action and social writings made him a forerunner of the Catholic Church’s more structured modern tradition of social teaching—a teaching broadly articulated fourteen years after his death in *Rerum Novarum* (1891). This encyclical became the reference point for the church’s subsequent social encyclicals and indeed all its present social teaching. Thus, the context from which that foundational encyclical emerged remains important for understanding the development and present structure of Catholic social teaching.

Nineteenth-century Germany has had a considerable influence on contemporary academic theology—as demonstrated by the continuing research on nineteenth-century philosophy, sociology, and systematic and biblical theology, for example. But we are lacking an equally meaningful understanding of the ethical and political developments from this period and place, especially in the area of church/state relations.³ *Rerum Novarum*, for example, did not spring full grown from the mind of Leo XIII, but emerged from the Catholic Church’s complex and often antagonistic tradition of relations with the increasingly secular governments of Western Europe. Nineteenth-century Catholicism was often defensive and characterized by alarm and entrenchment, but it was a time of intellectual inspiration, social vision and religious revival as well.

Ketteler’s practical engagement with the problems of his time belongs with the latter—especially regarding his application of Catholic social principles to political issues of secularization, industrialization, and representational government. The nineteenth century began with the secularization of German church properties and public offices. Religious institutions, Protestant as well as Catholic, were marginalized from political power and religion was increasingly viewed as a purely private matter.⁴ Modern nation-states, like Germany, used a liberal banner of reform to concentrate and magnify political

³ T. F. O’Meara writes: “The historical preparation for our present theology reaches back from Vatican II through five decades to the first half of this century. But the roots of those theologians and their ideas lie further back—in Möhler, Drey and Sailer; in Hegel, Schelling and Kant... Only a knowledge of the past century explains why our times, too gifted and anxious, include existentialism and evolution, mysticism and psychology, political theology and transcendental method.” Thomas F. O’Meara, *Romantic Idealism and Roman Catholicism: Schelling and the Theologians* (South Bend: University of Notre Dame Press, 1982), 198.

⁴ Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* (Boston: Beacon Press, 1972, c1957), 11. Krieger notes that Protestantism had long ceased to be an independent political force in Germany.

power with rationalized bureaucracies, centralized governments, and mass armies.

Ketteler recognized the signs of his times and the value of the churches' public voice in the emerging public sphere. In his early engagement with these modern political issues, he used a language of rights that was true to his Catholic principles.

This work argues:

(1) that rights language, including subjective rights language, was non-controversial in Ketteler's context. A language of rights was used and recognized by most Germans in the mid-nineteenth century, including Roman Catholics, to protect fundamental freedoms and to provide basic material goods necessary for a dignified human life. I use the term 'subjective right' throughout this work as specifying "an area of licit conduct allowed by law or a rightful claim to some external good."⁵

(2) that Ketteler's use of rights was firmly rooted in Roman Catholic traditions of natural law—relying directly upon St. Thomas Aquinas, and was also embedded in the nineteenth-century Romantic conception of the 'organic social theory.' Ketteler referenced these traditions for both corporate and subjective rights without apparent theoretical tension. Brian Tierney's judgment of twelfth- and thirteenth-century jurists was true also for Ketteler: "their writings were filled with a concern for rights—but the

⁵ Brian Tierney, "Marsilius on Rights," *Journal of the History of Ideas* 52, no. No.1 (1991): 9-10. The quote here is taken from Tierney's description of those subjective rights as used by Marsilius. I preserve this use of the term 'subjective right' because of its wide use by contemporary and nineteenth-century authors writing about rights, such as Tierney, Habermas, Savigny, and others. For an overview of scholarship on the term's medieval origin and use in modern discourse, see: Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: The Continuum International Publishing Group Inc, 2005), 95-109.

formal concept of a right (*ius* in a subjective sense) was taken for granted in their works rather than carefully scrutinized.”⁶

(3) that along with natural law, Ketteler’s creative articulation of rights incorporated the insights of secular legal traditions of nineteenth-century German jurisprudence, especially Savigny’s historical school, and that the legal or juristic realm of discourse influenced his political discourse.

(4) that in challenging the foundations of German liberalism and the absolutist elements of German conservatism (both of which will be defined), he also creatively adapted their constructive insights to strengthen his own natural law system. This creativity was possible because of the central importance of practical reason in his teleological natural law system.

(5) that Ketteler’s ‘rights language,’ which was developed within the context of an increasingly secular public discourse, reveals a philosophy of rights that has much to offer our contemporary discussion and thus demonstrates a continuing relevance for the natural law. His early, positive, and imaginative engagement with representational forms of government in the public sphere also demonstrates the rich potential for the church in public life.

The present work is an intellectual archeology that examines Ketteler’s writings and sermons in their historical context with particular attention to their political relevance.⁷

The work follows an analytic approach similar to that of *Begriffsgeschichte* by studying

⁶ Tierney, "Marsilius on Rights," 16.

⁷ This thesis owes a great debt to the publication of Ketteler’s collected works, eleven volumes published since the centenary of the bishop’s death in 1977. Ketteler, Wilhelm Emmanuel. *Sämtliche Werke Und Briefe*. Edited by Erwin Iserloh. Mainz: von Hase und Koehler, 1977-2001.

history through the narrow lens of a single word or concept, such as rights, as understood and used by a single historical figure.⁸ Ketteler's use of the term *Recht* reveals his intellectual foundation in non-liberal traditions, and it reveals the important ways that he confronted and adapted to the political changes brought on by nineteenth-century German liberalism and absolutism. The focus on Ketteler's rights language narrows this historical study of Catholic social teaching during a time of complex philosophical, political, and theological developments.⁹ In addition to being located in his intellectual context, Ketteler is located within the complex social contexts (Catholic, German, aristocratic, bureaucratic) of the pre-revolutionary or *Vormärz* period, generally 1830 to 1848. Ketteler has been often described, and appropriately, as a 'fighting bishop.' He vigorously confronted what he recognized to be threats to the Catholic Church and German society, but his involvement was often creative and adaptive. The account here examines the new meanings that emerged from his confrontations with the social issues of the modern world. The strength of my interpretation should be judged by the fairness of presented evidence and the soundness of its arguments.

⁸ Hanson Russell, "Begriffsgeschichte," *American Political Science Review*, *Indiana University* 96, no. 4 (2002).

⁹ Mark Bevir's *The Logic of the History of Ideas* emphasizes the study of specific words because of the importance of hermeneutic meaning for history. This "procedural individualism" holds that specific words and beliefs "may be apprehended by placing them within a web of beliefs, and a web of beliefs may then be understood in terms of its relation to an intellectual tradition... The result is what Bevir calls 'synchronic explanation,' which ostensibly preserves the sense of specific utterances or expressions while embedding them in larger configurations of meaning." *Ibid.* An analogous analysis called 'diachronic explanation' deals with the dilemmas posed by conflicting structures of meaning. This is a mostly synchronic explanation embedding Ketteler in his context. Russell is referring here to the following book: Mark Bevir, *The Logic of the History of Ideas* (New York: Cambridge University Press, 1999).

1.2. Reason For This Work: Ketteler Is A Key Transition Figure For The Roman Catholic Church

Ketteler was active during a historical turning point when the relationship of the church and the state was being defined for our contemporary period—when national governments established secular constitutional systems and the churches had to reconcile themselves to their exclusion from official political roles and influence. During his tenure in Mainz, he became the most important bishop in the German Catholic Church to address the various social problems (*Sozialfrage*) of the nineteenth century. He framed his arguments in a confident language of rights based upon a dynamic and philosophically nuanced understanding of classical natural law theory as well as German secular law. His understanding and use of rights have real value because they reveal a pre-*Rerum Novarum* practical theology that was capable of recognizing both the benefits as well as the dangers in the political process that has come to be known as secularization. This was the time of constitutions. Civil law was codified and legal rights were guaranteed to persons as persons, and not with reference to their noble title or class. “The law itself... was to be equally binding for everyone; in principle, no one was to enjoy a dispensation or privilege.”¹⁰ Ketteler was a leader who understood the signs of the times. He was unique among church leaders in that he was able to appeal to a wide audience not merely as a priest to a congregation or church, but also as a political figure to a ‘public’ that was asserting itself in Germany as a political force.

¹⁰ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence, *Studies in Contemporary German Social Thought* (Cambridge, MA: MIT Press, 1989), 80.

Ketteler was a vigorous critic of many modern political developments, yet he remains a key transition figure for the contemporary Roman Catholic Church because he voiced his criticism in the public sphere, performatively accepting its political legitimacy and its standards of reasoning. This is key for his rights language because ‘rights’ are essentially practical claims of justice. Using scholastic language, it can be said that rights are specific actualizations of justice. This is as true of its pre-modern as its contemporary usage, and it is an aspect that Ketteler especially cherished. Justice and rights are both political concepts because they mediate human relations on a social level. The discourse of rights, therefore, has its place in the political sphere—i.e., the place where a society resolves its disputes, orders its public life, and therefore ultimately defines itself as a people. Further, the political sphere in modern democratic political systems is ideally the location of non-coercive reasonable discourse where “forms of argumentation are externally institutionalized.”¹¹ This means that by entering into the political sphere and participating in its discourse, religious figures and institutions are accountable to its general principles of non-coercive reasonableness. Thus, when religious figures or churches enter into the political discourse on the national or international level and use a

¹¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, *Studies in Contemporary German Social Thought* (Cambridge, Mass.: MIT Press, 1996), 110. This principle is supported by the 2002 document from the Congregation for the Doctrine of the Faith, the “Doctrinal Note on some questions regarding the participation of Catholics in political life:” “By fulfilling their civic duties, ‘guided by a Christian conscience,’ (*Gaudium et spes*, §76) in conformity with its values, the lay faithful exercise their proper task of infusing the temporal order with Christian values, all the while respecting the nature and rightful autonomy of that order, (*Gaudium et spes*, §36) and cooperating with other citizens according to their particular competence and responsibility.”

language of rights, there are questions about boundaries and the proper roles of both religion and the state.

Conceptually, 'rights' cannot be separated from a historical and philosophical grounding because, whether explicit or not, that grounding effectively governs how rights are used in present political discourse to answer the following questions: Which rights are truly rights? Which rights trump other rights? What counts for a good argument for the expansion of rights? On a semantic level, it is a matter of common sense that political discourse, to be reasonable, requires at least general terminological consistency. More fundamentally, because political discourse is determinative of political action, i.e., action that carries with it the power of the state's force, the peremptory exclusion of foundations from discourse can lead to situations where rights language effectively masks power struggles. The danger of non-rational rights discourse is that the connection between rights and justice is weakened. Irrational rights are conceptually absurd, since rights are a principle of practical reason. Performatively, however, rights robbed of rational discourse in the public sphere function as signposts or markers of raw political power.

The church is an institution based on faith, hope, and love, not power. As such, it must be clear about the inherent values claimed when it makes strong public demands in the form of rights. As secularization marginalized the church from the internal structures of political power, Ketteler had the foresight to see a continuing public role for the church. That role brought with it a basically dual responsibility that underscored the increasing value of rights in the public sphere. First, the church's responsibility to maintain high standards of public rationality required that it deliberate in the language of

contemporary politics, and thus in a language of rights. Second, the church's 'prophetic' duty to emphasize the essential significance of justice for society made rights likewise increasingly valuable. Acknowledging that the language and context of the nineteenth-century public sphere involved some adaptation for the church, Ketteler's 'translation' of rights discourse involved a critical element. It was not a capitulation to liberal philosophical principles of the Enlightenment. For him, rights discourse deteriorates when it is ahistorical, abstracted from social experience, lacking terminological consistency, or if the philosophical foundations of rights discourse are peremptorily restricted. Without plainly articulated foundations, people may use the same word, 'rights,' to describe their strong political claims, but they will mean very different things. Thus, unarticulated and restricted foundations undermine reasonable political discourse, and rights claims are reduced to mere interest claims. Such interest claims carry not the force of reasonableness or justice, but rather of the political power of those making the claims. Rights discourse devoid of reason and the intention of justice is a forum of intimidation and power.

Ketteler's legal education and experience convinced him that the history of political discourse is essential for revealing its reasonable foundations as well as its latent biases. This key hermeneutical insight of the German Historical School of jurisprudence is that ahistorical political reason is at best illusory, but also potentially misleading. Truly transparent discourse requires an understanding of the historical development of political concepts and principles. In the case of rights language, rights' universal applicability requires a level of unbiased reasonableness that is itself a product of Western legal,

political and religious traditions. Even as rights discourse is a form of public reason that is ideally free from bias, it is the product of a specific philosophical tradition. An understanding of that tradition is actually essential for understanding the ways that rights discourse potentially masks its persisting Western bias. This principle holds true for contemporary rights language, such as fundamental human rights. Conceptually, they are universally applicable to all human beings, yet they continue to depend upon a history of discourse and implementation.

Ketteler's use of rights is historically relevant for the Roman Catholic Church, because he essentially translated the pre-modern concept for a modern public sphere. He is a transition figure whose conception of subjective rights (*das Recht im subjektiven Sinn*) expressed particular claims within a whole set of social (*Gesellschaft*) relations.¹² This is a continuation of the pre-modern concept, yet he is modern in the public way that he used rights as claims (*Ansprüche*) in legal and political forums. He performatively translated the term for a modern context. His modern use of 'rights' as representing the legitimate power of an individual against other individuals, existing social structures, and the state, did not compromise his essentially Thomistic social philosophy. Ketteler's 'translation,' of the concept was accomplished even as he rejected the principles and policies of the German proponents of liberalism, the *Aufklärer*. He expressly rejected the individualism of liberal anthropology and the social policies that developed from *laissez faire* economics.

¹² Friedrich Karl von Savigny, *System Des Heutigen Römischen Rechts: Erster Band, Rechtsquellen*, 8 vols., vol. 1 (Berlin: Veit und comp., 1840), 7.

Ketteler's priestly career was bracketed by the revolutions and parliament of 1848 and by the German *Kulturkampf* of the 1870s. This was the period when Germany and Italy were being formed as nation-states, and all western European governments were becoming increasingly secular. This focused analysis of Ketteler's rights language sheds light on the church's understanding of itself (ecclesiology), the world (sociology), and the relationship of the church to the 'worldly' institutions no longer under church control (political theology). Ketteler's rights language engaged the theological, social, and political questions in the public forum even as the church's voice was being marginalized.

The major tendencies that prevailed by the end of the eighteenth century are well known. The feudal powers, the Church, the prince, and the nobility, who were the carriers of the representative publicness, disintegrated in a process of polarization; in the end they split into private elements on the one hand, and public ones on the other. The status of the church changed as a result of the Reformation; the anchoring in divine authority that it represented—that is, religion—became a private matter.¹³

Ketteler's transitional role is all the more important given the bitter antipathies between the church and the increasingly secular states of nineteenth-century Europe. As a German bishop during this critical period of modern transition, he distinguished himself in the 'public sphere' and exercised leadership using distinctly modern means of mass communication. He shared the Romantic view that legitimate governments 'served' the people (*Volk*), and he recognized that the emerging ideal of representational government was potentially consistent with a public relevance for the church. He was, admittedly, wary of many modern developments, such as democracy's potential for mass political

¹³ Habermas, *Structural Transformation of the Public Sphere*, 11.

manipulation as was practiced by Bismarck and subsequent German leaders. He was certainly wary of the churches' public marginalization. He did not use Habermas' terms 'public sphere' and 'private sphere,' but Ketteler appreciated the modern phenomena they represent. His critical awareness of their emergence in the nineteenth century actually made it possible for him to use the forum of the public sphere to resist the relegation of the church to a private sphere. He performatively resisted the sharp differentiation of public and private spheres that would render the church politically irrelevant. By engaging social issues on the political level without surrendering the particularity of his religious beliefs, he demonstrated the continuing relevance of the church's moral voice in modern public life. He did this even in the face of challenges to that voice by liberal theorists and authoritarian governments. His language of rights is worthy of examination because it reveals the status, traditions, and resources of Roman Catholic practical theology—theological praxis applied to social and political issues—in the period prior to and influential for the encyclical *Rerum Novarum*.

The Roman Catholic Church's historical ambivalence towards democracy was partially mitigated by *Rerum Novarum* but only definitively put to rest by the Second Vatican Council.¹⁴ Ketteler's writings demonstrate that the church's tradition prior to *Rerum Novarum* was not always contentious and that the subsequent social tradition was not a simple capitulation to liberal philosophy. With his discourse of rights, Ketteler's example is especially valuable for the Catholic Church in the United States because it

¹⁴ The Catholic Church's recent documents are consistent with *Gaudium et Spes*' (§44) reluctance to advocate any single political system. Still, democracy is seen as consistent with the Catholic principles for social engagement as demonstrated most explicitly in the "Doctrinal Note on some questions regarding the participation of Catholics in political life" referenced above.

reveals the depth and complexity of a vital tradition that, if forgotten or obscured, grants the historical emergence of modern subjective rights to a philosophical tradition often at odds with important religious and philosophical beliefs.

Ketteler's writings are a valuable window into the German church's difficult but negotiated nineteenth-century relationship with representational government and liberal political theories. His context was obviously very different from that of the Catholic Church in America, which has been more influenced by the Anglo-American political tradition of liberalism, with its long tradition of constitutionally defended rights. But his context was also distinct from that of the Rome, which adamantly resisted the separation of church and state institutions. Ketteler's critique of liberalism did not keep him from engaging in the chaotic political process and seeing certain benefits the church enjoyed as a distinct institution with distinct. He recognized that the historical emergence of a public sphere was not a fatal threat to religion, but a potential forum for the church's mission and a hedge against absolutism. The more dangerous development for him as a leader of the Catholic Church in Germany was the liberal preemption of religious concerns from that public sphere.

The Roman Catholic Church's historical ambivalence towards democracy was partially mitigated by the encyclical *Rerum Novarum* but only definitively put to rest by the Second Vatican Council.¹⁵ Ketteler's writings demonstrate that the church's tradition

¹⁵ The Catholic Church's recent documents are consistent with *Gaudium et Spes*' (§44) reluctance to advocate any single political system. Still, democracy is seen as consistent with the Catholic principles for social engagement as demonstrated most explicitly in the "Doctrinal Note on some questions regarding the participation of Catholics in political life" referenced above.

prior to *Rerum Novarum* was not always contentious and that the tradition since *Rerum Novarum* is not a simple capitulation to liberal philosophy.

Ketteler's writings are also important for the American church because the social teaching of the worldwide Catholic Church is so rooted in the continental European tradition of conservative politics and the organic political philosophy of natural law. These influential social and political philosophical traditions are somewhat obscure for many Americans and viewed, understandably, in connection with their initial rejection of democracy, later absolutist politics and the twentieth-century's two world wars. The Anglo-American and the continental European traditions offer different philosophical approaches to rights, and so an understanding of both traditions provides insight into the church's antagonism to some aspects of liberal philosophy. Yet, Ketteler's writings show that the continental tradition was not inherently incompatible with modern liberal democracy. He fought for justice in a modern context with a confident Catholic political discourse of rights that was not only **not** the product of liberal philosophy, but it defined itself in opposition to the individualism and atomization so characteristic of nineteenth-century liberalism.

1.3. Nineteenth-Century Clash Of Liberalism And Catholicism In Germany Was Distinct From The Roman Experience

Rights language (or better, languages) developed in the nineteenth century along with political systems, as 'subjects' of the old regimes became 'citizens' of modern nation-states. Because its transition from subject to citizen was more gradual than that of France and Italy, Germany was able to preserve many elements of traditional rights concepts and usages.

In nineteenth-century Italy, the Roman Catholic Church's responses to revolutionary changes in society and politics were distinctly defensive and adversarial. The Vatican's uncompromising position regarding liberalism was stirred as much by liberalism's political menace as by its ideological differences. For the eternal city, Rome, the century began with the violence of Napoleon's occupation, continued under the grim fear of invasion from without and revolution within, reached a low point with the loss of territory to the new Italian nation in 1870, and ended with the marginalization of the Vatican's political aspirations and influence. In retrospect, we can see many great benefits reaped once the church had shed its political power, but there is no mistaking the fact that this new role for the church of Rome was involuntary. Yet the attitude of Rome towards modern liberalism and its political advances does not tell the whole story. Liberalism was expressed with great diversity in Europe, and responses to it mirror that diversity. German Catholics were sympathetic with Rome's situation, but they were not always in agreement with the statements and actions coming from Rome, which was occupied with its own specific political situation. When the popes used a language of rights, therefore, they used it to defend the political integrity of the Papal States against very real threats. That danger, however, was not the specific experience of the German church.

The nineteenth-century German Catholic Church found itself in a different wilderness. With its vast properties having been irretrievably lost under Napoleonic secularization, the church began from a position of weakness vis-à-vis the Prussian state. It could be argued, therefore, that its use of rights language was merely strategic and

defensive, as opposed to intellectually consistent with its tradition. Yet liberalism had no monopoly on rights. There was already a long tradition of such language in the various and overlapping European legal systems, differentiated by Harold Berman as tribal, canon, secular, feudal, manorial, mercantile, urban and royal.¹⁶ Berman, Tierney and others have brought to light the critical role the church played in preserving the Roman law in Europe and developing principles of rights during the medieval and even modern centuries. There is no denying that, by the nineteenth century, some forms of rights language had unmistakable liberal associations, especially in the rights catalogues of America and France. Yet the German Catholic Church was quite wary of liberalism as a political ideology bent on marginalizing the political significance of religion. When using a language of rights, therefore, German Catholics made great, even Herculean, efforts to identify, challenge, and separate the church from liberal principles. Corduroy roads are bumpy, slow, and vulnerable to storms, but they also open paths that can become avenues for communication and mutual understanding. The argument here is that Ketteler's rights language, and his approach in general, opened a bumpy road of possibility for the church in a modern democratic world shaped in part by liberal ideas, but also by centuries of Christian traditions.

In broad terms, the history of the use of rights in the Western European tradition may be split into three periods corresponding to developments in legal theory and practice. The first period begins in the twelfth century, as Brian Tierney has masterfully

¹⁶ Harold Joseph Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983). Berman's project was one of differentiating legal sources. This work generally uses the term "feudal" law to describe the vestiges of tribal, feudal, urban and manorial systems that persisted until the nineteenth century.

demonstrated,¹⁷ and continued until the emergence of the mercantile system of the late fifteenth and early sixteenth centuries. The second period reached its full force with the great neoscholastic syntheses of Suarez in the seventeenth century. This natural law tradition was continued and somewhat secularized by such Protestant figures as Grotius, Pufendorf, Thomasius and Christian Wolff.¹⁸ The third period continues to the present time. It began with the Enlightenment, was punctuated by the American and French catalogs of rights as well as the profound influence of Kantian philosophy, and reached a high point with the United Nations' Declaration of Human Rights in 1948. During the first two periods, the theorists were themselves explicitly identified with Christianity, and their political conceptions were expressly theological even as the positive law became increasingly independent from religion and morality. The final period is distinctive in that its most influential innovators identified themselves as essentially secular. From a general standpoint, most held that religion was a private matter, with at best a minor role in politics and the public sphere.¹⁹

¹⁷ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, Emory University Studies in Law and Religion; No. 5 (Atlanta, GA: Scholars Press, 1997).

¹⁸ Mack Walker, "Rights and Functions: The Social Categories of Eighteenth-Century German Jurists and Cameralists," *Journal of Modern History* 50, no. 2 (1978): 238. Walker claims that Wolff's "deductive/demonstrative jurisprudence did not have much influence as a jurist or political scientist, but rather as a rational philosopher and moralist." Dietrich describes Wolff's influence on eighteenth-century Catholic thought through the moralist Benedict Stattler, S.J.. Donald J. Dietrich, *The Goethezeit and the Metamorphosis of Catholic Theology in the Age of Idealism*, *European University Studies; Series 23: Theology* (Frankfurt/M: Lang, 1979), 43.

¹⁹ "The self-understanding of modernity is characterized not just by a theoretical 'self-consciousness,' by a self-critical attitude toward all tradition, but also by the moral and ethical ideals of "self-determination" and "self-realization." Jürgen Habermas, "Conceptions of Modernity: A Look Back at Two Traditions," in *The Postnational Constellation: Political Essays* (Cambridge, MA: MIT Press, 2001), 133.

Germany's political development is in many regards distinct from that of the French, Anglo-American, and Italian traditions. The French experience, from the beginning of the 'long' nineteenth century, was marked by the clash of revolution that pitted the old regime (*Ancien Regime*) 'conservatives' against the 'liberal' ideas and aspirations of the Enlightenment. The unbowing aristocracy of the old regime was dramatically removed from power and its political theories of entitlement discredited. The Catholic Church, which had largely allied itself with the old regime, was moved to the margins of political influence. The church was stripped of property and political authority, and many of its members were executed or exiled during the time of the Terror. Even when more traditional monarchs ruled after Napoleon's fall, the effects of the Revolution were preserved in the French legal system's secularist structure, as shown in the successive French constitutions that upheld the Rights of Man.²⁰

The English transition to liberal governance, in contrast, avoided revolutionary violence. The liberal legal innovations of the Enlightenment did not create havoc in its church-state relations because the English Reformation had long before established the subordinate position of the church. In France, the Revolution accomplished the transition to an essentially secular state in a painful but quick amputation of the church's secular authority. The churches in much of the rest of Western Europe, however, experienced extended and acrimonious struggles. Because the governing structures were diverse and

²⁰ This is shown in the rights catalogues of the 1814 "Charte Constitutionnelle Francaise" and the 1848 "Constitution de la republique Francaise."

the strength of the liberalizing influences varied greatly, the transition to secular political structures differed greatly from one region to another.²¹

The Catholic Church's adamant opposition to liberal rights in the nineteenth-century papal documents masks the reality that its opposition was not to rights *per se*, but to the liberal agenda and philosophy that specific rights were proposing. Norbert Brieskorn, writing about human rights from a German point of view, recognizes the church's reluctance to champion individual (subjective) rights as a symptom of the contentious historical relationship with liberalism dating roughly from the time of the French Revolution.²² On the liberal side, the French Revolution is seen as part of the struggle dating from the seventeenth century for the recognition of 'inalienable' human rights, for freedom as political autonomy, and for popular participation in government. From the perspective of the Roman Catholic Church, which often identified itself with ruling interests (especially the Vatican, which controlled much of northern Italy), the struggle was a defensive one aimed to protect what were seen as objective goods of social and moral order—goods which were not differentiated from the church's political power.

Brieskorn summarized the church's opposition to the historical catalogs of rights, such as the French Rights of Man, in five points, and not one of those five points attacks the actual concept of 'rights.' Firstly, argues Brieskorn, the catalogs did not recognize the

²¹ Habermas notes the distinct characteristic of the modern period beginning around 1800. Rather than a unified process, modernity continuously defined itself against tradition. Though politically there were converging trends, the negative characteristics better describe modernity, such as the way religion ceased to "guarantee the ethical integration of social life." Habermas, "Conceptions of Modernity," 135.

²² Norbert Brieskorn, "Menschenrechte Und Kirche," in *Sociales Denken in Einer Zerrissenen Welt*, ed. Kerber Müller (1992), 93.

ultimate ground of rights in God as their source and therefore, secondly, they judged the creators and beneficiaries of rights to be human persons—persons as isolated and individualistic beings. This neglected the ultimate foundation of rights in God the creator, and the specific nature bestowed by God upon humans as social and interdependent beings. Thirdly, the catalogs of rights advocated personal freedoms that disregarded human moral obligations. They thus reflected a philosophy contrary to the Christian understanding of freedom. Fourthly, the catalogs assumed an understanding of the state in neutral terms, as a mere human construct which serves the interests of individual human beings. Finally, the catalogs did not recognize the good of social unity.²³

Brieskorn offers five representative papal statements to understand the scope and development of this Roman position relevant to the nineteenth century.²⁴ It is interesting that the five statements explicitly referenced rights only with regard to the state and the church and never to individuals. This is not to say that the Vatican was blind to the condition of individuals. Rather, for reasons outside of the scope of this work, they were simply not dealing with the concerns of individuals in the language of rights. The first document is the encyclical of Pope Pius VI, *Caritas: On the Civil Oath in France* (April 13, 1791),²⁵ which denounced the principles of the French constitution and specifically the constitution on the clergy which attempted to bring the administration of the church, including the appointment of bishops and pastors, under the authority of the state. In doing so, the pope explicitly recognized only the authority of the king and implicitly

²³ Ibid., 97.

²⁴ Ibid., 99.

²⁵ Claudia Carlen, ed., *The Papal Encyclicals* (Raleigh, NC: Pierian Press, 1990).

rejected the authority of the Estates General. Similarly, Pius VI's successor, Pius VII, issued the bull excommunicating Napoleon when the new regime was seen to be infringing upon the rights of the church. While the intrusions of the French authorities may have been overreaching—in appointing bishops, in taking the pope into custody, and in taking possession of the Vatican states—the aspirations of the documents are similarly uncompromising in attempting to restore the old order and recognizing only the rights of the old regime and the church. By addressing only the fundamental differences between liberalism and Catholicism, they did not directly recognize individual rights, but they also did not reject them.

Pope Leo XII's encyclical, *Ubi Primum*, promulgated upon his assumption of office in 1824, saw the Catholic Church under siege by the advocates of 'toleration and indifferentism.' It warned the world's Catholic bishops about the dangers of Christian scripture in the vernacular, and it reiterated the claim that there was no salvation outside of the church. It is remarkable that the reactionary encyclical was written at the same time that the Bavarian Ludwig I was envisioning the new faculty to be assembled in Munich including Görres and Döllinger, both optimistic proponents of engagement with 'the world' and both strong proponents of subjective rights.²⁶ Next, Pope Gregory XVI's position was already established in his 1799 work, *The Triumph of the Holy See against the Assaults of the Innovators*, written thirty years before his election to the papal throne, an election to which Metternich himself lent his voice if not a vote. Gregory XVI's encyclical *Mirare Vos* (1832) was an immoderate reaction to the perceived "storms of

²⁶ Görres in his *Athanasius* and elsewhere, and Döllinger as a leader in the Frankfurt Parliament.

evil and toil,” and the “terrible conspiracy of impious men.” It was literally a call to arms that denied any plausibility or good to those who held dissenting opinions. Specifically, in addition to defending central tenets of faith and church practice, it called all church authority to itself as “rights of the Holy See,” rejected the freedom of conscience for all as a facet of indifferentism and immoderate freedom, called for the removal of ‘bad’ books and teaching, and advocated unchanging subjection to princely authority.

We speak of the things which you see with your own eyes, which We both bemoan. Depravity exults; science is impudent; liberty, dissolute. The holiness of the sacred is despised; the majesty of divine worship is not only disapproved by evil men, but defiled and held up to ridicule. Hence sound doctrine is perverted and errors of all kinds spread boldly. The laws of the sacred, the rights, institutions, and discipline—none are safe from the audacity of those speaking evil. Our Roman See is harassed violently and the bonds of unity are daily loosened and severed. The divine authority of the Church is opposed and her rights shorn off. She is subjected to human reason and with the greatest injustice exposed to the hatred of the people and reduced to vile servitude. The obedience due bishops is denied and their rights are trampled underfoot. Furthermore, academies and schools resound with new, monstrous opinions, which openly attack the Catholic faith; this horrible and nefarious war is openly and even publicly waged. Thus, by institutions and by the example of teachers, the minds of the youth are corrupted and a tremendous blow is dealt to religion and the perversion of morals is spread. So the restraints of religion are thrown off, by which alone kingdoms stand. We see the destruction of public order, the fall of principalities, and the overturning of all legitimate power approaching.²⁷

If there is any development from Gregory XVI to Pope Pius IX, it is in the direction of further desperation because, unlike his predecessors, Pius IX had no expectation that the old regimes of princes and kings would re-establish the old order with the high position of the Catholic Church. He thus no longer defended the princes or ‘lay governments,’ whom he lumps together with all the other threats to the church. Pius IX was so scarred

²⁷ *Mirari Vos (On Liberalism and Religious Indifferentism)* Encyclical of Pope Gregory XVI promulgated on August 15, 1832, paragraph 5. From Carlen, ed., *Papal Encyclicals*.

by the 1848 revolutions that he retreated into a posture hostile to all perceived social or theological development. His encyclical *Syllabus of Errors* (1864) contains more than two dozen references to rights, and all refer either to rights of the church or of the state. There is not a single reference to individual rights—even to declare them dangerous or in error. There is a nod, however, to the distinct division between secular and religious power with a reference to Matthew’s Gospel (Mt 22:21): “give to Caesar what is Caesar’s.” Even Pope Leo XIII’s proactive approach towards the end of the century, with the promulgation of the great Catholic social encyclical *Rerum Novarum* (1891), demonstrated that while rights claims were tenable within the tradition, they were also rife with ambiguity and problems.²⁸

The clash of liberalism and Catholicism in Germany, however, was distinct from the Roman experience as outlined above. The form of liberalism that took root ‘East of the Rhine’ was politically moderate by comparison with the often revolutionary liberal groups found in France and later in Italy, and it was tempered by Prussian conservative rule. For German Catholicism, liberalism never posed a lethal danger, and the two groups even shared some overlapping interests with regard to the Prussian monarchy. Thus, the church’s reaction to liberalism was real, but not entirely defensive or reactionary. This is not to say that there was a harmonious relationship—far from it. When the arguments raged, however, the German Catholics brought a significant degree of confidence to the

²⁸ Ernest L. Fortin, "Sacred and Inviolable: *Rerum Novarum* and Natural Rights," in *Ernest Fortin, Collected Essays, Vol 3: Human Rights, Virtue, and the Common Good, Untimely Meditations on Religion and Politics*, ed. J. Brian Benestad (Lanham, MD: Rowman & Littlefield, 1996).

table. Moreover, the points of debate, including rights claims, were wholly distinct from those of the Roman encyclicals.

When the historical narrative identifies the Vatican's concerns with the entire Catholic response, we also lose the many examples in the nineteenth century where liberals and Catholics were not only able to co-exist, but also to influence and learn from one another. As for rights, liberals in Germany had no monopoly on the term or its use. Rights had a long and evolving tradition in canon law, Roman law, Germanic law, and feudal law, for example, and the concept 'right,' including as applied to individuals in subjective rights, was not seen in itself as a fundamental threat to the basic Catholic positions.

For the Catholic Church in Rome, which wanted to hold onto both religious and secular power, however, the liberal ideological system posed a more dangerous threat. Individual subjective rights were often identified as banners of the liberal ideology that sought the end of Catholic influence in public life. The Catholic tradition of essentially subjective rights in various legal contexts reaching back to Marsilius of Padua was marginalized, disregarded, or forgotten.

It must also be noted that the liberalism that posed the greatest threat to Rome was of a variety more common 'West of the Rhine.' German 'East of the Rhine' liberalism was an altogether different animal from that in France and Italy, as Leonard Krieger has shown in his *The German Idea of Freedom*. After Napoleon's secularization, the German Catholic Church found no comfort in identifying itself with the Prussian monarchy ruled by the Pietist Hohenzollerns. The church preferred agreements that preserved their

independence, which the generally tolerant Hohenzollerns often granted in order to preserve order in their diverse lands. In this state of affairs, German Catholics understood that rights, including subjective rights, were important protections against the twin threats of a liberal secularizing agenda and Prussian absolutism—especially when the siblings were not fighting with one another, but instead acting collectively.

In sum, viewing the Catholic response to liberalism only through a Roman lens has the unhappy result of identifying rights, as a concept, with the secularizing political agenda of liberalism. If this surrender of the concept is granted, as it has been by those following Leo Strauss' school of thought,²⁹ then the post-*Rerum Novarum* narrative of Catholic Social Thought is written as the church's gradual capitulation to the insights of liberal social philosophy. It is as if the church had obstinately resisted the inevitable progress of liberal rights, and then was gradually forced to see the inherent unreasonableness of its own claims. The implication is that with each capitulating step, not only were the rights adopted, but so were the liberal philosophical presuppositions of those rights. If the narrow historical and philosophical narrative is granted, then the Catholic adoption of rights is a theoretical poisoned pill—because the claims of rights would include the philosophical underpinnings of liberalism, with its individualistic anthropology and its strict division of public/political and private social spheres, and with religion and thus religious teaching relegated to the margins of social relevancy. Ketteler offered a more philosophically coherent approach for the church to engage political issues with a language of rights.

²⁹ Oakley, *Natural Law*, 90,90-95.

1.4. Romantic Catholicism And The Emergence Of The Public Sphere

The first half of nineteenth-century Western Europe was quite conscious of history, and, following a period of revolutionary upheavals, it was conscious of society's evolution through history. This was the age of Romanticism that, though resisting easy definition, was united by an increasing dissatisfaction with Enlightenment rationality, an appreciation for the insights of religion and traditional cultures, and a rational discourse that gave great weight to historical scholarship. Despite its critique of Enlightenment 'progress,' its passion for all things historical, and its nostalgia for an idealized medieval time, Romanticism was actually a quite modern movement in significant ways.³⁰ It spurned the individualism of liberalism, but it valued an individualism of another modern invention, the private sphere. Here, "family life retreats more and more into an intimate sphere," and was accompanied by a "greater concentration on subjectivity and inwardness... [emerging in the] cherishing of sentiment."³¹ Also associated with Romanticism is a focus on aesthetics beyond the religious arts,³² the profusion of literary works and criticism, and generally the awareness of a social or public 'sphere,' "a common space, a space in which people come together and contact each other... a society

³⁰ Dietrich, *Catholic Theology in the Age of Idealism*, 25. Dietrich notes Romanticism's uneasy subjectivism: "Romanticism focused on the development and refinement of the meaning of personality as well as seemed to be the final expression of the revolutionary movement of subjectivism... [yet s]imultaneously and on another level, there took place a struggle to overcome subjectivism."

³¹ Charles Taylor, *Modern Social Imaginaries* (Durham: Public Planet Books, Duke University Press, 2004), 104-105.

³² Michael J. Himes, *Ongoing Incarnation: Johann Adam Möhler and the Beginning of Modern Ecclesiology* (New York: Crossroad Publishing Company, 1997), 282. Himes discusses the role of aesthetics for the Romantics, and specifically the way that Möhler adopted the dynamic of the philosophical concept for his ecclesiology.

constituted purely extrapolitically and in profane time.”³³ Religious belief was by no means rejected, but a universal ‘public’ community was differentiated from distinct religious communities that were more and more perceived as belonging to a private sphere.

Romanticism spanned the academic disciplines and was marked by a characteristically modern appreciation for an extra-academic reading audience in the emerging public sphere.³⁴ The Romantics critiqued liberal arguments by referring to pre-modern history, but their intent was not reactionary in the sense of hoping to turn back society to pre-modern forms of religion or politics. Their ‘reflex’ to modernity was ‘reflective’ rather than reactionary, in the sense that their response to the Enlightenment critique of religion and tradition adopted many of its insights into social injustice, the human capacity for freedom, and most importantly, the nature of reason. The study of history, therefore, was a constructive process that mined the cultural resources of tradition to generate essentially new forms of social solidarity and interaction.³⁵ Savigny provides a good example as the representative of the ‘historical school’ of jurisprudence. His legal arguments begin with a study of the adoption of Roman law in Europe, tracing

³³ Taylor, *Modern Social Imaginaries*, 104.

³⁴ Abraham Peter Kustermann, "Observations Concerning the Tübingen "Axiom" Then and Now: That There Must Exist within the Church an Analogy to What within the State Is Called Public Opinion," in *The Legacy of the Tübingen School*, ed. Donald J. Dietrich and Michael J. Himes (New York: The Crossroad Publishing Company, 1997). Kustermann notes that Drey, the founder of the Tübingen School, could not be considered part of the ‘anti-*Aufklärung*’ (ibid., 45). Further, only two years after moving to Tübingen, the faculty founded a journal, the *Theologische Quartalschrift*, in 1819. “They were bearers of public opinion in a double capacity: not only did their opinion have public weight within the church thanks to their scholarly competence, but it could ‘publicly’ be made public at any time-inside and outside the church” (ibid., 46).

³⁵ Habermas, "Conceptions of Modernity." Habermas’ notion of “reflexivity” is found on page 155. Though I benefit from his analysis, my focus on Romanticism is significantly different.

the ancient Roman codes through the sixth-century *Justinian Code* and taking account of the various written codes of Germanic law in the middle ages. History was a tool that helped established clarity in the structure and principles of the present law, i.e., in the structure of Savigny's own social order.³⁶ Döllinger, Ketteler's professor of church history, made ecclesiological arguments using research on the Christian communities in the first centuries. Döllinger's project, however, focused upon an issue of his own day—the true nature and structure of the Catholic Church. Finally, Möhler argued points of systematic theology as a historical theologian by comparing the conflicting positions of great theologians from the history of the church. Möhler was not daunted by a nineteenth-century academic expectation of public reason as laid down by Kant: "By the public use of one's reason I understand the use which a person makes of it as a scholar before the reading public."³⁷ Möhler, like his Romantic Catholic colleagues, recognized that fulfilling the requirements of rationality demanded by the university had an impact on the faith of modern believers.³⁸ In sum, Romanticism was a conservative intellectual movement in many ways, but it was also a modern one.

In the atmosphere shaped by the struggle between the allies of Enlightenment and reaction, Ketteler sided with the 'conservatism' of Romantic Catholicism. The struggle was, in brief, between the liberal impetus to reform and reorganize society on universal principles of freedom and equality, and the conservative impetus to maintain the ideals

³⁶ Mathias Reimann, "Nineteenth Century German Legal Science," *Boston College Law Review* XXXI, no. 4 (1990): 854.

³⁷ Kustermann, "Public Opinion," 45.

³⁸ Stephen Fields, "Doctrine as Symbol: Johann Adam Möhler in Dialogue with Kant and Hegel," in *The Legacy of the Tübingen School*, ed. Donald J. Dietrich and Michael J. Himes (New York: The Crossroad Publishing Company, 1997), 130.

and virtues of an organic and unified social order. For Ketteler and Romantic Catholic colleagues, the most important points of reference are the French Revolution, with particular emphasis on its eventual ‘Terror,’ and the achievements and ultimate defeat of Napoleon’s Grand Army with its accompanying Enlightenment agenda of secularization. Attempting to neutralize what was perceived to be a destabilizing liberal agenda, the Congress of Vienna (1815) sought to balance Europe’s major powers by preserving social structures of church and state. That said, the conservatism that characterized Romantic Catholicism in Germany must be distinguished from Metternich’s reactionary conservatism, which attempted to turn back the clock in Europe and re-establish its dynastic dynasties.³⁹ Among their differences, perhaps the most important one was that for Romanticism government had to be rationally legitimated in the forums of the public sphere. Though Romanticism was a historically-minded movement, its demand for freedoms of expression and other constitutionally established ‘rights’ made it an unmistakably modern one. The Romantics envisioned “an idealized medieval period as their own normative past. This Romantic consciousness also showed the distinctive features of a new beginning, detaching itself from what it supposed it was leaving behind.”⁴⁰ The Catholic periodical *Historisch-Politische Blätter*, for example, was meant to influence a wide Catholic public with political reports and analysis. Its very existence was a performative acceptance of the Kantian principle that “governments ought to

³⁹ Dietrich provides an overview of Catholic reform at the turn of the nineteenth century: “Catholic reform as renewal tried to establish itself midway between two extremes, revolution and restoration.” Dietrich, *Catholic Theology in the Age of Idealism*, 35.

⁴⁰ Habermas, “Conceptions of Modernity,” 131.

legislate and rule in the midst of a reasoning public.”⁴¹ This was a modern principle that underlined the importance of the ‘public sphere’ for Catholics across the conservative-liberal political spectrum.

Broadly, this period coincided with the fall and rise of Prussian ambitions in the nineteenth century. The fall came early at the hands of Napoleon’s army, which overran all of Europe.⁴² The rise came with the political, social, and military reorganization that reached its apogee under Bismarck’s leadership—a leadership that excluded Austria, leaving the remaining German Catholics marginalized in Berlin. This narrative arc of Prussia’s rise to power coincided chronologically with Ketteler’s biography. He was a fervent believer in the emergence of a German national form, but he was quite critical of Prussia’s methods of achieving it. Relaying the concerns of a marginalized Catholic minority wary of their freedoms vis-à-vis the emerging political system, Ketteler’s writings were practical responses to problems he experienced personally as a pastor, a bishop, and a trained jurist. His theological, philosophical, and sociological arguments were competent theoretically, but, in this period before *Rerum Novarum*, his contribution was in the area of *phronesis* as opposed to *theoria*. Often without the time or predilection for more abstract academic theorizing, he entered the fray in a forum that was uniquely modern—the public sphere.⁴³ By doing so with a competency that spanned the legal, political, and theological worlds, he formed a template for later Catholic social teaching.

⁴¹ Taylor, *Modern Social Imaginaries*, 88.

⁴² The low point, the defeat at Jena in 1806, inspired Fichte’s “Das deutsche Volk,” beginning a period of German nationalism.

⁴³ The notion of the public sphere has its roots in the Enlightenment and reaches a clear moment of definition in Kant’s “What is the Enlightenment,” as a public use of reason. But the concept,

The Enlightenment and post-Enlightenment religious and philosophical developments in Germany differ from the rest of Europe in a way that is relevant to Ketteler's thought and the topic of this present work. Even with secularization, Germany did not completely separate religion and state, and it had a much more religious and historical predilection than those regions west of the Rhine. Thus, Enlightenment thought east of the Rhine was quite different from the philosophical materialism of France and the epistemological skepticism and empiricism of Locke and Hume's Great Britain.⁴⁴ Germans, both liberal and conservative, had initially looked to the developments of the French Revolution with some optimism, but, across the political spectrum, all were repulsed by the chaos and violence that subsequently developed. Economically, Germany had lagged behind the industrial progress of England and other Western European nations, but the early nineteenth century began a time of rapid growth for Germany, especially in the western Rhineland and Ruhr Valley regions. Accompanying this industrial growth, there were demographic and economic transformations as the workers and their families moved from rural agrarian situations to the urban factories. Germany's movement in the nineteenth century from diverse and independent provinces ('Lands' such as Bavaria and Prussia) towards national unification with a strong industry and military required, among other things, a unified legal code with an underlying socio-political philosophical consensus.

as Kustermann argues, had a reception and adaptation among the Catholic Romantic theologians such as Drey. Kustermann, "Public Opinion," 44-48.

⁴⁴ Dietrich, *Catholic Theology in the Age of Idealism*, 15.

The achievement of German national unity had many obstacles. The consensus was hindered by the grim history of religious struggles, by the insularity of local regions, by the lingering bitterness against Napoleon's secularist measures, and by the horror at the violence unleashed by the French Revolution. In an essay entitled "What is a People?" Habermas acknowledges that the movement towards a German national identity drew from common roots of language, history and religion. However, he also notes that genealogical identities are incapable of unifying peoples of mixed ancestry and traditions.⁴⁵ National unity is essentially a constructive project that requires both the active repression of conflicting cultural particularities and the positive adoption of some universalistic political principles, including trans-cultural solidarity, constitutional government, and democracy.⁴⁶ Thus, the nation-state needed a process of "democratic will-formation" that reached the hearts and minds of all in society to create a "collective identity."⁴⁷

Nineteenth-century German Catholic leaders, with its significant number of bishops and prominent priests, generally contributed to this process of national collective identity, despite significant misgivings. Church figures continued to function as political figures—especially given the comparatively few lay Catholic intellectuals in the post-

⁴⁵ Jürgen Habermas, "What Is a People? The Frankfurt "Germanists' Assembly" Of 1846 and the Self-Understanding of the Humanities in the Vormärz," in *Postnational Constellation*, ed. Max Pensz, *Studies in Contemporary German Social Thought* (Cambridge, MA: MIT Press Edition, 2001), 9.

⁴⁶ *Ibid.*, 18. I disagree with much of Habermas' argument in his article. He denies that the Germanists possessed the inherent philosophical tools to transcend their genealogical methodology. He acknowledges that there were exceptions like Jakob Grimm and Savigny who did in fact champion democracy and constitutional principles. My argument is that Grimm and Savigny were not exceptions, but were exemplary—especially for Ketteler.

⁴⁷ *Ibid.*, 19.

secularization universities, but their public representation was significantly altered by the context of religious marginalization. The legislative reforms of Stein and Hardenburg in Prussia confirmed the principle of the *Rechtsstaat*, reinforced the legal abolition of clerical and class privilege, and thus advanced the principle that the law was equally binding upon all. Even the aristocrats at the Congress of Vienna did not stop this process as monarchs continued to function as executives, but the sovereignty of public opinion was increasingly acknowledged over against dwindling deference to divine legitimacy. What was crucial about Ketteler's biography is that although he emerged from an 'old world' context of aristocracy, he was actually born after the fact of Napoleon's secularization—a social revolution that hit Germany's western provinces with full force. Further, his juridical training was imbued with a Romantic political philosophy holding the enduring authority of legal tradition and the importance of historical methodology, but his legal mentors were also convinced of the need for constitutional reform along the lines of rational governance. And thirdly, although Romantic political philosophy was historically rooted, it was not nostalgic to the point of paralysis. Rather, it was often at the heart of political activism, and its roots in jurisprudence grounded its ideological insistence on legitimacy against excesses of both liberal and monarchical governments.

Catholic Romantics, Ketteler included, recognized the emerging public sphere as the appropriate location of legitimate political debate—even if they did not have a word for it at the time, and even if they grumbled at the biases of 'the media.' Their awareness of the nature of and importance of this public sphere is most clearly demonstrated by the rash of Catholic periodicals founded in the early nineteenth century, most prominent of which

was Ketteler's favorite, *Der Katholik*.⁴⁸ This appreciation of the new media and a transition to its use included the preservation of essentially Catholic philosophical principles and sense of religious mission. Following early innovators like Josef Görres, Catholics understood that the message needed to be articulated in a public language that acknowledged the authority of *öffentliche Meinung*, or public opinion. This new development was made possible by the technological and communication advances of the modern period, and it was required by the particular needs spawned by the modern period. Further, the Catholic newspapers projected a public language to an audience wider than the community of believers; they were speaking to an audience much larger than the believers already in the pews.

That Catholics began publishing newspapers intended for a wider audience need not necessarily prove that they were convinced of democratic principles and the rationality of public discourse. We need only remember Karl Marx's critique of the transition from feudal relations: that it only masked the previously manifest political powers. He argued that it was not a movement to rational discourse, but simply a more sublime means of public manipulation.⁴⁹ Hegel also dismissed the rational dimension of the public sphere and reduced public discourse to a pedagogical tool. It was not plausible for him to

⁴⁸ Gerhard Valerius, building on Aubert, demonstrates the Catholic conviction of the importance of the press. "Alle Kreise, Gruppen und Strömungen hatten ihre Zeitschrift, bzw. ihre Zeitschriften, zur Erbauung oder 'zur Belehrung und Warnung' wie es im Untertitel des Katholiken hieß. Zunehmend wurden sie das Kampfmittel in der Auseinandersetzung mit außenstehenden Gegnern—wie Staat, weltanschaulichen Gegnern und Konfessionen—und im innertheologischen und innerkirchlichen Streit." Gerhard Valerius, *Deutscher Katholizismus Und Lamennais: Die Auseinandersetzung in Der Katholischen Publizistik 1817-1854, Veröffentlichungen Der Kommission Für Zeitgeschichte: Reihe B, Forschungen Bd. 39* (Mainz: Matthias-Grünwald-Verlag, 1983), 25.

⁴⁹ Habermas, *Structural Transformation of the Public Sphere*, 124.

recognize a public, i.e., the mass of individuals representing their particular interests, as necessarily capable of recognizing the good for society as a whole.⁵⁰ Therefore, the proof of Ketteler's openness to public rationality will have to be demonstrated in his works themselves.

Those works show that Ketteler's understanding and use of subjective rights were influenced by a great number of legal, social, and political traditions, but that ultimately he held that rights were practical claims of justice with objective validity that ordered human society to a great good. Whereas the German legal sciences, following the lights of Pufendorf, Thomasius, and Wolff, had essentially granted the state a position immune from individuals' rights claims, Ketteler's unique legal and theological education gave him the intellectual resources to recognize, challenge, and argue for those rights necessary for human flourishing—even when it meant challenging and defying the state. The Prussian state did not have the legal avenues to address rights violations, so Ketteler used a discourse of rights language that appealed to a public rationality—thus tapping into the political power of the masses in newspapers and polemical sheets, as well as the Mass in sermons, of which many were published.

Ketteler recognized the positive developments and potential of a public sphere in Germany in the form of a developing Catholic press. This was possible in part because censorship within individual German states could not limit importation of publications from other regions.⁵¹ There are, after all, benefits to political disorganization. Though the

⁵⁰ Ibid., 122.

⁵¹ Analouise Clissold Bolten, "Watch, Pray, Fight: Wilhelm Emmanuel Ketteler as Priest-Politician" (Doctoral Dissertation, George Washington University, 1983), 77.

terms ‘public sphere’ and ‘public rationality’ are modern terms,⁵² Ketteler demonstrated his understanding and support for a rigorous and free public rationality in his critique of Bismarck’s centralization of power and the Wilhelmitic repression of domestic and international opposition. Geopolitically, Catholics and Protestants alike were invested in some resolution to the national composition that was finally established under Prussian control in 1870. The two basic positions debated whether the nation would encompass the majority of German speaking states (*Großdeutsche Lösung*), or exclude the southeastern states of mostly Catholic Austria (*Kleindeutsche Lösung*). The ultimate exclusion of Austria after the Austro-Prussian War (1866)⁵³ meant that the Catholics were relegated to minority status and excluded from the inner workings of a national government dominated by Prussia. With that minority status, access to the public sphere was made more difficult, but all the more important.

1.5. A ‘Performative’ Analysis: Context Is Critical For Understanding And Translating The German Word *Rechte*

Translating ‘*Recht*’ as an ‘individual’ or ‘subjective’ right is fraught with complexity because the word ‘*Recht*’ occurs with such great frequency in the German language and with wide variation in its legal and political use. As in English, context is critical for understanding the meaning of the word. For example, ‘right’ within ‘right handed’ is distinguished from ‘right’ in ‘right thinking’ or ‘inalienable right.’ With regard to *Recht*

⁵² Specific use follows Habermas: Habermas, *Structural Transformation of the Public Sphere*.

⁵³ Ketteler came late to the conclusions implied by this war, but once he did, he directed his attention to the necessarily compromised Catholic response in his book: *Deutschland Nach Dem Krieg* (1866). The work demonstrates his central congruous identity as a Catholic leader and a German citizen, as well as his attempt to ensure Catholic freedoms within a constitutional framework.

as a moral, legal and political ‘claim’ (*Anspruch*), however, its textual differentiation as individual or subjective is not as clear-cut as ‘right’ is in English—though individual and subjective rights were used and recognized by most Germans in the nineteenth century, including Roman Catholics. Therefore, a clear understanding of the full meaning of *Recht* requires not only a good definition, but also an analysis of its use—its performance. That said, a definition and etymological review of the word shed some light on the German historical context from which it emerged, and is thus a good jumping off point for a performative account.

The term ‘subjective right’ signifies a right of subjects or individuals, as opposed to national rights or corporate rights, for example. Jürgen Habermas, writing from a continental European perspective, points to Savigny’s critical influence on the use of rights in European and American law. Savigny’s provides us with a clear definition of the concept. “Rights, (*Subjektive Rechte* in German) fix the limits within which a subject is entitled to freely exercise her will. More specifically, they define the same liberties for all individuals or legal persons understood as bearers of rights.”⁵⁴ ‘Subjective rights’ language is distinguished from ‘human rights’ terminology because ‘subjective’ is the more general and descriptive juridical term that can be properly applied to both nineteenth-century and contemporary rights discourse. It has the added benefit of being a cognate of the German term for individual rights, *subjektive Rechte*, and it avoids the danger of anachronistically or sloppily applying ‘human rights’ language, which is really a later historical term with clearer roots in the Anglo-American tradition. While the

⁵⁴ Habermas, *Between Facts and Norms*, 82. Parenthesis in quote from Habermas.

contemporary German word for human rights, *Menschenrechte*, was rarely used in nineteenth-century German discourse, the Germans did have a lively rights discourse. German political figures of all stripes and colors, including Roman Catholics, used rights language, despite the differences of their fundamental conceptual systems.

In contrast to the complex historical development of the German use of the word ‘*Recht*,’ the modern Anglo-American transition to a ‘rights discourse’ was relatively straightforward. In the English narrative, the concept ‘right’ was already well established by the nineteenth century, and was non-controversial within a “slow but persistent development of institutions which comprise the common law tradition.”⁵⁵ This relatively linear development of rights was only mildly influenced by continental sources like Grotius. Its deepest roots were within the common law tradition, with its native English conventions and institutions such as the Magna Carta (1215), the Bill of Rights (1689), and the structures of parliament. English rights were influenced by theorists such as Hobbes and Locke in the early modern period, were called into some question by Bentham and Burke after the French Revolution, but were always defended and secured by the common law lawyers like Coke, Blackstone and their successors, who ensured the continuity of parliamentary and legal procedures—yielding only grudgingly in the general direction of greater simplicity and centralization.⁵⁶ Even Burke’s conservative reaction to French and English liberalism’s use of rights (and the Enlightenment in general) essentially accepted the concept as established. “Far am I from denying in

⁵⁵ Mary Ann Glendon, Michael W. Gordon, and Christopher Osakwe, *Comparative Legal Traditions in a Nutshell* (St. Paul, MN: West Publishing Co., 1982), 143.

⁵⁶ *Ibid.*, 154-156.

theory, full as far is my heart from withholding in practice (if I were of power to give or to withhold) the real rights of men. In denying their false claims of right, I do not mean to injure those which are real, and are such as their pretended rights would totally destroy.”⁵⁷ Burke’s rejection of the French rights codes was also one of prudence, i.e., he rejected the French liberal practical reasoning that led to an entirely new structure of government. For him, governments are slow growing plants that require careful cultivation. They respond poorly to grafts or radical alterations, and transplantations destroy the root systems they need to flourish. This form of organic theory made Burke a rare British hero of German Romanticism. Görres considered him a giant and followed his example of defending real rights, as opposed to rejecting the concept of rights itself.⁵⁸

Key for this study is the principle that rights are context dependent; they emerge from and are dependent upon intellectual and political traditions. Charles Taylor uses the American Revolution as an example. The American ‘Englishmen’ had to demonstrate that the colonies possessed a legitimate ‘right’ to secede from the British crown. This maneuver required some complicated but necessary intellectual gymnastics because the legitimacy of their claims to separate from the British Empire depended upon the conviction that American independence was actually preserving the truest and most ancient of English political traditions. The legitimacy of the political separation depended

⁵⁷ Edmund Burke, *Reflections on the French Revolution* (Pilgrim Press, 1984), 149.

⁵⁸ Jon Vanden Heuvel, *A German Life in the Age of Revolution: Joseph Görres 1776-1848* (Washington, D.C.: Catholic University of America Press, 2001), 247. Görres’ sympathy for Burke is a natural one, since Görres own disappointment with the French Revolution and its Enlightenment principles came from witnessing Paris in 1800. He returned with a new political outlook that applied Burke’s principles to Germany. See Vanden Heuvel Chapter 3: “Görres Breaks with the Revolution.”

upon an argument of the new nation's deeper continuity with the tradition, thus demonstrating the normative importance of the historical narrative. The Americans' historical arguments referenced the Glorious Revolution of 1688 and the subsequent achievement of rights as most central to the English political narrative. The arguments for deep continuity with the past, Taylor argues, created something new: a transformed popular understanding of legitimacy.⁵⁹

The important achievement that came with this move was the shift in social imagination to a more fundamental philosophical legitimacy rooted in the natural order, i.e., a timeless space different even from the seventeenth century's 'imaginary' original social contract. Still, this development of social imagination was gradual and syncretic, rather than revolutionary, and it depended upon "the continuity in institutions and practices that allowed for the reinterpretation of past actions as the fruit of the new principles."⁶⁰ Thus, the American Bill of Rights functions as a transitional document according to Taylor's theory because a historical orientation provided its sources and articulation, but its own birth also signals a freedom from history insofar as the rights are legitimized by the will of "We the People."⁶¹ The realization of rights by 'The People' remained a work in progress as the gentlemen's document was read and interiorized by generations of 'The People,' including those of different classes, races, and gender. Nevertheless, compared with the rights tradition on the continent, the historical development of American rights language was relatively linear.

⁵⁹ Taylor, *Modern Social Imaginaries*, 109-110.

⁶⁰ *Ibid.*, 112.

⁶¹ *Ibid.*, 110,148.

An understanding of ‘*Recht*’ in the German language requires a grasp of historical context analogous to that of ‘rights’ in the English language. Rights language in a German context has an additional semantic complexity because the German word *Recht*, like *ius* in Latin, has a wide range of possible meaning – the word *Recht* can be translating into English as ‘just,’ ‘law,’ ‘right,’ and ‘rights.’ This complexity, however, also demonstrates the close semantic relations existing among the concepts ‘justice,’ ‘law,’ and ‘right’ in German, especially in the nineteenth century. The specific meaning of the word, therefore, requires reference to both its historical and semantic context. *Der Kleine Eichborn* dictionary provides a good starting point for the discussion here by providing seven general possibilities for translation. A *Recht* can be a “*Recht*: (1) law, (2) (*Anspruch*) right, claim, interest, title, (3) (*Befugnis*) power, authority, (4) (*rechtliches Gehör*) due process of law, (5) (*Gerechtigkeit*) justice, (6) (*Rechtsstudium*) jurisprudence, law, (7) (*Vorrecht*) privilege.”⁶² Subjective rights fall under the category of *Anspruch*, and specifically as a claim. Thus, while *Recht* translates most simply into ‘law,’ a *grundlegendes Recht* is unambiguously a claim, a ‘fundamental right.’ A *Rechtsanspruch* is a legal right or claim (*Anspruch*)—which seems to walk a line between ‘right as claim’ and ‘law,’ while *staatsbürgerliche Rechte* and *originäres Recht* (civil rights and natural right) fall firmly on the side of ‘right’ as opposed to ‘law’ in translation.

A formal definition of *subjektive Rechte* is possible: subjective rights frame limits that are defensible within particular spheres of action, and those ‘spheres’ can range from

⁶² Reinhart von Eichborn, *Der Kleine Eichborn: Wirtschaft Und Wirtschaftsrecht, Deutsch-English*, 4. überarbeitete Auflage ed. (1997: von Eichborn Siebenpunkt Verlag KG, 1997), 683 Entry for “Recht”.

voluntary associations to universal categories. This formal definition, however, requires content. The defensible limits to property rights, for example, might vary greatly in different national contexts. Thus, as Habermas argues, the most adequate method of analyzing rights is to study their actual use, i.e., the performance of rights. This has the advantage of distinguishing the use and legitimation of rights.⁶³ The definition of ‘rights as limits’ may be understood in both active and passive senses that take shape in various forms of positive claims, powers, privileges, or immunities.⁶⁴ Within a voluntary association, for example, the rights of the association’s members depend upon satisfaction of the association’s rules. Legal rights are obviously not voluntary. They describe the claims of citizens that the state is obliged to recognize and enforce by definition of its own laws. Civil, economic, and political rights may fall under legal rights if they appeal to the legal structure of a single state, or they may appeal to the broader category of human rights if they appeal to external and more universal criteria, such as moral values. Human rights raise the bar of complexity because the sphere of action lacks particularity and the conflicting ‘rights claims’ often lack authoritative adjudicative processes. On the one hand, the United Nations Declaration of Human Rights has achieved much in articulating those ‘limits’ which should apply to all human beings by virtue of their ‘human-ness.’ On the other hand, that articulation has only the force of

⁶³ Habermas, *Between Facts and Norms*, 82. Habermas’ Chapter Three, “A Reconstructive Approach to Law I: The System of Rights,” makes the argument that in addition to abstract theories of equal rights, rights as laws require the social achievements of “mutual understanding” (ibid., 83). The same articulated rights in different locations or eras are not ‘performed’ equally because the standards of legitimation and the expectations for enforcement are different.

⁶⁴ This four-part categorization by Hohfeld is merely one classic example of the divisions possible. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions: Four Part Description of Rights: Right, Privilege, Power and Immunity* (New Haven: Yale University Press, 1919).

application that the member states may voluntarily apply. Moreover, as Kant's old dictum states, a law without force is no law. To speak again performatively—when rights are enforceable by a civil authority, they have the force of positive law. When they lack enforcement, they may be best defined as claims that describe generally the values of society, and specifically the petitions or hopes of particular groups or individuals.

These aspirations are important, but as David Hollenbach has argued, apart from (1) a theoretical foundation, (2) an ordering or relation of rights to each other, and (3) a relation of rights to the institutions of social, political and economic life, the rights lack synthesis and force.⁶⁵ These three points cannot be simply conjured from abstractions. Rather, it is best to approach and understand the foundation, ordering, and relation to institutions of rights by studying the historical practice of rights—a topic in German scholarship that falls under the category of *Rechtswissenschaft* and specifically *Rechtsgeschichte*.

In early nineteenth-century Germany, given the multiple and overlapping legal systems and theories, there was simply no single theoretical foundation, but rather many overlapping understandings which led to a similar complexity in the ordering of rights in relation to each other as well as in relation to institutions. Despite this complexity, however, there was a long tradition of using the word *Recht* to describe not only rights in general, but also specific subjective rights. The Basic Rights, *Grundrechte*, of the 1848/1849 German Constitution, *Deutsche Verfassung*, provides us with the clearest and most audacious example. That rights catalogue of the Frankfurt Parliament, the

⁶⁵ David Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition*, *Woodstock Studies*; 4 (New York: Paulist Press, 1979), 33.

‘Professor’s Parliament,’ revealed the willingness of most German social groups to recognize the legitimacy of subjective rights.

The Grimms’ *Deutsches Wörterbuch*⁶⁶ is an appropriate nineteenth-century dictionary to cite here because it is a contemporaneous representation of Ketteler’s general legal philosophy (the historical school). The massive article on *Recht* (approximately 25,000 words) was published later in the century after the death of the two founding brothers, but it still represents their editorial style and philosophical perspective. Jacob and Wilhelm Grimm were not only, like Ketteler, students of Savigny, they were also raised in his household after their parents death. The dictionary, as a project, reflected the Grimm’s linguistic philosophy that human language, and thus words, are not simple ‘signs’ corresponding to ‘things.’ Rather, words, like language in general, are human expressions that reveal complex matrixes of cultural meaning. The Grimms, in addition to compiling their children’s stories and dictionary, were important legal scholars who believed that “law, language, and imaginative literature were so entangled with each other in German culture that they should be understood together as dimension of the same cultural process. [The] point was that the historical evolution of

⁶⁶ Jacob Grimm and Wilhelm Grimm, eds., *Deutsches Wörterbuch, Achter Band: R-Schiefe* (Leipzig: Verlag Von S. Hirzel, 1893). The dictionary was originally edited by the brothers Jacob and Wilhelm Grimm, the famous Romantics and collectors of German folk tales, and it expressed their way of thinking as much as Diderot’s *Encyclopedia* was the expression of the Enlightenment’s highest hopes. Philology and etymology were basic tools of the Romantic philosophers. Jacob Grimm was a representative of the historical school of jurisprudence and was a very close associate of Savigny. A teacher of law in Göttingen during the years Ketteler studied law there, in 1837 Grimm heroically stood up to the prince of Hannover’s abolishment of the constitution and lost his university position because of it. Grimm was also a member of the 1848 Frankfurt Parliament, where he was an outspoken opponent of the liberal constitutional measures, but also an advocate of rights as articulated in the *Grundrechte* discussed in Part Two.

law was only comprehensible if it was integrated into a history of culture more generally.”⁶⁷ The dictionary entries were written, like the *OED* in English, with an eye to differentiating the different meanings of the word as revealed in historical documents. For each separate aspect of the definition, the dictionary cites historical references of the word within a context. The article on *Recht*, for example, cites its use from the thirteenth-century *Sachsenspiegel* to the contemporaneous literature of Goethe, Heine, and other nineteenth-century writers. The article refrains from making any arguments for *Recht*’s inherent validity, or for its objective reality in the moral order. Rather, it lays out the actual uses of the term as it appeared in history with extremely precise differentiations.

The Grimms’ *Deutsches Wörterbuch*’s historical and etymological research attests to the wide use of a pre-constitution, non-liberal use of subjective rights language. It notes the use of a subjective right as the right of a person occupying a recognized position within a hierarchical social order, binding all persons to respect specific claims and responsibilities. Subjective rights also refer to the benefits a person might expect with respect to their social standing. This may include one’s ‘right’ to sacraments before dying or the privileges that come with an official position. The sense of the word here is that rights emerge from a person’s position in the social order. A related use of the word is its use as an appeal to the established legal order. A head of a household could appeal for what was necessary for his position in society, as could a hunter or a bishop. Most relevant to the modern form of subjective rights, however, *Recht* is an entitlement or privilege that follows from a person’s position. The person has a right or ‘rightful claim’

⁶⁷ John Edward Toews, *Becoming Historical: Cultural Reformation and Public Memory in Early-Nineteenth-Century Berlin* (Cambridge: Cambridge University Press, 2004), 322.

to participate in those goods necessary for life, and those rights should be protected by the legal order:

4e) Right (*Recht*), in the sense of entitlement, which is assumed either legally or morally. Occurring also in the plural, it means the right to something..., based upon a familial or other relationship

4f) Right (*Recht*) as a power over something, to use or dispose of something; includes a right to build on a piece of property, a right to trespass, etc...

4g) Right (*Recht*) in the sense of being separate from duty ... the right that differentiates itself from its duty such that duties, to be recognized, must be also articulated separately.⁶⁸

The Grimms' *Recht* article continues with the legal meanings of the word in a second section: "right (*Recht*) in an objective sense,' as 'that which is the consequence of a moral law... It is, a) connected with other moral principles..., b) in opposition to injustice..., c) united with duty... etc."⁶⁹ The article then takes up the historical development of the term from the moral sense to the more narrow legal meaning (in section III) as the norm expressing both juridical and divine law—which continues to express a moral order as opposed to raw power. It outlines the use of the term in case law and legal processes and procedures.⁷⁰ Finally, the article continues with a discourse on 'right' (*Recht*) as an adjective. Here we get a detailed etymology of the word *Recht*, with its earliest appearance as a description of being straight (as in not crooked). It is also used as the opposite of left and as a ninety-degree angle.

Similar to the Grimm article on *Recht*, Norbert Brieskorn's etymology of the word points out that it is rooted in *richtig* (correct) and *Richtung* (direction) and related to the

⁶⁸ Grimm and Grimm, eds., *Deutsches Wörterbuch, Achter Band: R-Schiefe*.

⁶⁹ Paraphrased again from *Ibid.*, 371 Entry "Recht".

⁷⁰ *Ibid.*, 380.

concept ‘justice’ (*Gerechtigkeit*), much like the Latin term *ius* and the Spanish term *derechos*.⁷¹ However, Brieskorn warns that the term is “colorful, imprecise, and ‘in everyone’s speech (*in aller Munde*)’ as well as very closely tied with the concepts law and justice, and thus we need to be careful in our analysis.”⁷² That is to say, again, that while the word had clear non-liberal meanings in its subjective use, its context is critical for understanding its specific meaning.

In sum, the nineteenth-century use of the word *Recht* contained a divergence of meaning, but clearly included what we understand as a ‘subjective right,’ i.e., the right of an individual person to specific active claims and passive liberties that are recognized as legitimate by the community and defended by the state with legal means. As shown by the Grimms’ dictionary, and as will be shown in the argument below, the German context maintained a continuity with pre-modern legal traditions that sought to place all members in a society under the law with specific rights.⁷³ The nature of this German context will be closely analyzed in the discussion of Savigny’s historical jurisprudence, which so strongly influenced Ketteler’s own thinking. It is most important here to note that subjective rights had a long history in the German context, i.e., subjective rights predated the influence of Enlightenment thought and those pre-modern conventions and understanding of subjective rights persisted during the nineteenth century during a period that saw the rise of liberal rights theories.

⁷¹ Norbert Brieskorn, *Rechtsphilosophie*, vol. 14, *Grundkurs Philosophie* (Stuttgart, Berlin, Köln: Verlag W.Kohlhammer, 1990), 33.

⁷² *Ibid.*

⁷³ Dietrich comment: Sept 2006. Feudalism is often used to describe the many overlapping legal traditions of the pre-modern European eras. Berman, *Law and Revolution*.

1.6. The Term ‘Right’ And The Concept Of Subjective Rights In Ketteler’s Writing

Ketteler’s rights language does not make great efforts to sharply distinguish between corporate and subjective rights as if they are radically different concepts. Nevertheless, a study of his writings reveals three basic elements relevant to his use and understanding of subjective rights: (1) Subjective rights, like all rights, maintain an objective aspect such that they describe ‘that which is just,’ according to a divinely willed natural order. (2) Subjective rights are subjective (*ius agenda, Subjektives Recht*) in that they pertain to individuals with respect to other individuals, corporations, the state, or society itself. (3) A subjective right is a juristic (legal) concept, i.e., clearly outlined in law with the enforcing power of the state. These three aspects can be seen clearly in the following quotation, coming from a very public dispute Ketteler engaged in while a member of the Frankfurt Parliament in 1848:

My opinion is different from the simple idea that every individual can practice every right to which he is entitled. For me, the state is no machine, but is instead a living organism with living members. This [living organism] is designed such that every member has his own right, has his own function, and has his own free life. For me, these members are the individual, the family, the community (*Gemeinde*), and so on. Every lower member is free to move about within its own sphere and enjoy the right to the freest self-determination and self-government.⁷⁴

⁷⁴ *SWB II*, 1:331. Ketteler’s letter to Thüssing, 1848. “Meine Ansicht geht dagegen von dem einfachen Satze aus, daß jedes Individuum seine Rechte, die es selbst ausüben kann, auch selbst ausüben darf. Der Staat ist mir keine Maschine, sondern ein lebendiger Organismus mit lebendigen Gliedern, in dem jedes Glied sein eigenes Recht, seine eigene Funktion hat, sein eigenes freies Leben gestaltet. Solche Glieder sind mir das Individuum, die Familie, die Gemeinde u. s. w. Jedes niedere Glied bewegt sich frei in seiner Sphäre und genießt das Recht der freiesten Selbstbestimmung und Selbstregierung.”

First, regarding the objectivity of rights, Ketteler rejected the idea that rights could have existence apart from the living tradition of the community, but supported the notion rights entail a sphere of freedom (*sein eigenes freies Leben*). Rejecting liberal contract theories and the related conceptions of autonomous rights, he held that the state is not something foreign introduced into human society. It is a political structure most essential for humans, social beings created according to a divine plan. Human reason, embedded in a tradition, provides insight into the divine plan and informs the principles of the natural law, including insight into the elements necessary for human society. Condensing this complex discussion for reasons of brevity, for Ketteler, rights describe those freedoms consistent with and necessary for human social flourishing. As such, even though rights emerge historically within specific traditions, rights can be understood to have an objective aspect because they order humans to an objectively necessary end. Taylor names this an “ontic component” that “identifies features of the world that make ... norms realizable.”⁷⁵ For two basic reasons, however, rights’ objective nature does not make them absolute. First, rights are not absolute because the practical reason that provides insight into the divine plan is limited by human weakness. Second, rights within the ‘living organism’ can conflict and so must be adjudicated according to the human ‘end,’ or purpose. Ketteler speaks of the right to the ‘freest self-determination,’ and not of a right to ‘absolute freedom.’

The tension of maintaining a notion of objectivity in a historically established principle was a real one for Ketteler, but it was balanced by the objective inferences

⁷⁵ Taylor, *Modern Social Imaginaries*, 10.

preserved in the word *Recht*, just as it was in the word *ius* for medieval jurists.

“Ontologies are built into the syntax and vocabulary of the predominant languages of each metaphysical epoch. And these ontologies, in turn, determine the circumference and the internal structures of the world.”⁷⁶ In Ketteler’s worldview—in his social imagination—rights claims reflected the proper structure of society as ordered to its proper purpose. Brian Tierney traces the term ‘right’ from the classical Roman *ius*, the objectively right, which retains that meaning through the time of Aquinas. It is “the objectively just, the just thing itself, that which is just.”⁷⁷ Tierney argues that this meaning is never completely absent in later thought leading up to the modern period, even after the distinction emerged between “*ius* as meaning a law or body of law (as in *ius civile*) and *ius* as meaning a subjective power, what we should call a right (as in *ius agendi*).”⁷⁸

Second, Ketteler was typical of his time in general and of the historical school in particular in maintaining this distinction between corporate and subjective rights without contradiction. Though his collected writings have many references to subjective rights, providing material for research here, Ketteler’s references demonstrate only modest effort to defend his use of such language. He presumably took for granted that such rights were part of the legal and political landscape, and as such, required no defense. In the quotation above, he was anxious to locate subjective rights within the matrix of social relations contributing to human flourishing. This places him squarely in line with the

⁷⁶ Habermas, "Conceptions of Modernity," 144.

⁷⁷ Tierney, "Marsilius on Rights," 4.

⁷⁸ Ibid.

medieval jurists who, Tierney argues, also found no inherent contradiction in the distinction between *ius* as a subjective power and *ius* meaning the whole body of law. Tierney points out that medieval jurisprudence, though holistic in important ways, was “marked by constant tension and interplay between the claims of individuals and those of the corporate whole.”⁷⁹ The complex matrix of human relations, duties, and responsibilities is not endangered by the recognition of rights, as a “specified...area of licit conduct allowed by law or a rightful claim to some external good.”⁸⁰ The distinction also posed no contradiction for Ketteler who was tied to that medieval jurisprudence through training in theology, canon law, and through the historical school of jurisprudence.

This second aspect is critical because, while subjective rights language may not differentiate Ketteler from medieval jurists, it does differentiate him from nineteenth-century papal documents that do not use this subjective language with reference to individuals, though they are replete with references to corporate rights as possessed by the church and its leaders. The various historical reasons for the papacy’s exclusively corporate use of rights language are beyond the scope of this study, but that rhetorical reluctance does not prove the incompatibility of subjective rights with traditional Catholic political thought. Tierney argues that there is a long tradition of Catholic Aristotelians, beginning with Marsilius of Padua, who quite coherently utilized subjective rights.⁸¹ Ketteler too, I argue, is part of this tradition that recognized that rights in their

⁷⁹ Ibid.: 6.

⁸⁰ Ibid.

⁸¹ Ibid.

subjective form are necessary safeguards for the whole community. For Ketteler, rights are founded in the community, have meaning only within a community, and have legitimacy because they benefit the community (*Gemeinde*). Abstracted from the community, rights are theoretically incoherent.

And third, a right is a juristic concept, i.e., a legal concept belonging properly in the realm of positive law. This is the case even though it emerges from personal relations and its function is to protect those personal relations. Ketteler's social theory, alluded to in the quotation above, utilized this juristic concept 'rights' in a political discourse to protect the integrity of social structures. Here we get a glimpse of Ketteler's 'subsidiary' social theory and the important role he ascribed to rights for society. 'Subjects' possess rights because they are embedded in a matrix of social relations. In an expanded sphere, rights protect the integrity of families by protecting those spheres of freedoms necessary for the family's flourishing—for parents educating their children, for example. The family is the archetype of all human relations and the most basic social sphere protected by rights. Parents have rights stemming from their natural nurturing role, and conversely, children have rights based upon their relation to their parents and society. To speak of parents' rights is to speak only of only one aspect of the parent/child relationship. It is a secondary aspect, but an essential one. As social relations are manifested in increasingly larger circles, or communal spheres—from the individual to the family to the local community to the nation-state—rights reflect the proper roles necessary to maintain the integrity of those spheres.

The state, as a 'living organism,' has a role in the natural order to recognize and protect those rights necessary for human flourishing. The state is not separate from, and is certainly not above or immune from, the demands of human community. It is a human structure providing a necessary role according to a design, i.e., the natural order, which Ketteler holds to be divinely given in that it is part of God's Creation. The state is answerable to this divine design through other necessary social structures that are also discernible with practical reason. The most notable of these for rights is the legal structure. With established law, members of society can make claims upon the state, insuring that the state fulfills its role and purpose. These claims upon the state are articulated in rights language. In sum, the state's role and purpose is the protection of the rights of its people within the communities in such a way as to foster full human living. Rights, for Ketteler, were determined by practical reason and legitimated by their foundation in the natural law and their contribution to the common good of the social order.

People live freely when they are able to enjoy the rights and functions proper to each sphere of human society: in their families, their local religious and neighborhood communities, and in the increasingly universal governing structures. Ketteler set the principles of self-determination and self-government (*Selbstbestimmung und Selbstregierung*) into the overarching hierarchical social framework, with the principle of subsidiarity sorting out the relations between the embedded community and state interests. The ultimate *telos* is the free self-government of the population, with Ketteler's principle of subsidiarity indicating that each successively larger community, from the

family to the nation, should be granted as much freedom as it can properly exercise for its own flourishing. True to the organic model, the practice of freedoms on the lower levels fosters the competence for freedom in more universal forums of governance. Thus, by protecting the rights of individuals, families, local communities, and so forth, society (within which the state plays an important role) fosters the capacity for freedom on the national level. Ketteler believed that liberal imposition of rights ‘from above’ is destructive of social flourishing because it does not foster the capacity of individuals in society to enjoy the rights prescribed for them. Practically speaking, in order for rights to be maintained, the people must be capable of exercising or enjoying (*genießen*) them.

Ketteler rarely cited references or influences in his public works, and his terms were often undefined or open to different interpretations. These tensions, however, do not compromise the thesis regarding Ketteler’s public rhetoric. The argument is not that Ketteler undertook a conscientious, categorical, or academic defense of the concept *per se*. Rather, the argument is a performative one—that Ketteler used rights. His writings were often produced quickly and intended for a specific political question. Even in those works that were carefully written and painstakingly considered, rights were not the topic of concern as a subject *per se*, but were utilized to protect fundamental freedoms or basic human needs necessary for a dignified human life. Ketteler’s rights rhetoric is important precisely because it was so unself-conscious. He took it for granted that claims of rights were compatible with his core beliefs, and when he used such rights rhetoric, he did not feel obligated to defend himself for doing so.

Though Ketteler's use and understanding of rights developed over time, much remained constant. For example, Ketteler's *Soll die Kirche allein Rechtlos sein?* (1864) was written after he was bishop of Mainz for fourteen years. The protest document represented his developed understanding of the Catholic Church's relation to the state. Its title and language represented the mature discourse of a political infighter and the representative of a politically alienated large minority. At this stage in Ketteler's life, his language, including his use of the concept 'rights,' was stable, conscious, and deliberate. Still, an accurate translation of the meaning and force of Ketteler's use of 'rights' concepts requires a subtle understanding of his world. It is not so easy, for example, simply to translate the above title as the following: *Should Only The Church Be Without Rights?* In some contexts *Rechtlos* could mean 'lawless' or out of control, though Ketteler could hardly have had that in mind here. Even if we grant that the best translation is 'without rights,' there is a further complication regarding the meaning of the phrase. The title might be asking, on a specific level, whether the law does not grant the same privileges to the church as it grants other legal 'persons' in the realm. On a more abstract level, Ketteler might be asking if only the church is excluded from bearing fundamental rights, i.e., rights granted to all persons and recognized institutions *qua* persons and recognized institutions. Thus, the translation depends upon context, and the context depends upon an appreciation for the complex history of concurrent and often competing legal systems in the history of the German states.

1.7. Biographical Notes And Outline Of Dissertation: Ketteler Was Rooted In The German Legal Traditions Without Compromising His Strong Catholic Identity

In order to support the thesis that Ketteler's position on rights is consistent with his understanding of Catholic natural law (*klassisches Naturrecht*), it is first necessary to establish the context in which Ketteler, in fact, used a language of rights, and then to detail his performative understanding of rights—that is, the understanding that underpinned his actual use of rights language. This requires that I establish three central points. The first point, addressed in Chapter Two, is essentially empirical. It is that Germany was a politically and religiously diverse place in the first half of the nineteenth century and that there existed a great deal of philosophical and theological divergence within these political parties and religious denominations. Even Catholics, who were more unified as a corporate entity than the other groups, differed greatly in their willingness to incorporate philosophical developments. In general, Catholic intellectuals and church officials had contested much of Enlightenment philosophy and were suspicious of its political implications expressed under the label liberalism. Still, there were many Catholic liberals, and the conservative Bavarian Catholics could by no means speak for all German Catholics.

The second central point, demonstrated in Chapters Three and Four, is that Ketteler lived and worked in the midst of this diversity, but that he conscientiously safeguarded his Catholic credentials. He was not sheltered or isolated from non-Catholic social, political, or intellectual worlds, but was in fact a competent lawyer and administrator in the Prussian bureaucracy, and he was strongly influenced by the Roman law being taught

in the law schools by Savigny and others.⁸² Even his legal training was diverse. He attended lectures first in the mostly Protestant Göttingen, then in Heidelberg and Berlin, which was then establishing itself as the capital city not only of Prussia, but of a surging German national identity. Ketteler's also studied canon law and civil law in Munich, an important city of Catholic Bavaria with a university that had ambitions to become another of Germany's great centers of scholarship. Munich provided Ketteler with Catholic mentors, friends, and scholarship.

Part One as a whole establishes my third and most important point, that the use of 'rights' language in nineteenth-century Germany was not uniquely liberal. Rather, rights were claimed by a variety of groups using various philosophical arguments and traditions. These rights claims reflected the diversity of existing legal and philosophical traditions in nineteenth-century Germany. Some discussion on the complexity of the German legal landscape in relation to Ketteler's writings will demonstrate the different schools of thought emerging and developing over the course of his career.

Thus, Ketteler was rooted in the German legal traditions without compromising his strong Catholic identity. He held these together simultaneously despite the pressure of their oppositions. He was proud of the many elements of his identity, such as his social position, his Catholicism, his German-ness, his Westphalian roots, his basic common practicality, without being naïve about the tensions among them. He was well informed about the dynamic intellectual schools emerging in the nineteenth century in the related

⁸² Savigny's first important work, Friedrich Karl von Savigny, *Das Recht Des Besitzes* (Giessen,: Heyer, 1803)., introduced this field and his monumental work, Savigny, *System Des Heutigen Römischen Rechts I*. represents the more mature, but essentially consistent position that he would have been teaching in Berlin when Ketteler was there.

philosophical, theological, and legal sciences, and he judged the soundness of those schools by their consistency with the long intellectual and religious traditions of Germany, Europe, and the Catholic Church. By demonstrating this I want to emphasize that Ketteler's legal understanding remained important for him during his ecclesial career when he became more closely associated with the Catholic Romantic movement and its 'organic' theory of state.

The Introduction has laid out the reasons why a close study of Ketteler's life and work offers insight into a Catholic understanding and use of rights. Chapter Two describes the context in which Ketteler lived. This German *Vormärz* period was a time of political and ideological conflict that shaped Ketteler's understanding of rights as well as his appreciation for their legitimacy for religious minorities. It contains a systematic analysis of rights as a concept and the specific 'rights' questions that Ketteler would have had to address as a lawyer, a Roman Catholic priest, a participant in the 1848 Frankfurt Parliament, and then later as bishop. The Prussian Civil Code came at the end of the Enlightenment, but it did not establish a dominant theory of jurisprudence in Germany. Rather, it was only a flashpoint in the larger ideological struggle that, in the field of law, was played out between the liberal *Begriffsjurisprudenz* and the more conservative Romantic *Geschichtsjurisprudenz* where Ketteler's sympathies found a home. This alliance with the historical school of jurisprudence, however, did not ally him with those Prussian and Protestant social and philosophical principles alien to Romantic Catholicism.

This establishes the complexity of the competing legal schools and locates the young Ketteler in the midst of that complexity on the side of Romantic/historical jurisprudence and as an advocate for the *ständische Verfassung*. Conversely, it distances Ketteler from the more liberal traditions of jurisprudence linked directly to the Enlightenment through Kantian influences. The early nineteenth century was a time of intellectual, political, and spiritual flux, within which the future bishop steered a course using those tools that were ‘at hand.’ Specifically, the chapter will lay out the ingredients of the legal mix that was available to Ketteler. The claim is that Ketteler in fact borrowed from the different schools. This example demonstrates his intellectual flexibility, his respect for various models of intellectual approaches, his practical legal mind, and his appreciation for the constitutional structures that protect basic human needs, i.e. rights.

Chapter Three outlines the important legal, ideological, social, and political influences upon Ketteler’s *Vormärz* (pre-1848) world. His social and philosophical principles were quite definitively shaped by his Catholic and Westphalian roots in western Germany. His family, together with just a few other noble houses, had governed the region around Munster for many centuries. The consciousness of that heritage is relevant to the entirety of his life and written work. Ketteler was a Romantic in philosophical leanings and general temperament, and his worldview contained the ideals of the medieval world where patriarchal values were positive, not oppressive, attributes. The patron was responsible for establishing discipline and order in the house, as well as caring for the weakest members of the extended family. For the Ketteler family in the midst of the social and political turmoil of nineteenth-century Westphalia, this

responsibility played out in the field of law. Chapter Three shows how Ketteler himself took to the law and why he then later renounced a legal career in favor of the priesthood. It shows how his legal and theological education influenced his worldview and underpinned his specific interests and political positions. Specifically, Ketteler's aristocratic background, legal education in the historical school of law, and Catholic political interests all influenced his language of rights. These various influences are consistent with the position of Catholic Romantics in the first part of the nineteenth century.

Like Görres and other Catholic Romantics, Ketteler never needed an argument for an explicit and specific theory of rights, although he did make great efforts to outline his understanding of the natural law. The analysis of rights in his early writing demonstrates that as his thinking developed he continued performatively to hold the conceptual frameworks of a rights discourse and natural law as complimentary. That is to say, he made rights claims and he made natural law arguments—sometimes he made rights claims based upon natural law arguments—and he saw no inherent problem in doing so. Ketteler's genius is practical and it is legal, and the patterns of thought revealed in his early writing demonstrate a pattern that will be followed in his later life.

In the application of Romantic principles to law, Enlightenment codifications were shunned as lifeless and dangerous compared to reform that ordered the law according to principles rooted in society. Codifications based upon abstract principles were artificial and depended upon brute force for compliance. The Romantics urged rather legal reforms that sought to preserve essential principles of law while removing legal contradictions

and filling legal gaps. Constitutions were not inherently objectionable for the Romantics, however, who recognized the value of written law and who championed the principle that even state authority was subject to the law's constraint. I clarify this tension between 'legislation' and 'culture,' along with Ketteler's various strategies for resolving it throughout his career, by demonstrating that his familiarity with the structure of the law and the nature of its development remained important throughout his life. This point is made using his family's history, his education, and his early years as a Prussian administrator, as reflected in the arguments of his early writing. When he made arguments, he brought the confidence of a person from a family of social standing accustomed to wielding power both political and ecclesiastical—often both at the same time. When he used the language of rights to defend a position, which he did frequently, he did not do so as a revolutionary. Rather, the opposite is true. His use of rights quite consciously rejected the ideological suppositions of liberalism.

Ketteler's writings, and specifically his use of rights language, are analyzed both historically and intellectually. The goal is to provide the background information necessary for a close reading of the texts themselves, which are then evaluated chronologically. Chapter Three deals specifically with the situation of legal scholarship that formed Ketteler's basic worldview. His 1836 legal paper on the rights of Jews and Mennonites in the Prussian constitution⁸³ illustrates his legal mind before he had begun any serious contemplation of theology or a vocation to the priesthood. It was an

⁸³ "Darstellung Der Allgemeinen Grundsätze, Durch Welche Der Preussische Staat Bei Behandlung Der Juden Und Mennoniten Seit Dem Jahre 1815 Geleitet Worden, Und Der Staatsbürgerlichen Verhältnisse Dieser Religionsparteien Im Regierungsbezirke Munster," (1836) referred to as *Darstellung* (1836) in the text. *SWB I*, 5:43.

Abschlussarbeit, that is, the work required for the fulfillment of one's training for legal career. This work of a young Ketteler gave him the qualifications necessary to work in the Prussian bureaucracy. It is his first significant piece of writing and it demonstrates his early allegiance to the historical school, his non-problematic use of subjective rights language and concepts, and his aversion to liberal political influences, especially in the realm of law. To make this argument, the chapter outlines the form of liberalism that held sway in Germany, 'east of the Rhine,' as represented by the reforms of Stein and Hardenburg. It also outlines the distinction between Catholic and Prussian conservatism by outlining the main principles of the *Herrschaft* ideology, which continued to hold sway in Berlin until Bismarck's time.

Chapter Four outlines the state of German Catholicism after the Cologne Conflict in 1837. It deals with the theological influences in Ketteler's life that can be generally categorized as early nineteenth-century Catholic Romantic thought. It held to the organic theory of state that rejected the 'liberal' impulse to fix social ills with abstract and timeless legal codes. Ketteler's theology, like his language of rights, was not revolutionary, but it was a product of the time and it contained the theoretical resources to prudently adapt established principles to a new situations. Chapter Four describes Ketteler's intellectual formation in Munich, the center of the new German Political Catholicism, under the influences of Görres, Baader and Möhler.

Part Two, beginning with Chapter Five, continues with a focus upon the pivotal year 1848 and treats Ketteler's own articulated theology as well as his social thought—in particular, his understanding of the 'organic society.' Part One had covered Ketteler's

theological influences, especially Franz von Baader and Adam Möhler, and described the situation for Catholics in early nineteenth-century Germany. Chapter Five outlines the context for Catholics in the midst of the 1848 revolutions. Chapter Six deals with the parliament formed in Frankfurt after the revolutions and the extraordinary role that Catholics, and especially Ketteler, played there. Chapter Seven carefully analyzes Ketteler's famous collection of *Advent Sermons*. Delivered after a revolution-weary year only fifteen miles from the site of the Frankfurt Parliament, Ketteler preached the sermons to huge crowds in the city of Mainz upon the invitation of the prince-bishop of Mainz. Mainz had been an elector city and it continued to be a politically important center of Catholic political power in Germany. Ketteler used this opportunity on a national stage to outline a Catholic position in response to the radical ideas being espoused in the revolutionary parliament and the barricaded streets outside.

The parliament had itself published a bill of rights according to the model of the French Revolution, and the discourse of rights was certainly in the air. This context may go some way towards explaining Ketteler's outline of rights based on St. Thomas Aquinas—especially property rights. This attribution of a strong rights discourse to Aquinas is surprising to modern Catholic ears, but Ketteler's creative reading reveals three basic points germane to the entire work. First, it reveals a lack of a univocal Catholic rights discourse. On the contrary, the evidence indicates the variety of ways the topic was being treated. Second, the sermons reveal the relative lack of consensus regarding Thomistic interpretation in the first half of the nineteenth century. Ketteler was living in a time following the suppression of the Jesuit order, whose scholastic professors

had a powerful influence in the Catholic faculties of German universities.⁸⁴ In addition, he was appropriating Aquinas' *Summa Theologica* long before Aquinas was recognized by Leo XIII as the central theorist of Catholic thought in *Aeterni Patris* (1879). Third, the homilies show Ketteler's predisposition to read a strong rights theory into Aquinas' relatively neutral work on the topic. That is, his projection of a strong rights theory into his interpretation of Aquinas reveals his own legal mind-set and rights-ordered worldview.

Part Three, consisting of Chapter Eight, follows with Ketteler's more mature thought. It begins with a biographical outline of his life from the time of his ordination as bishop in 1850 to the end of his life in 1877. His writing as bishop was intended for popular audiences and was often polemical. Also considered are his speeches before the Reichstag after the creation of the German Empire (*Reich*) in 1871. The speeches provide an insightful bookend to both the development, and also the fundamental consistency of, Ketteler's rights language throughout his life. These, together with his private letters, have been published in just the past twenty-five years under the direction of Erwin Iserloh and Christoph Stoll. They offer an important window into the thinking of a bishop, trained in the law, who steered a middle course between the forces of reaction and liberalism during a time of conflict and transition for the Catholic Church in the late nineteenth century.

This Third Part concerns the practical application of his early theories as Ketteler's legal training continued to be important for his later writings. He understood the central

⁸⁴ Dietrich, *Catholic Theology in the Age of Idealism*, 30,43-44.

place of law in society and grasped early on how the emerging Prussian constitutional structures had the potential to form a bulwark against absolutism and the capricious abuse of power. It is true that Ketteler came late to the conviction that state intervention was necessary to address the social ills of poverty and workers conditions in the form of positive legislation, but from very early in his public life he had a strong sense of rights insuring civil protections.⁸⁵ This is demonstrated in his account of the rights of Jews and Mennonites in his early life, his actions in the Frankfurt Parliament shortly after he was ordained a priest, and later when as bishop he defended individual and religious freedoms.

This split between the legal focus on the one hand and theological and philosophical foci on the other is potentially misleading because of the close interrelatedness of the fields, especially in the early nineteenth century. Feudal law, which was in force in certain districts even up until the First World War, made strong theological claims in the oaths that were at the heart of class and property relations. Roman law made philosophical claims about the universality of law and thus made existential claims with philosophical and theological ramifications. The ambitious legal codifications of the late eighteenth and early nineteenth centuries were influenced by the often deistic natural law claims of Enlightenment thinkers. Moreover, the strong reactions against those codes by the Romantic legal scholars under Savigny's influence were reactions stemming from

⁸⁵ William Hogan's dissertation in 1942 makes much of the development of Ketteler's thought over the course of his career, while not paying much attention to the bishop's early legal training. He makes a strong argument, however, regarding Ketteler's early strategy of moral rather than political influence regarding these matters. William Edward Hogan, "The Development of Bishop Wilhelm Emmanuel Von Ketteler's Interpretation of the Social Problem" (PhD Dissertation, Catholic University of America, 1947), 70.

intellectual movements that were themselves very theological. While we acknowledge the close interrelatedness of these fields, there is an advantage to understanding the specifically legal developments separately. This legal context is essential and integral to Ketteler's understanding of rights because his writing and intellectual development reflected the character and juristic principles of his early legal training. To give one example, this is evident in his continual appeal to the provisions in the Prussian constitution for religious freedom, a great legal signpost he appealed to in his struggles for independent confessional schools. He referred to these provisions again during the drafting of a proposed constitution for the new German nation after 1870.

Ketteler's rights language here and elsewhere carried rhetorical force because of his respected church office, especially once he ascended to the bishop's seat in Mainz. But his language was given wider force to the extent that it addressed political issues as revealed in legislation as well as appeals to essentially ecumenical theological principles and natural law. His audience, including that for the *Advent Sermons*, was much larger than the Catholic community, and so his rhetorical references needed to transcend those boundaries as well. This was the case when, as a bishop, he came into direct conflict with German liberalism. His discourse became much more confrontational as his polemical writings took up issues such as the rights of religious denominations to staff schools, to have religious orders function independently of the government restrictions, and so on.

In short, the Introduction establishes the importance of the question and the relevance of Ketteler's example. Part One establishes Ketteler's competency in the Prussian (and thus liberal) legal system. Part Two then establishes his Catholic

credentials by examining his interesting use of rights in relation to the philosophy of St. Thomas Aquinas. And Part Three examines how he continued to apply and develop this theory in his later life.

The Conclusion, Chapter Nine, summarizes Ketteler's work and strives to show its relevance for contemporary Catholic political thought. Ernest Fortin's critique of the use of rights in modern natural law is used to show that relevance. Fortin had argued that rights language, as inherently liberal, has no place in Catholic Social Thought. Yet the study of subjective rights in the nineteenth century demonstrates that it was not a merely liberal project. Ketteler is one example of a natural law thinker who was quite at home with rights language, including subjective rights language. His use of the natural law bore characteristics of the Romantic jurisprudence of Savigny's historical school, especially in its historical methodology. It also incorporated the insights of traditional Catholic (or classical natural law) with a close and original reading of St. Thomas Aquinas' *Summa Theologica*.⁸⁶ Ketteler's rights language offered the German Catholic Church a 'corduroy road' of protection from the equal threats of secularizing liberalism and absolutism at a time of considerable social and political flux. Fortin's criticism highlights some important pitfalls of contemporary political discourse for Catholic Social Thought, but Ketteler rights discourse is shown to be an authentic and coherent approach, and one historically sensitive to the emergence and importance of modern human rights discourse.

⁸⁶ St. Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province, Benziger Bros., 1947 ed. (1947).

PART ONE:
Rights For Ketteler In The German Vormärz Period, 1830 To 1848

2. The *Vormärz*: Legal, Ideological, Social, And Political Context

2.1. **Three Important Complexities Of Pre-Nineteenth-Century German Legal Landscape: Political Fragmentation, Conflicting Jurisdictions, Competing Ideologies**

Ketteler's early legal career, as will be demonstrated from his *Darstellung*,⁸⁷ was occupied with applying a consistent law despite the following three complexities typical of Prussia's territories:

- (1) a fragmented political organization;
- (2) overlapping and competing legal jurisdictions; and
- (3) opposing philosophies regarding the nature, structure, and practice of law.

Like the enlightened absolutists of Europe, the Prussian monarchy had attempted to address these complexities with, respectively: centralization, rationalization, and legitimization, but the actual work of jurists was necessary to iron out this process for individual cases.

The first complexity was long standing. Since the Middle Ages, the "Holy Roman Empire" was essentially a weak association of various local forms of feudal governments under the titular head of an 'emperor.' "There was in fact no 'Germany' at the end of the eighteenth century, although there was something that sounded as if it might be: the Holy Roman Empire of the German Nation. But this ramshackle, invertebrate entity neither

⁸⁷ *SWB I*, 5:43. Ketteler, *Darstellung* (1836).

was, nor aspired to be, a German nation-state.”⁸⁸ The various local governments maintained *ad hoc* agreements with each other and were broadly divided along religious lines, but they found some common legal ground in the traditions of jurisprudence that idealized certain Roman legal codifications. Still, the ‘empire’ lacked the centralizing power needed to institute wide legal uniformity. This was still the case when seventeenth-century philosopher Samuel Pufendorf called the more than 300 overlapping German territories a “constitutional monstrosity.”⁸⁹ Local powers were much more influential in the actual application and development of the law within their regions, and thus they fostered those systems that legitimized their own authority and interests. The Junkers (Prussian nobles), for example, were granted jurisdiction within their estates (*Gerichtsherrschaft* or *Patronsrecht*) in return for their backing of the princes.⁹⁰ Thus, in distinction to the rise of French absolutism, in which the local aristocracy forfeited their regional jurisdiction to the king, the ‘enlightened’ monarchs in Germany had significantly less leverage against the local dukes and counts. All attempts to reform the legal system, therefore, met with resistance from the nobles, who jealously protected their private interests and did so with a language of ‘rights.’

A parallel resistance to political centralization occurred on the level of legal theory: the centralizing influence of Roman law was countered by the localizing force of the individual legal systems (*Lehnrecht* or feudal law). Legal cooperation on a broad level

⁸⁸ David Blackbourn, *The Long Nineteenth Century: A History of Germany, 1780-1918* (New York: Oxford University Press, 1998), 13.

⁸⁹ Werner Ebke and Matthew W. Finkin, *Introduction to German Law* (The Hague ; Boston: Kluwer Law International, 1996), 2.

⁹⁰ Robert M. Berdahl, *The Politics of the Prussian Nobility: The Development of a Conservative Ideology, 1770-1848* (Princeton, N.J.: Princeton University Press, 1988), 20.

was resisted by the aristocratic estate-owners who had much to lose by forfeiting legal jurisdiction. The *Lehnrecht* often included mixtures of local customs together with vestiges of historical legal classics, and only rarely were they codified into single systematic structures.⁹¹ Cohn stresses that this legal particularism countered the Roman influence of centralization and codification. “*Stadtrecht bricht Landrecht, Landrecht bricht gemeines Recht*”⁹² indicates the relative jurisdiction giving precedence to the local law over the larger state’s law and the state’s law over the even more general law. This is very different from the American system, for example, in which federal law has precedence and disputes are conclusively resolved by a supreme court, a general body with general jurisdiction, and legitimated by the American Constitution, a single document with ultimate authority.⁹³

The Congress of Vienna (1815) significantly reduced the conflicts of jurisdictions with the “German Confederation.” Accepting the Napoleonic secularization and territorial organization, it still left Germany with thirty-eight territories—all but four of them ruled by royal families. A great variety of philosophies regarding the nature, structure, and practice of law were left in these mostly dynastic territories dominated by

⁹¹ Ernst J. Cohn and W. Zdziebło, *Manual of German Law*, 2nd completely revised ed., *Comparative Law Series; No. 14* (London, Dobbs Ferry, N.Y.: British Institute of International and Comparative Law; Oceana Publications, 1968), 19,20.

⁹² *Ibid.*, 21.

⁹³ Even the states’ powers designated in the Tenth Amendment of the Bill of Rights (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”) indicated that the federal document, i.e., the Constitution, is the source of these powers.

Prussia, Austria and Bavaria.⁹⁴ The discussion below focuses upon the variety of legal philosophies existing within the Prussian territories alone.

2.2. Frederickian Enlightened Absolutism: The Prussian Civil Code Preserved A *Herrschaft* Ideology In A Pseudo-Liberal Document

The ideal of the Enlightenment was understanding “the workings of the universe through the exercise of reason,” and “ordering institutions in such a way that society would become imbued with reason and moral sense, creating the conditions for self-fulfillment and the realization of human happiness,”⁹⁵ but humans are a stubborn lot, resistant at times even to Kantian logic. Though Prussia focused its enlightened energies on “law, administration, economics, education, health and welfare,” the project was fundamentally associated with progressive Protestant theology, and especially Pietism.⁹⁶ Like the faithful of many religions, enlightened believers were filled with a commendable hope, but not necessarily a realistic one.

The code word for the process of adopting Enlightenment ideas in the eighteenth and nineteenth centuries was ‘reform.’ Austria’s enlightened despot, Joseph II, was single-minded in attempting reform and only minimally successful in the Habsburg possessions. Prussia was in an even more difficult position, given the variegated development of German law and legal theory up to the nineteenth century.⁹⁷ Reform in the manner of

⁹⁴ Blackbourn, *Long Nineteenth Century*, 92.

⁹⁵ *Ibid.*, 34.

⁹⁶ *Ibid.* This view is moderated by James Sheehan’s *German History*. He stresses that there is a Catholic Enlightenment, often overlooked, which took root in places like Munich. James J. Sheehan, *German History, 1770-1866, Oxford History of Modern Europe* (New York: Oxford University Press, 1989), 185.

⁹⁷ Blackbourn, *Long Nineteenth Century*, 21.

codifications and unifications, however, did begin to take hold at the end of the Enlightenment period. Frederick II (the Great, 1740-1788) of Prussia initiated the project that resulted in the Prussian Civil Code, promulgated after his death in 1794. This constitution was by no means the equal to the French *Code Civil* in scope, liberal theory or jurisdiction, but it did succeed in simplifying and codifying numerous distinct and overlapping legal systems, and it did rationalize much of the arbitrariness of legal procedure within the borders of the Prussian jurisdiction. The 1794 Prussian codification hardly reached the ideal of Kant's universal maxims, as will be shown below, and it applied to only a relatively small area of what Bismarck eventually unified into a single nation after 1870.

As opposed to the radical social agenda launched by the French *Code Civil*, the Prussian system reified the long-standing Prussian social structure, offering amends to the nobility and challenging few of the traditional rights of the aristocratic order. It was, however, successful in translating the power relations of the 'old regime' into more modern language, a language which deserves attention because it preserves the word 'right' while shifting its philosophical underpinning and legitimation. The legal code was part of the enlightened absolutist's larger project which also included the extension and standardization of education and bureaucracy, as well as securing an efficient and effective military force. The various modes of enlightened rationalization, theoretically liberal advances, were meant to centralize power in the hands of the monarch. Even German liberals were not primarily interested in democracy. They saw the advantage of channeling mass movements, but only the radicals held firmly to the principle of

democratic suffrage.⁹⁸ In short, as Krieger's central thesis holds, what passed for liberalism in Germany was consistent with a government that was essentially absolutist.⁹⁹

2.2.1. Ketteler's 'Ständisch' (Hierarchical and Patriarchal) Characteristics Are Distinct From The Prussian *Herrschaft* Ideology

The vestiges of aristocratic thought in Ketteler's writing do not make his work inconsistent or obsolete, though they do raise questions that need to be answered. Specifically, it is crucial to show that there are fundamental differences between his system and the ideology that informed the political language and goals of the Prussian aristocracy, in order to distance Ketteler's social principles from those of the *Herrschaft* ideology that informed late nineteenth-century German absolutism.

The *Herrschaft* Ideology was primarily concerned with the aristocracy's preservation of power, so that the *Ständisch* (hierarchical and patriarchal) structure of society was an essential element.¹⁰⁰ This system does bear superficial similarities to Ketteler's social ideals based on Romantic organic theory—for example, his 1848 *Sermons* defended some aspects of patriarchal social responsibility. However, Ketteler's system is different in its vision of a common good, its respect for the dignity of all persons, and the instrumental (not essential) value he placed on hierarchical social relations. Prussian aristocrats were aware of the significant transitions taking place in social, intellectual, political, juridical, and economic fields. They were conservative by disposition, but still pragmatic enough to realize that it was sometimes necessary to extend rights to avoid social unrest. Such

⁹⁸ Krieger, *German Idea of Freedom*, 335.

⁹⁹ *Ibid.*, 498.

¹⁰⁰ Berdahl, *Politics of the Prussian Nobility*.

figures as Stein and Hardenberg, both aristocrats, viewed these ‘modernizations’ as necessary for the preservation of more essential elements of the *Stände* society. Their use of rights at these times did not signify a social revolution, but was a strategic move to further the single aim of retaining power.¹⁰¹

Ketteler’s own legal theory and rights language were developed within the context of a *Stände* or ‘classed’ society. The region of Westphalia surrounding the city of Munster had been ruled by a relatively stable order of aristocratic families, including Ketteler’s, for hundreds of years.¹⁰² He was predisposed to the hierarchical and patriarchal social principles that informed his organic theory and his natural law system. Like most Catholic and Protestant Romantics, he idealized the undemocratic medieval age as a time when society was in perfect harmony with God and nature, with everyone in a proper place contributing to the whole. It was seen as a period of perfect balance—between, for example, freedom and authority, work and leisure, human endeavors and appreciation of nature. Even Görres, whose egalitarian roots did not fade with his move to Munich and his return to the center of Catholic conservatism, waxed nostalgic over the period.

This is a critical point because as Ketteler witnessed the effective legal dismantlement of *Stände* society, he had to articulate a Catholic social theory relevant to people who suffered from persisting social and economic inequalities and whose concerns were decidedly foreign to medieval ideals. These modern people dealing with developments such as urbanization, industrialization, and secularization were often ill

¹⁰¹ Krieger, *German Idea of Freedom*, 155.

¹⁰² Munster’s main cathedral carries the heraldic crests of these patron families that included the Drostes, the Galens, the Kettelers, and not very many others.

served by ideologies that effectively maintained inequalities, as Karl Marx and others were well aware. The Romantic “cult of monarchy” and its nostalgic historical imagination, for example, were used by monarchs in the German Confederation for their own absolutist ends, to build national loyalties and to legitimize their own power.¹⁰³ Minor nobles also benefited from residual *Stände* relations as the estate, with its common pastures and woodlands, was assumed as their own private property. ‘Emancipated’ estate labor, no longer legally tied to the land, continued to bear the weight of the hierarchical society as low-wage laborers, while the German aristocracy leveraged its privileges for advantages in the emerging capitalist society.

Thus, the hierarchical and patriarchal society that shaped Ketteler’s thought poses a dilemma regarding the centrality of *Ständisch* attitudes in his Catholic social theory. To his credit, Ketteler later voted in favor of the Frankfurt Parliament’s *Grundrechte*—the catalogue of fundamental rights that declared all Germans equal before the law. Even his vote against Lorenz Brentano’s petition to abolish the aristocracy, “The nobility as a legal class is abolished (*Der Adel als Stand ist abgeschafft*),” was cast on the basis that the fundamental right in the *Grundrechte* had already achieved the necessary equality.¹⁰⁴

¹⁰³ Blackbourn, *Long Nineteenth Century*, 97.

¹⁰⁴ Christoph Stoll, “Wilhelm Von Ketteler Im Frankfurter Parlament,” *Archiv fuer Mittelrheinische Kirchengeschichte* 42 (1990): 223-224. Ketteler’s comments, “Wir haben gegen den Antrag ‘Der Adel als Stand ist abgeschafft’ deshalb gestimmt, weil durch die bereits angenommenen beiden Sätze des § 7, lautend: ‘Vor dem Gesetze gilt kein Unterschied der Stände: Alle Ständesvorrechte sind abgeschafft’ schon ausgesprochen ist, daß vor dem Gesetze überhaupt keinerlei besondere Stände ferner bestehen, mithin auch kein Stand des Adels, eine besondere Erwähnung der Aufhebung eines nicht mehr existierenden ‘Adelsstandes’ daher überflüssig.” *SWB I*, 4:79 “Entwurf einer Rede über den Adel zur 1. Lesung der Grundrechte.”

What must be proved is the independence of his natural law principles from the unjust social structures of his time.

2.2.2. Prussian Political Background And ‘Herrschaft Ideology’

The nineteenth-century march towards a modern German nation carried with it the baggage of a paternalistic feudalism that did not take easily to the innovations of the Enlightenment. The new constitutions in German states did not eradicate the ideals and effects of the old social systems, and the excesses of the French Revolution and Napoleon’s empire-building left a legacy of conservative backlash in Germany to match its initial enthusiasm for its ideals of equality, fraternity, and freedom. Yet the return to the patriarchal feudalism of the Middle Ages was not a viable option.

The German states leading up to the nineteenth century had a smorgasbord of legal resources and influences, ranging from the ideals and codes of Roman law and church (Canon) law to the local collections and traditions of feudal law and Germanic law, as well as the more recent but still localized constitutions commissioned by the princes influenced by the Enlightenment. The complexity of legal resources and influences mirrored the convolutions of the German political structures as well as the intricacy of the competing intellectual movements. Wieacker’s study of this historical development rightly acknowledges the relationship between general trends of intellectual development and the playing out of those ideas practically in legal codes and practice. “Legal history is

essentially the history of the way in which ideas have been realized in state and society.”¹⁰⁵

Rights claims continued throughout Germany in the nineteenth century, but they were made according to radically divergent conceptual traditions. This is in contrast to the relatively linear development of the United States’ history that traces its pre-constitution roots through many decades of British colonial rule with a stable system of legal procedure. In the discourse of early nineteenth-century Germany, however, the question was not whether a right could be claimed *per se*, but whether the right was legitimate. For example, feudal rights continued to be claimed by the aristocracy who traced those rights historically to the sixteenth century and conceptually within a traditional *Herrschaft* ideology. The German states under Prussian control were characterized by Europe’s most unyielding nobility, who manipulated their ‘patriarchal’ political, social, and juridical power through their control of the land.¹⁰⁶ In addition to the Prussian nobles on the far right of the spectrum,¹⁰⁷ German liberals advocated a political agenda rooted in Kantian philosophy and the ideals of the Enlightenment. Most princes controlling the many German states steered a middle course of advocating centralizing administrative, legal, and economic policies without attempting to disrupt the social structure.

¹⁰⁵ Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany*, trans. Tony Weir (New York: Oxford University Press, 1995), 6.

¹⁰⁶ Berdahl, *Politics of the Prussian Nobility*, 3,14.

¹⁰⁷ The political spectrum of right to left representing conservative to liberal is another product of this late eighteenth century era and was consciously utilized by those who engaged political questions in Germany of this time.

From the left, advocates for constitutional reform pressed for equal rights based upon Enlightenment ideas. They found their political base from among the middle class and in the universities, but they were in no way comparable to the French in number, organization, or radicalism.¹⁰⁸ The Prussian right was dominated by the Junkers (“*jung-herre, junc-herre*,” i.e. young lords¹⁰⁹) who rooted their political claims in the ideology of *Herrschaft*. Mostly Protestant, their rise to power dated to the time of the Reformation, when they secured local rights, including the right to appoint village pastors (*Patronsrecht*), and when many had acquired estates formerly held by the pre-Reformation church.¹¹⁰ Thus, their power was closely linked to their allegiance to the Protestant faith. In return for supporting the prince and the central bureaucracy in the sixteenth century, they received the total control of the administration of their estates. This control included the local courts under the system called *Gutsherrschaft*. It entailed “the cultivation of the estate land by the noble owner for his own profit, [and] using the labor of serfs over whom he had complete legal jurisdiction.”¹¹¹

The experience among the various states varied greatly, but in general this aristocratic class was able to maintain control over the political reigns well into the nineteenth century, even with the rise of the bureaucracy. While the explicit economic foundations of feudalism had been gradually eroded by the early nineteenth century, feudal social ideals, relations, and worldviews were represented in the *Stände*, the structures of social stratification, and continued to wield influence and resist change in

¹⁰⁸ Blackbourn, *Long Nineteenth Century*, 54.

¹⁰⁹ Berdahl, *Politics of the Prussian Nobility*, 16.

¹¹⁰ *Ibid.*, 17.

¹¹¹ *Ibid.*, 20.

the German states. The *Stände* were the classifications of social standing that determined a person's place in society. The English terms 'class' and 'caste' do not adequately convey the meaning of *Stand*. "*Stand* suggests a kind of stasis, a relatively fixed and durable social order... [Max Weber suggests] that class is based on a cohesion of economic interests, whereas *Stand* is based on social privilege, a distinct style of life, and a certain notion of honor."¹¹²

Robert M. Berdahl's *The Politics of the Prussian Nobility*¹¹³ traces the struggle of the Prussian nobility to retain power through the period of radical social unrest during the end of the eighteenth century, through the time of the French Revolution and the Napoleonic conquests, until the mid-nineteenth-century revolutions. He argues effectively that the nobility was successful in its transition from a largely land-based power base to a more bureaucratic and capitalistic political system. They did this on three related levels: the ideological, the political, and the economic.

The *Stände* were social positions within the ideology of the *Herrschaft* paternalism. *Herrschaft* represented an entire worldview. Its modern translation as 'power' or 'rule' misrepresents its late medieval understanding as 'lordship,' a word much closer to the eighteenth and early nineteenth-century Prussian understanding. Rights were determined according to one's *Stand* or standing in the complexly relational social structure. The predominant model of the ideology was the family, ruled by a father and cared for by the mother. Peasants were seen as children who enjoyed the privilege of parental care and

¹¹² *Ibid.*, 12.

¹¹³ *Ibid.*

protection and who would respond with obedient humility or would face punishment, often corporal punishment.¹¹⁴

As a Herr im Haus, the father's authority, his Herrschaft, was linked with a hierarchy of other authorities, ranging from the noble lord to the prince to the divine source of all legitimate rule. Like other earthly Herren, the father could enforce his will by violence over his children and over other members of his household. In all matters of importance, his word was law.¹¹⁵

The lord of the estate held responsibility for the land, the village, and the people, and in return he could expect control in terms of respect, appointment of pastors and local schoolteachers, and payment from the peasants with money or labor. My words are carefully chosen here regarding the nobles' relation to the land, for it would be greatly misleading to say simply that the nobles owned the land before the legal innovations of the nineteenth century. "Owning land meant having access to one or more of what Henry Sumner Maine called a 'bundle' of property rights, privileges, and obligations."¹¹⁶ As the Romantics in the nineteenth century would later nostalgically contend, the medieval estate was an organic world without the separations of modern life between the public and the private. One's rights were not abstract universal principles, but were held to task by Christian values, specifically determined according to one's relationship in the community, and represented by omnipresent social symbols, from codes of dress and customs of interaction to determination of occupations, marriageable partners, and inheritance rights. Berdahl describes the situation in terms of power relations:

The concept of paternalism legitimized domination by stressing the interdependency, the mutuality of rights and obligations, within the lord-

¹¹⁴ Ibid., 65.

¹¹⁵ Sheehan, *German History, 1770-1866*, 81.

¹¹⁶ Ibid., 93.

peasant relationship. It brought both classes together into a familial relationship, naturalizing the role of the lord as Hausvater [Father of the House].¹¹⁷

This ideological structure was sustained by the church—something reinforced, of course, by the *Patronsrecht* that gave Protestant lords much control over the local pastor if not the outright right of appointment. Krieger notes that

as a final guarantee of aristocratic primacy, a separate order of the clergy within the secular principalities was either nonexistent or, by reason of the system of aristocratic patronage, unimportant. The post-Reformation churches in Germany did increase the administrative power of the prince, but their higher clergy remained a social component of a single aristocratic estate.¹¹⁸

Catholic lords also held significant roles in the appointment and functioning of the church in their domains. Dependent upon a particular agricultural economic structure that ceased to exist in most German states in the nineteenth century, the *Stände* and the ideology of the *Herrschaft* continued to wield ideological weight well into the nineteenth century within concepts of honor, privilege, and social prestige.

2.2.3. From ‘Lord Of The Estate’ To Landlord: Private Property And The Delegitimation Of The ‘*Herrschaft* Ideology’ In Nineteenth-Century Politics

The *Herrschaft* ideology was integrally linked with the legal conception of the land. The estate was under the stewardship of the lord. The rights of all the people associated with the estate were related to their *Stand* or position in the estate, especially in relationship to the lord. This implied, at least ideally, a moral responsibility of the lord to the workers of the land. Politically and legally, within the *Herrschaft*, the peasants were

¹¹⁷ Berdahl, *Politics of the Prussian Nobility*, 66.

¹¹⁸ Krieger, *German Idea of Freedom*, 11.

as bound to the lord as children are to their parents. Especially in these extremely localized economies, all official administrative roles were mediated through the lord, including payment of taxes and the administration of police protection through the appointment of the local *Schultz*.¹¹⁹

The patrimonial courts of the local lord had jurisdiction over the entire estate and everything that happened within it. There were checks in the form of appeal to larger district courts depending upon the strength of the ruling princes, but largely the local lord had great latitude in estate administration, including the administration of corporal punishment that was deemed most appropriate for peasants, with what was seen as their childlike moral development. The townspeople, including the guilds, also lived within the *Herrschaft* worldview. Upon committing themselves to the fully qualified ‘master’ artisan, apprentices entered into his *Haus* and became subject to his authority. The associations of master artisans, the guilds, had some political muscle by virtue of their strong corporate identity and organization as well as their importance to the local economic order. Like the nobility, their authority was dependent upon their relations to the various levels of local rulers and monarchs. Their independence was reduced in Prussia by laws in 1731 and more explicitly by the Prussian Civil Code in 1794, which tried to explicitly delineate the subordinate position of the guilds to the more central authority.¹²⁰ The advance towards industrialization would undermine the economic

¹¹⁹ Berdahl, *Politics of the Prussian Nobility*, 55n40. Berdahl discusses the development of a more centralized jurisdiction through an 1843 intervention of the Ministry of the Interior who rejected the local lord’s appointment of a Jewish *Schulz* on the basis that the police power is reserved to the state.

¹²⁰ Sheehan, *German History, 1770-1866*, 111.

legitimation of the guilds' social status, just as the obsolete estate structure undermined the aristocrats' social claims.

Whereas the guilds were gradually supplanted by the growing bourgeoisie, however, the Prussian nobles maintained political power over the course of the nineteenth century despite their diminished legitimacy. The estate was radically changed by the economic and legal developments that accompanied the transition to capitalism. Nevertheless, the aristocracy used its influence with the monarchy to retain many rights and privileges of the *Herrschaft* ideology even as the original conditions for their status disappeared. The general three-part distinctions in the *Stände* of nobles, peasants, and townspeople were written into the Prussian Civil Code in 1794.¹²¹ The distinctions were diminished by the emancipation of the peasants in 1807,¹²² but they essentially persisted until the revolutions in 1848.¹²³ It is interesting to note that there was criticism of the Prussian Civil Code for referring to the king as the head of state rather than with some paternalistic title. Such representations were seen as crassly functional—cause for perilous cracks in the legitimacy of the *Herrschaft* ideology. Conversely, liberal reformers were justified in their skepticism towards the aristocracy's legal claims to certain rights as merely self-interested leverage against the more deserved well-being of the laborers and their families on the estates.

Economically, the social structure, braced by the legal system, had locked the aristocrats into a local agricultural model that only slowly developed before the more

¹²¹ Berdahl, *Politics of the Prussian Nobility*, 12.

¹²² *Ibid.*, 55.

¹²³ *Ibid.*, 61.

radical reforms of the late eighteenth century. Title to the land was restricted to nobles. Peasants were tied to the land in various enforced legal measures, and the transfer of land was closely controlled in order to preserve the exclusiveness and therefore dignity of the aristocratic *Stand*. Change came in the form of demographic growth with swelling numbers of available workers after 1750,¹²⁴ technological development in the form of more efficient land preparation and growing techniques, and financial opportunities with the rise of international trade and greater investment opportunities.¹²⁵ Frederick the Great preserved the stability of the aristocracy by allowing measured economic reform, such as extending sources of credit, creating incentive for agricultural modernization, and instituting juridical modifications. The creation of a credit corporation, the *Landschaften*, for example, provided investment resources for the nobility. It utilized non-noble capital without sacrificing honor or opening up property to broad speculation. It was a tightly controlled tool of the aristocracy.¹²⁶ Land speculation became possible once the allodial laws were repressed and land could be sold for capital to buyers outside of the family—something that had been previously impossible. The effects upon the *Herrschaft* ideology were far ranging and gradually opened up the prospect of selling estates to non-nobles.

With the constant transfer of estates from one noble to another, the longstanding link between lord and peasant, the entire context for the ideology of paternalism, and with it, the justification for the system of social relations in rural Prussia became difficult to maintain. Paternalist arguments in defense of serfdom became obviously absurd.¹²⁷

¹²⁴ Sheehan, *German History, 1770-1866*, 75.

¹²⁵ Blackbourn, *Long Nineteenth Century*, 29.

¹²⁶ Berdahl, *Politics of the Prussian Nobility*, 79.

¹²⁷ *Ibid.*, 80.

The anomalous situation created by non-noble ownership of estates opened a rift in the *Herrschaft* ideology. “These people based their own claims to power and prestige on different grounds: wealth, political competence, educational accomplishment, moral superiority.”¹²⁸ The topic of property rights will be discussed more thoroughly in Chapter Two with Ketteler’s famous sermons in 1848, but the point to be made here is that the ideological, political, and economic bases of the *Herrschaft* foundation of rights were being undermined at the beginning of the nineteenth century. Despite this social transformation, however, the rights claims of the aristocratic *Stand* continued to be made in such forms as the Prussian Civil Code presented, but there were cracks in the argument. Those cracks were recognized and there were attempts at reinforcement, but the more modern or liberal glue of the Civil Code could not be applied without undermining the entire foundation. The ensuing treatment of the Prussian constitution promoted by Frederick the Great and promulgated by his nephew and successor Frederick William II demonstrates the advances and limitations of this constitution of half measures.

2.2.4. Prussian Civil Code And The Principles Of Enlightened Absolutism

Krieger argues that the Prussian Civil Code incorporated the idea of enlightened absolutism into a single document with three essential principles: 1) People have liberties defined as rights that are protected by a sovereign political authority, but the sovereign is not limited by any force outside itself. 2) With a new concept of the state, monarchical

¹²⁸ Sheehan, *German History, 1770-1866*, 132.

absolutism is reconciled with a new individualism by the state's protection of individual rights, though only according to individuals' social standing. 3) Its political theory is rooted in a theory of the organic society with its natural hierarchy.¹²⁹ Krieger's work, "focused chiefly, albeit not entirely, upon the Prussian version of the German problem,"¹³⁰ presents the tensions that the code would pose to the Rhenish Confederation's Catholics, which included Westphalia. Most importantly, they resented the political liberties surrendered according to the code as well as its inconsistent rights, which were easily manipulated by Prussian leaders. The Westphalians, formerly under French control, had been subject to French law before being transferred to Prussian administration in 1815. The Prussian Civil Code included a long list of rights, but those rights were quite different from the rights of the French Civil Code—rights that were essentially ignored anyway in Westphalia.

The [Prussian Civil Code] can be properly regarded as a political compromise, or social compromise... The result was a functional distribution of positive rights and status within a system where elaborately differentiated rights of groups and individuals were aligned with their elaborately differentiated roles and functions in the whole society and state.¹³¹

2.3. The Civil Code's *Herrschaft* And Liberal Elements Did Not Suppress Catholic Resistance To The Prussian Monarch

Krieger claims that the "enthusiastic participation of a whole aristocratic party in the modernization of the state... cemented the marriage of monarch and aristocracy in Germany."¹³² In the case of Catholic aristocrats, especially in the Rhine provinces,

¹²⁹ Krieger, *German Idea of Freedom*, 70.

¹³⁰ *Ibid.*, x.

¹³¹ Walker, "Rights and Functions: 18th Century German Jurists and Cameralists," 247.

¹³² Krieger, *German Idea of Freedom*, 145.

marriage is too strong a description. They were often in bed together, but their trysts lacked the trust necessary for commitment.

The reaction of many Catholics of the Rhineland, such as Görres, as well as the glaring example of the later Cologne Conflict, demonstrate that Catholics cannot be reduced into a general label of conservatism on the Prussian model. Krieger explains that the primary drive behind the extension of the code into the Rhenish states was the extension and consolidation of Prussian absolute monarchism.¹³³ It is certainly true that Catholic aristocrats like the Ketteler family were willing to enter the bureaucracy without moral qualms or significant anti-Prussian anxiety. This was the case even though their incorporation into the bureaucracy tied them to the Prussian monarchy and significantly divested them of their local autonomy.¹³⁴ It is also true that Prussia enjoyed some popularity after liberating the Rhineland from the French. Conversely, however, some French liberal ideals had taken root,¹³⁵ Prussia was a distant land separated by many miles on poor roads and as yet few railroads,¹³⁶ and the martial nature and ambitious scope of Prussia's national ambitions were unmistakable.

On a fundamental level, the Prussians and their Catholic subjects held diverging social conceptions that reached down into their distinct Protestant and Catholic

¹³³ Ibid., 143.

¹³⁴ Ibid., 144.

¹³⁵ Blackbourn argues that the social effects of the French occupation were most significant: "More fundamentally, social forces were freed by the emancipation of the peasantry, the diminution of guild privileges and other attacks on the corporate order." Blackbourn, *Long Nineteenth Century*, 70.

¹³⁶ Germany's first railroad was built in 1835 and had 240 kilometers of rails built by 1839. Udo Sautter, *Deutsche Geschichte Seit 1815: Daten, Fakten, Dokumente. Band 1, Daten Und Fakten*, vol. 1 (Tübingen: A. Francke Verlag, 2004a), 189.

intellectual traditions and convictions. Wary acceptance appropriately describes Catholics' relationship with their Prussian overlords. Despite their regional antagonisms, suspicions, and confessional differences, they were united by a common sense of "German" identity.¹³⁷ Their social conceptions, however, remained fundamentally distinct. Görres is a good example of a Catholic who at times was swayed by German liberalism and later by German Romanticism, but his identification with both groups was held concurrently with his Catholic identity.

Josef Görres was an early Catholic figure who saw and critiqued the awkward situation that Prussian rule presented to German Catholics, especially to Rhineland Catholics. He protested against both the earlier French code and the later Prussian code, yet his protest against the liberal principles of these constitutions was not a rejection of constitutions and certainly not against the concept of rights. Rather, Görres wanted a constitution that protected individual rights. In this, he was united with other Romantics who saw no opposition between traditional social principles and constitutions. They viewed Great Britain as a model monarchy that was constitutionally limited and protective of subjective rights. In particular, Görres wanted and vigorously fought for a free press that respected the power of public opinion. Yet he wanted to preserve the aristocracy as a political elite as well as the role of the church as a moral foundation for society.¹³⁸ Görres' opposition to Prussia was distinctly for social rights. This is quite different from that of the Prussian nobility and liberal bourgeois who called for reform in mostly economic realms. Krieger does grant some aristocratic opposition, given the

¹³⁷ Vanden Heuvel, *Görres: German Life in Age of Revolution*, 233.

¹³⁸ *Ibid.*, 234.

largely estate-based agricultural economy, but limits their concerns to property and trade.¹³⁹ Middle-class political concerns were also primarily economic, as demonstrated by the Rhenish Petition Movement of 1817-1818. Signed by thousands of essentially middle-class businessmen, the petitions of the movement represented their main concerns in the years of recovery following Napoleon's fall. They called for the protection of mostly economic freedoms in constitutions specific to individual cities, such as Trier, Cologne, Cleves, and Aachen and not for abstract freedoms in social and political realms.¹⁴⁰

Krieger's argument is that on the one hand the German aristocracy was by nature non-revolutionary and by political necessity tied to the monarch. On the other hand, German liberalism suffered from an awe of political authority that came with university professorships, bureaucratic jobs and bourgeois middle-class ambition. Consequently, German society possessed no resources that could challenge the state structures that limited or even injured actual human freedoms.

Liberal deference to state power developed historically on parallel theoretical and political levels. On the theoretical level, following the lights of Pufendorf, Thomasius, and Wolff in the early modern period,¹⁴¹ and later Kant and Hegel, human freedom was practically relegated to the personal, the moral, or the internal sphere. One was free to think, though there were limits to expression in speech and in the press. St. Thomas Aquinas held the law's coercive and moral elements together. For Aquinas, the law

¹³⁹ Krieger, *German Idea of Freedom*, 32.

¹⁴⁰ Vanden Heuvel, *Görres: German Life in Age of Revolution*, 237.

¹⁴¹ Krieger, *German Idea of Freedom*, 51.

certainly contained a coercive element: “I answer that, law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for ‘*lex*’ [law] is derived from ‘*ligare*’ [to bind], because it binds one to act.”¹⁴² However, the law was also necessarily an expression of justice, such that an unjust law was no law. Beginning with Thomasius in the modern period, these two elements of the law were uncoupled, as law and morality were conceived as independent sciences.¹⁴³ Wolff (1679-1754) represented a high point of this German natural law thinking that is sometimes labeled *Vernunftsrecht*¹⁴⁴ and sometimes *Jusnaturalismus*¹⁴⁵ to distinguish it from the classical natural law, *klassisches Naturrecht*, of Aquinas (and the schools that venerate him). On the one hand, Wolff consciously strove for mathematical precision and logical perfection (the *mos geometrica*) in outlining a system of law with clear principles of rights, freedom, and equality. On the other hand, because rights find their expression through the state as positive law, there is no right external to the state. Thus, the state as represented by the king could not be challenged. Therefore, on the political level, the Hobbesian Leviathan of political governance remained unassailable even after the theories of divine justification were replaced by an Enlightenment system of ‘pure reason.’ Subjective

¹⁴² Aquinas, *Summa Theologica*. From the “First Part of the Second Part (I-II),” the “Treatise on Law,” Question 90, “Of the Essence of Law,” art. 1, “Whether law is something pertaining to reason?”

¹⁴³ Fritz Loos and Hans-Ludwig Schreiber, “Recht, Gerechtigkeit,” in *Geschichtliche Grundbegriffe: Historisches Lexikon Zur Politisch-Sozialen Sprache in Deutschland*, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1984), 268.

¹⁴⁴ Susan Gaylord Gale, “A Very German Legal Science: Savigny and the Historical School,” *Stanford Journal of International Law* 18 (1982): 126. Gaylord Gale quotes Wieacker as the authority who suggests this differentiation. It is later distinguished by “classical” and “modern” natural law.

¹⁴⁵ Thanks are due to Norbert Brieskorn for this suggestion.

rights are recognized and valued by these figures, yet their existence is dependent upon the power of the sovereign ruler.¹⁴⁶

Krieger argues that Frederick the Great (1740-1788) was the political figure who successfully undermined what was left of the aristocracy's feudal powers by making the aristocracy entirely dependent upon the monarch in a modern German absolutist state. He thus set the institutional framework for the nineteenth-century German state under Prussian rule.

Frederick fixed a permanent pattern of authoritarian alliance between aristocracy and monarch within the bureaucratic state, but he reformulated the traditional political values of the social hierarchy into the ideal of the freedom inherent in the modern state...

The formal political principles which Frederick developed to guide and to justify his government revealed that the basic framework of his politics was set by the logical extreme of the leveling sovereign state, in which the relationship between ruler and subject was unambiguous, impersonal, rational, and hence eminently controllable. No consideration of tradition, hierarchy, or privilege should impede the comprehension and concentration of political power in a single system which brought all the citizens into an equally direct connection with the head of the state.¹⁴⁷

Krieger argues that Frederick's 'liberalism' was essentially illiberal. It assumed the language of personal freedoms, rights of man, and rational government as developed and legitimized by Pufendorf, Thomasius, and Wolff, but it made the entire system of freedom dependent upon the person of the sovereign. It did this with the premises of liberalism such as the "popular origins of government, the removal of politically privileged intermediaries and the exercise of rulership with due regard to the material

¹⁴⁶ Krieger, *German Idea of Freedom*, 57.

¹⁴⁷ *Ibid.*, 23.

welfare.”¹⁴⁸ Regarding rights, Krieger acknowledges the importance of rights for the Prussian system that made the bridge from feudal relations to modern claims of liberty, but grants that theoretical transition only within the political theories of enlightened despotism or absolute monarchism. In a sense, because the system was dependent upon the king, he and the state that supported him were above the law. The Prussian Civil Code had the trappings of a constitution but was effectively the expression of the monarch’s unrestrained will. Thus, the hierarchal relations of the pre-modern society were preserved within an absolutist system immune from the threat that liberalism had posed and would later pose outside the German-speaking territories.¹⁴⁹

Ketteler’s frustration with the ambiguous rights in Prussia’s law points to a fundamental ambiguity inherent in the Civil Code itself. He learned it and benefited from his experience with it, but he never identified with its foundational principles. Mack Walker’s 1978 article on eighteenth-century German political and legal scholarship describes the historical dissolution and decay of well-defined doctrines of rights and legal theory prior to the “Age of Revolution.”¹⁵⁰ Walker agrees with Krieger and Blackbourn that the Prussian Civil Code was a political compromise that used rights to essentially reify the complex interrelationships of hierarchical groups.¹⁵¹ Yet like Krieger and to some extent also Sheehan and Blackbourn, the discussion of ‘German’ scholarship is limited to Protestant thinkers who occupied academic chairs at the pleasure of Prussian kings—though they sometimes lost those chairs after frustrating those same kings.

¹⁴⁸ Ibid., 24.

¹⁴⁹ Ibid., 26.

¹⁵⁰ Walker, "Rights and Functions: 18th Century German Jurists and Cameralists," 246.

¹⁵¹ Ibid.: 247.

Regardless of why Protestants dominate the discussion of German legal science, Walker, Krieger, Sheehan, and Blackbourn are in agreement that that this largely Protestant legal history leading up to the Prussian Civil Code lacked a unified legal tradition, and that it had no univocal notion of rights as a concept. Likewise, the legal sciences that came after it continued to be primarily concerned with the function of government. The document is exemplary in that its declarations were asserted without philosophical argument and, as Walker points out, the code's treatment of rights was descriptive of the society as it existed—at least in the minds of its authors: Prussian-trained jurists and cameralists.¹⁵²

(part 1, §2) Civil society consists of several lesser societies and estates [*Gesellschaften und Stände*] bound together by nature or law or both together. (§6) Persons who, by virtue of their birth, identity [or vocation: *Bestimmung*], or main occupation are accorded the same rights in civil society, together make up an estate of the state [*Stand des Staates*], and (§§7-9) the rights of persons are determined by which of those estates they belong to.¹⁵³

Walker's discussion of the Prussian Civil Code follows a discussion of two political and administrative schools of thought that emerged in the early part of the eighteenth century: the cameralists interested in administering the state, and the jurists who concerned themselves with the nature and adjudication of law. He juxtaposed two great minds of nineteenth-century German legal theory, Justi and Moser, who each proposed vast and scholarly treatises on rights, although their positions are fundamentally opposed to one another. Justi represented a cameralist position interested in the administrative functions of government. He leaned towards the notion of rights in their positive or written forms and rejected abstract notions of justice (*Gerechtigkeit*). Moser, to the

¹⁵² Ibid.: 248.

¹⁵³ Ibid. Walker quoting and paraphrasing from *Allgemeines Landrecht für Preussische Staaten*. ed. H. Hattenhauer and G. Bernert (Frankfurt am Main, 1970) pp. 51-55.

contrary, represented an older tradition of jurisprudence interested in maintaining a system of rights that keeps the peace by avoiding conflict on personal, social, and national levels.¹⁵⁴ Unlike Justi, who refrained from even using the term *Recht* and understood justice only in terms of the state, Moser's system was universal enough to include a theory of justice and rights that even held the prince to account. This ideological diversity, Walker concludes, stems from the schools' "different goals and from the determination of each to be practical and true to the phenomena: the identification of rights, or of functions, in a society where these two kinds of description depicted quite different societies."¹⁵⁵ His key insight for the present discussion is that though there was a divergence of doctrines, the force and effectiveness of the legal system itself were functions not of the systematizers, but of the social theory that informed them. Therefore, the key for understanding the nature and force of rights is not merely to look at the legal documents, but to understand the "social ideologies of a governing and educating class."¹⁵⁶

2.4. Prussia After The 1794 Civil Code: 'East Of The Rhine' Liberalism & Stein/Hardenburg (1810-1812) Reforms 'From Above' Lacked Commitment And Consistency

Liberalism in early nineteenth-century Germany, 'East of the Rhine,' must be differentiated from a more radical French liberalism to understand both Ketteler's appreciation of certain liberal ideals as well as his fundamental objections to it. East of the Rhine, there were few Germans, liberal or conservative, interested in the kind of

¹⁵⁴ Ibid.: 238.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.: 250.

revolution and bloodshed that characterized the French Revolution. The ‘Terror’ continued to be the reference point of what was to be avoided at all costs for the entire first half of the nineteenth century, including the period of the 1848 revolutions. That said, it is necessary to emphasize that the German hopes for an enlightened political order did not completely fade with the end of Napoleon’s punishing wars and the humiliating defeat of Prussia’s armies (especially on the battlefield of Jena, 1806). The Rhineland had felt the burden of those campaigns and few of the benefits of fraternity, equality, and liberty. The economy had collapsed, leaving many with nostalgia for the days before the Age of Reason.

To meet these challenges in Prussia, despite significant aristocratic resistance, Karl vom Stein and Karl von Hardenberg were installed as the chief architects of the liberal reforms. They served alternating terms as ministers of the Prussian state and were both products of the university at Göttingen. There they became enamored of Adam Smith and British classical economics.¹⁵⁷ Like their British models, Stein and Hardenburg were no revolutionaries, and they sought to preserve aristocratic institutions as social structures even as they attempted to empty them of political power. Sheehan claims that Stein had

a Whiggish sort of aristocratic liberalism, and a belief in the value of corporate institutions. [However] he was a bureaucrat who had worked his way up the administrative hierarchy and who accepted the state’s role as a key instrument for social change and moral progress.¹⁵⁸

They were ‘reformers’ and they used a language which identified them with the great emancipatory movements of the age. The serfs were ‘freed’ and restrictions on

¹⁵⁷ Sheehan, *German History, 1770-1866*, 297.

¹⁵⁸ *Ibid.*

transferring title to landed estates were done away with. Guild privileges were dismissed and occupations were opened up to wider populations. Yet there was little if any political representation. The effect on the poor was often to remove their traditional safeguards without offering realistic opportunities for either land ownership or stable gainful employment. In 1810 Hardenburg centralized the tax system in Prussian states, transferring authority away from towns and guilds to the bureaucracy, and nationalized the church lands of both the Protestant and Catholic Churches. In 1812 he introduced legislation that removed many of the restrictions formerly placed on the Jews and “declared them ‘natives and citizens’ (*Einländer und Staatsbürger*).”¹⁵⁹ Sheehan notes that the specific meaning of the terms for the Jews is left unclear, to be decided upon in a future time. These uncertainties remained unclear until Ketteler was writing about the topic over twenty years later.

In his *Darstellung* Ketteler simply mentions the reforms of 1812 and that Jews were granted full citizenship rights. He does not go into too much detail except to be wary of the characteristic tendency of liberal legal systems to proliferate rights claims. He disparages the legislation which “does not hesitate to tear down the foundations of social conditions,”¹⁶⁰ even if those *Verhältnisse* are the product of centuries of social development. On the one hand, Ketteler critiques the reform legislation for simply drafting legislation that attempts to reform social relations with the stroke of a pen without the hard work of actually doing anything to build or foster social groups. On the

¹⁵⁹ *Ibid.*, 306.

¹⁶⁰ *SWB I*, 1:47. Ketteler, *Darstellung* (1836).

other hand, Ketteler critiques the reformers for withholding the true benefits of the rights that were legislated:

So although it is not suitable for that all civil rights (*bürgerliche Rechte*) be granted the Jews suddenly and all at once, it is also not suitable to allow these restrictions [from teaching posts, for example] to remain standing. It is completely inexplicable and unjust to make an about face and abolish those rights which had been granted.¹⁶¹

The historical reality is that the liberal reforms, though moderate in relation to those of the French Civil Code, were railroaded through in a desperate measure to reform the entire juridical, social, and economic system. Frederick William III's humiliation at the hands of Napoleon motivated him to reform the state by removing the class and guild restrictions and establishing a liberal economy. The old system with all its aristocratic privileges had proven itself a liability; the Junkers preferred to protect their narrow interests above the interests of the larger state, even in the face of a common threat. Thus, following Prussia's disgrace, Frederick William's liberal ministers Stein and Hardenberg went to work reforming the structures of government and society. However, the bureaucratic inertia and aristocratic opposition to reform significantly slowed such attempts.¹⁶² Frederick William was not a strong political leader and he lacked a coherent ideological vision. Therefore, even as he supported the reforms of his ministers, he was subject to the pressure of old-line advisers under the sway of the Romantic backlash to liberal reforms.

Peasant emancipation, freedom of land ownership, and the growth of rural industry would destroy the organic harmony and welfare of the countryside,

¹⁶¹ *SWB I*, 1:48. Ketteler, *Darstellung* (1836).

¹⁶² Eric Dorn Brose, *The Politics of Technological Change in Prussia: Out of the Shadow of Antiquity, 1809-1848* (Princeton, N.J.: Princeton University Press, 1993), 30-32.

leaving only a cash nexus to govern relations between men. What was worse, materialistic bourgeois values and the lust for profit would emasculate the nation and loosen traditions of loyalty and sacrifice. An ignominious ‘Jew-State’ would replace the heroic Prussia which they knew.¹⁶³

The privileges and prejudices of Germany’s aristocracy would die hard. Bismarck himself was a product and early defender of the landed nobility¹⁶⁴—rising to power on the support among his peers in the Junker class, though he was largely responsible for extinguishing the political legitimacy of the aristocracy with social and political reforms as he founded the Second German Empire. Ironically, the same stroke that effectively ended the feudal aristocracy earned him his title as prince.¹⁶⁵ Still, it was not until the First World War that the explicit claims to aristocratic power lost force—when, for example, the Wittelsbachs formally relinquished the royal throne in Munich that had given them authority over much of Bavaria for over 800 years.

2.5. Nineteenth-Century Jurisprudence Conflict: Rationalist *Begriffsjurisprudenz* vs Romantic *Geschichtsjurisprudenz*

2.5.1. Liberalism And ‘Concept’ Jurisprudence—*Begriffsjurisprudenz*: Codified Natural Law (*Vernunftsrecht*) And The *Konstitutionelle Verfassung*

Vernunftsrecht was an Enlightenment natural law movement that scorned the great unwieldy mass of legislative traditions, procedures, and overlapping jurisdictions, and attempted to erect a wholly rational system using universal principles and rigorous rules

¹⁶³ Ibid., 33.

¹⁶⁴ Erich Eyck, *Bismarck and the German Empire*, Norton Library (New York,: Norton, 1968), 19.

¹⁶⁵ Officially, many aristocratic privileges continued until the end of First World War, but the founding of the Reich in 1871 greatly reduced their autonomy and independence. Even the Bavarian Wittelsbachs were subject to the German civil codes as well as financially dependent upon Bismarck’s largess. (See Fritz Stern)

of reason. This natural law school of legal philosophy (also labeled *Jusnaturalismus*) should not be confused with the Catholic natural law *klassisches Naturrecht* or European neoscholasticism in the later part of the nineteenth century. *Vernunftsrecht* was essentially a school of thought that included Grotius, Pufendorf, Thomasius, and Christian Wolff. Though it was influenced by Spanish scholastics such as Suarez, it also influenced Protestant theology and philosophy, and it was a product of the religious civil wars of the seventeenth century.¹⁶⁶ Grotius, for example, advised Sweden during the resolution of the “Thirty Years War” that was resolved by the Peace of Westphalia (1648). *Vernunftsrecht* later championed the ideals espoused by Wolff, one of the most influential forerunners of the German ‘concept’ constitutional codes of the early nineteenth century. His intention was to form a constitution that “embodied natural morality in positive legislation.”¹⁶⁷ The goal was to construct a perfectly logical and closed system with universal principles and axioms: the *konstitutionelle Verfassung*—literally translated as the constitutional constitution. The role of the judge in this system was simply to apply the rules according to the norms prescribed. Ideally, no human action could fall outside the purview of the codified legislation. As opposed to the British common law system and the previous German legal traditions, the judge is simply an administrator whose judgments bear no weight upon future law except to the extent that they shed light upon the universal principles and procedures themselves. The judge in this

¹⁶⁶ Alexander Hollerbach, "Das Christliche Naturrecht Im Zusammenhang Des Allgemeinen Naturrechtsdenkens," in *Katholizismus Und Jurisprudenz: Beitrage Zur Katholizismusforschung Und Zur Neueren Wissenschaftsgeschichte*, ed. Alexander Hollerbach (Paderborn: Schöningh, 2004b), 243.

¹⁶⁷ Wieacker, *History of Private Law in Europe*, 254.

system is a bureaucrat in the sense that the office as prescribed requires less creative insight than familiarity with guidelines and procedures.

This is the system of law and rights that Ketteler explicitly rejected. The ‘bureaucrat’ summed up all that was wrong with the modern world for Ketteler and his circle. Görres’ 1842 book *Kirche und Staat* held the bureaucrats, the *Beamtenstaat*, accountable for the Cologne Conflict because they were unable to understand either the complexity of the situation or the danger of applying simplistic legislation.¹⁶⁸ The bureaucrats thus trampled upon the real lives of people living in a complex society. Görres’ book expressed the feelings of a generation of Catholics dissatisfied with the direction of the Prussian government and alarmed at the marginalization of church leaders. The book was a huge favorite of Ketteler, who was so enraged by the Cologne bishop’s detention that he abandoned his legal career.

And yet, the legislative reforms of the early-nineteenth century were intended to correct the inefficiencies, the ambiguities, and the overlapping jurisdictions of the traditional feudal system of law, which was a far from ideal state of affairs on many

¹⁶⁸ Marcus Bauer, *Der Athanasius Von Joseph Görres: Ein Politisch-Kirchliches Dokument Im Spannungsfeld Zwischen Politik Und Theologie*, vol. Reihe III Geschichte und ihre Hilfswissenschaften, *Europäische Hochschulschriften* (Frankfurt am Main: Peter Lang GmbH, 2002), 222. Ketteler wrote to his sister Sophie: “Recht neugierig bin ich darauf, ob wohl die neue Broschüre von GÖRRES [*Kirche und Staat*] bei Euch verboten werden wird. Ich zweifle nicht, daß sie Euch gut gefallen wird. Namentlich ist es wohlthuend, das Gefühl der Verachtung so großartig ausgesprochen zu sehen, der Verachtung über das pöbelhafte Benehmen so vieler protestantischer Scribenten in den letzten Jahren. Ueberhaupt enthält das Buch so viel Wahrheit, wie man kaum mehr zu lesen gewohnt ist. Wenn man es verbietet, so ist die nackte, reine Wahrheit unmittelbar selbst mitverboten. Wenn doch unser König einmal ein solches Buch ganz durchlesen wollte! Es gibt eine Art zu sprechen, die nur der Wahrheit eigen ist und die auf jeden irgend einen guten Eindruck machen muß, der noch der Wahrheit zugänglich ist.” *SWB I*, 4:197-8. Ketteler letter (#55) to his sister Sophie v. Merveldt, July 30, 1842. See also: Klaus Müller, “Die Staatsphilosophischen Grundlagen Der Politik Kettelers” (University of Munich, 1963), 25.

levels. These constitutional reforms were instituted by men who were proponents of the Enlightenment and who looked to the codes of Roman law as their model, both as it was practiced in the Roman Empire and as it was adopted by various European states. This legal theory broadly labeled ‘Roman law’ lay in the background of all European political and legal development and remained important for all the eighteenth and nineteenth-century natural law theorists.

[Roman law] formed nations and legal systems and allowed them to become aware of their own identity. It provided the basis for the rational character of the systems and the legalism of the western nations. Further, even the very principle of settling social and economic conflicts not only by force, authority or compromise, but also by the application of general conceptual rules—which is the characteristic feature of western legal thought—became possible on the basis, and perhaps only on the basis of Roman law, or what was thought to be Roman law.¹⁶⁹

Wieacker’s last qualification is important because his broad attribution of Roman law’s influence is something analogous to describing the influence of any great tradition of intellectual development. The passing down of the tradition is fraught with complexity, ambiguity, and contradictions. Even so, there are dominant themes, recognizable patterns, and persisting principles that are associated with European history from the time of the Romans through to the time of the Enlightenment and beyond.

The continental systems of law find their roots in that ‘principled’ and codified tradition, while the Anglo-American ‘precedent’ tradition finds its intellectual roots more in the legal model that idealized the Roman republic. This is the first important

¹⁶⁹ Wieacker, *History of Private Law in Europe*, 257.

differentiation in the European reception of Roman law.¹⁷⁰ Wieacker describes the judicial systems on the continent as characterized by a form of “decision-making not on the basis of precedents but by way of subsuming a case under the terms of an abstractly formulated authoritative text or statute.”¹⁷¹ He further describes the historical process of this reception of Roman law with an eye towards the implications of this history for nineteenth-century legal theory.

Following the collapse of the Roman political structures, Roman law was received in the German states in generally two ways, which roughly mirror the *Begriffs/Geschichte* split between Thibaut (a nineteenth-century German codifier) and Savigny.¹⁷² First, in those states that had long-standing relations with Rome, especially the Franks along the Rhine, the reception of Roman law as applicable to business transactions was a natural and essentially smooth historical transition. This reception did not, however, carry over to other aspects of relational life where the dominant movement was towards a more general acceptance of German law. This law of the German peoples, in contrast to the written Roman codes, embodied their “way of life.”¹⁷³ The resulting legal understanding held the two traditions together without contradiction or conflict. Second, in those states and peoples where the Roman traditions were not generally adopted, Roman law was received primarily through the influence of the missionaries and clerics. This late reception was therefore limited and the German legal traditions persisted with an even

¹⁷⁰ Franz Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought," *Boston College Law Review* IV, no. 2 (1981): 258.

¹⁷¹ *Ibid.*

¹⁷² Wieacker, *History of Private Law in Europe*, 20-21.

¹⁷³ *Ibid.*, 21.

stronger continuity. The historical school looked back to this early period of German legal history as a time when the customs of the Volk were pure. That said, this Romantic idealization of the early German legal traditions was post-Kantian, critical, and appreciative of much historical development—especially in the sciences. There was, for example, no appeal to resurrect the ordeal as an ordinary means of jurisprudence.

The *Begriff* methodology of ‘Roman law’ looked neither to precedents (common law), nor to the historical principles developed organically in local communities (Germanic law), but rather it took the text of the law itself as revelatory of the fundamental legal principles. The *Konstitutionelle Verfassung* constitutions were written with the goal of providing a ‘complete system’ that could account for all human possibilities, such that the law would be applied by university-trained jurors in a uniform and predictable way. In Prussia, the motivation for reforming the law was present as early as Frederick William I in the early eighteenth century.

Frederick the Great, influenced by the Enlightenment, asked for a code to be drafted that was “to be rational and comprehensible as to the form, and as to the substance it was to be based on natural reason and the constitutions of the component territorial units.”¹⁷⁴ The work begun under Frederick’s auspices began from the principles and documents of the European Roman law. After a massive undertaking of historical and legal scholarship, Frederick received a draft copy near the end of his reign in 1784 and declared that it was too big.¹⁷⁵ The aesthetic principle was that the law, like all things reasonable and beautiful, should be simple, elegant. A further revised document was published in 1787 to

¹⁷⁴ *Ibid.*, 261.

¹⁷⁵ *Ibid.*, 262.

elicit comments and criticism, and a final version was promulgated in 1794.¹⁷⁶ Wieacker has great praise for the structure and theoretical soundness of the Prussian Civil Code, yet he recognizes that while it reflected the social situation within which it was written, that social situation was rapidly changing with the events of the French Revolution and its aftermath. It was also overreaching in its attempt to account for all human potentialities, giving little flexibility to judges.

Its faith in reason was uncritical; it was reluctant to let citizens take responsibility for their own lives. The lawmaker's belief that it is possible to find an absolutely correct legal solution (in a given historical situation) made him presumptuous enough to try to provide immutable prescriptions for all possible contingencies.¹⁷⁷

Ketteler's prioritizing the 'historical' over the 'conceptual,' does not mean that he rejected the academic search for conceptual principles. Rather, it means that he identified with the principles of the historical school of law (*Historische Rechtsschule*) over and against the school of legal philosophy that was most associated with the Enlightenment. This 'conceptual' school of law approached the legal field in a way analogous to positivist scientists in the physical sciences, i.e., non-historically and abstractly. Reimann illustrates this liberal jurisprudence by quoting Feuerbach, the liberal author of Bavaria's 1812 constitution. Feuerbach claimed that three steps were needed for constructing a constitution. "The first is correctness, exact certitude, acute precision, lucid clarity of the legal concepts, the second the internal coherence of the legal rules, the third the

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., 265.

systematic coherence of the legal dogmas.”¹⁷⁸ This was essentially Wolff’s idea of mathematical precision, the *mos geometrica*.¹⁷⁹

My argument is that the difference in legal theories rested upon the larger ideological questions of the day. Feuerbach, and like him, Thibault, were skillful post-Kantian theorists who did recognize the importance of legal history. They also understood the pitfalls of simplistic arguments from nature. However, their focus and goal was the structuring of a ‘complete legal framework’ in the form of a constitution. This constitution could then be applied by jurists based on true and valid abstract concepts—hence the name ‘concept’ jurisprudence (*Begriffsjurisprudenz*). The jurist in this system need only be an efficient administrator, recognizing applications of universal codes to human exigencies. In a sense, they were hoping to do for law what Newton did for physics.

With specific regard to rights, this liberal school emphasized the post-French Revolution transition to a “functionalism of rights” whereby a right was less associated with the social ordering, and used far more as an instrument protecting natural freedoms.¹⁸⁰ This development was accompanied by the retreat from liberal discourse of the concepts “objective right” and justice in favor of such phrases as liberty, equality, and such.¹⁸¹

¹⁷⁸ Reimann, "Nineteenth Century German Legal Science," 849.

¹⁷⁹ Dietrich, *Catholic Theology in the Age of Idealism*, 45.

¹⁸⁰ Loos and Schreiber, "Recht, Gerechtigkeit," 289.

¹⁸¹ *Ibid.*

2.5.2. Savigny's Evolutionary Paradigm: Rejects Legal Codification Of *Vernunftsrecht* Theorists

In contrast to the abstract natural law principles of *Begriffsjurisprudenz*, the Romantics of the historical school found its insight in human experience as revealed in the juridical texts of the ancients to the moderns, including assembled canons, theoretical books, legal commentaries, individual juridical decisions, and the remnant customary laws of pre-Roman European peoples. As opposed to social contract 'state of nature' fictions, they began with the belief that political relations were like language in that they were co-original with human society. Over time, social traditions formed into explicit customary codes that were forged into legal principles through an ongoing dialectic of rule making, social discord, and conflict resolution that reflected the natural development of every people.

For Savigny, law as custom was the result of 'internal silently operating powers' working within the people. Like language, it reflected a people's indigenous character. It was therefore an expression of ... the 'Volksgeist,' the spirit of the people... 'Volk' in this context was neither a social nor an empirical, but instead a cultural concept. And 'Geist' was not, like Hegel's 'Weltgeist,' a highly abstract intellectual entity, but the concrete, generally shared cultural characteristics of a people... The law was part of this character.¹⁸²

Far from idealizing early peoples, the historical school placed value upon the law as a means through which the power relations of every society are controlled and ordered according to the society's highest principles. "Legal institutions, or institutes... articulated the formal element in ... concrete relations and protected the exercise of the

¹⁸² Reimann, "Nineteenth Century German Legal Science," 853.

individual human subject's essential freedom in these relations."¹⁸³ Religion played a crucial role here because of its role in informing social principles, and Christianity was given a special significance in Europe's closely linked moral and legal/political development. The legal system of the ancient Roman Republic and Empire, viewed as a single historical arc, was respected above all because it was a triumph of social ordering that allowed for human flourishing. The Roman law was 'true' in that its acceptance by peoples directed their specific cultures to greater flourishing. The system was unabashedly Eurocentric and Christian, even as it shared the Romantic curiosity and respect for non-European cultures and religions. There was a clear teleological dimension to the law: "That general aim of all law is simply referable to the moral destination of human nature, as it exhibits itself in the Christian view of life."¹⁸⁴ *Geschichtsjurisprudenz* thus had the stated purpose of using the study of law to order society according to its best lights, and thereby furthering the moral development in Germany in its Christian way of life.

There is significant consensus about Friedrich Karl von Savigny's important contribution to legal theory in Germany as well as generally to Western legal scholarship. He was the major figure and inspiration behind the historical school of jurisprudence, *Geschichtsjurisprudenz*, which contested the legitimacy of Enlightenment codes of law

¹⁸³ Toews, *Becoming Historical*, 285.

¹⁸⁴ Friedrich Karl von Savigny, *System of the Modern Roman Law*, trans. William Holloway (Westport, CT: Hyperion Press (reprint edition), 1867; reprint, 1979 reprint), 43.

and fought to mitigate their influence. Constitutions were potentially valuable, but only if they emerged as authentic summations of pre-existing legal principles and relations.¹⁸⁵

In this essentially Romantic organic theory, the state is similar to the law in that it “arises spontaneously and naturally, in a people, through the people, and for the people,”¹⁸⁶ and thus represents the collective will of the people. The positive law is the expression of the people’s united will, has external and objective reality as demonstrated by its historical use, and is continuously protected and refined by the operations of the legislator.¹⁸⁷ Against the liberal theories that hypothesize a state of nature preceding a civilized era, Savigny argued that civilization is itself a natural phenomenon. The law stands to human nature as the rules of grammar stand to the human potential for speech. Human life benefits from the law, but is not determined by the law, just as grammar helps shape speech without in any way being confused with the great achievements of language like literature or song.¹⁸⁸

The jurists and legislators overreach when, instead of articulating the law as it emerges and develops in a people, they impose legal relationships and realities that are foreign.

If a dogmatic exposition of the law is constituted as to destroy the internal

¹⁸⁵ *Geschichtsjurisprudenz* suffered under the leadership of second- and third-generation scholars who moved the school in a decidedly positivist direction under *Pandektsjurisprudenz*. This later development was damaging to Savigny’s legacy, but does not diminish the coherence or importance of his actual scholarship.

¹⁸⁶ Savigny, *System of the Modern Roman Law* (Holloway 1867 Translation of 1840 Ed.), 23.

¹⁸⁷ Danger flags might arise here regarding the political implications of this system, but for good or ill, Savigny limited his scholarship to private law and left the sticky questions of political legitimacy to what he considered the political sciences. Reimann, "Nineteenth Century German Legal Science," 857.

¹⁸⁸ Savigny, *System of the Modern Roman Law* (Holloway 1867 Translation of 1840 Ed.), 15.

unity of the institutions of law, to bind up together the essentially diverse, to disfigure and reverse the real relation of different institutions to one another in point of importance, then such errors of form are essential since they obscure the matter itself and are hindrances to the true insight.¹⁸⁹

Together with the many adherents to his line of thinking, Savigny was successful in slowing down the adoption of universal or 'concept' constitutions in the style of the French Civil Code. Abstract and artificial codifications, according to the historical school, are destructive of the culture because they are imposed from the outside and find no 'fit.' They therefore run roughshod over long-practiced customs and practices that had previously defined human society. Roman law was important to Savigny because of the historical importance of its reception over hundreds of years of European culture. The liberal jurists acted with hubris when they conceived a replacement of that tradition by constructing a wholly new system. Yet Savigny himself recognized that most juristic relations persisted in the midst of social and political upheavals, including the introduction of new, supposedly enlightened constitutions, and thus there was room for tolerating and working with the new systems. In fact, once constitutions have been received by a nation, this was preferable to all other options.

Ketteler had studied law first in Göttingen, where the famous jurist Karl Friedrich Eichhorn had taught and Gustav Hugo, then advanced in years, was still teaching.¹⁹⁰ Though Savigny was considered the brightest light of the historical school, Hugo was actually its founder and it is very likely that the historical school would have been taught there. In any case, the principles of the historical school provide a helpful interpretive

¹⁸⁹ Ibid., 331.

¹⁹⁰ Margaret Lavinia Anderson, *Windthorst: A Political Biography* (New York: Oxford University Press, 1981), 18.

framework for Ketteler's analysis of Prussian legislation, though they do not represent his own complete position. The 'Evolutionistic Paradigm' as outlined by van den Bergh condenses the basic principles of the historical school and suffices to differentiate it from the codes of *Begriffsjurisprudenz*:

- (1) The law has evolved from implicit and loose rules to explicit and fixed rules; customary law preceded codes, unwritten law preceded written law.
- (2) The law derives from folk custom and is not invented by legislators; early folk custom is an unspecified whole of law, religion, morals etc.
- (3) Law is not an autonomous system, but a function of society, even when jurists develop it into a special skill.
- (4) The study of law is a means to understand society and the study of society is indispensable to understand law.¹⁹¹

The principles of this paradigm and the parallels between Savigny's principles and Ketteler's will be shown below in the specific discussions of his works. For the present argument, Ketteler's direct attribution of his former teacher is not essential. What is most important is that he used the historical school's methodology, for which Savigny was the most important representative and most authoritative theorist.

Catholics of the *Geschichtsjurisprudenz* school were theoretically disposed to the four principles of the evolutionistic paradigm outlined above, and were generally sympathetic to Savigny, who had high praise for the influence of the church and canon law in European legal and cultural history. Like Schelling, Savigny was an unambiguously Protestant and Prussian scholar who was well regarded and trusted by

¹⁹¹ Reimann, "Nineteenth Century German Legal Science," 853-856, G.C.J.J. van den Bergh, "The Concept of Folk Law in Historical Context: A Brief Outline," in *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, ed. Alison Dundes Renteln and Alan Dundes (New York: Garland Science, 1994), 42.

Catholics. This trust was possible because of his philosophical identification with the Romantics as well the fact that his wife was a member of the famous Catholic Brentano family. Also like Schelling, however, Savigny's actual religious beliefs did not fit within any established denomination.¹⁹² Representing the work of his entire career, the first volumes of his *The System of the Modern Roman Law* were published in 1840 in the midst of much Protestant/Catholic rankle. Thus, his location of the church vis-à-vis the state was diplomatically generous in its reverence for the churches and in granting them a kind of legal independence without imposing any burdens or limitations upon the Prussian state. Savigny rejects the subordination of the church to the state as practiced in Roman law, for example, because of Christianity's "world embracing nature." Though he does not cross the line into advocating secular jurisdiction for the churches, he suggests that they be regarded as "existing beside the state, though in manifold and intimate contact with it."¹⁹³ This lack of subordination to public and private law differentiates the church from other corporations, praises its social role, but also potentially relegates its power to a moral and cultural sphere. While not ideal from the perspective of a secularized Catholic church that could still remember its former power, it was a good deal more satisfactory than the liberal solutions of marginalization to the private sphere.

It is important to note that this focus on history does not descend into a historicist relativism as the legal scientists (*Rechtswissenschaftler*) look more to the organic development of the legal theory (i.e., of the jurists) than to the more muddled reality of

¹⁹² Toews, *Becoming Historical*, 302. Toews writes: "Although Savigny insisted that he was a 'supernaturalist' who believed in God's personal transcendent reality, he remained a theological liberal impatient of dogmatic argument and confessional division."

¹⁹³ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 22.

how the law is obeyed by a people. They viewed history in order to understand the organic and progressive emergence of tried and true principles. They assume a progressive movement towards greater clarity and legal coherence with the unfolding of history—possibly a holdover from the Enlightenment faith in ‘progress,’ but more likely a kind of faith shared by the great systematizers of the nineteenth century such as Hegel, Schelling, Savigny, and Ranke, to name a few.¹⁹⁴ Finally, as history is the matter of legal research, reason is also brought to bear in analyzing and systematizing the principles that are discerned in history.

Some caution is necessary regarding the purity of distinctions among German schools of legal science. In the tangled knots of German legal and political history, Kant’s influence was pervasive—including in Catholic circles. Kant toppled Wolff’s ‘Law of Reason’ jurisprudence and insisted upon the methodological separation of ethics and law that had become confused in Wolff’s ‘mathematical model’ of legal natural law. “This critique thoroughly discredited the natural law school in the eyes of the generation of legal thinkers after Kant.”¹⁹⁵ Kant’s influence is seen, first, in the open appeal to reason in universalizing the diverse codes and principles (i.e., the relevance of the categorical imperative). Second, Kant influenced the shift of law to an independent realm—free from the sway of religious belief and the arbitrary whims of political rulers. Thirdly, most legal scholars accepted Kant’s notion of individual freedom, “that the dignity and essential worth of human beings was grounded in subjective freedom, in the right to obey only those laws that could be recognized as expressions of one’s own

¹⁹⁴ Sheehan, *German History, 1770-1866*. Savigny (549); Hegel, Schelling, Ranke (552).

¹⁹⁵ Reimann, "Nineteenth Century German Legal Science," 845.

essential will.”¹⁹⁶ Savigny freely recognized the importance of Kant for his own work. Caution is also merited in the distinction between ‘concept’ and ‘historical’ jurisprudence. In the actual practice of law in German states, the two schools of jurisprudence functioned as essentially ideal types with jurists adopting elements of each school. Finally, the schools that followed Savigny branched in directions that conflicted with Ketteler’s thought, especially as positivism took hold of the historical school in the later part of the century.¹⁹⁷ Savigny himself had been marginalized as a political figure during the late 1830s by his Hegelian critics and his legacy dissipated in the hands of his students, especially Stahl. Savigny’s own 1842 appointment as Minister of Justice for Legislation and Legal Revision by his former tutor, Frederick William IV, moreover, was seen as a particularly unsuccessful application of his legal principles.¹⁹⁸ While these later developments cannot be comprehensively treated in this present work, Savigny’s legal writing continues to be an important articulation of those principles which informed Ketteler’s legal ‘imagination.’

2.6. Distinct From The Prussian Social ‘*Herrschaft*’ Ideology, Ketteler’s Rights Language Was Embedded In A Teleological Social Theory Ordered To The Common Good

Differentiating Ketteler’s understanding of rights from certain modern liberal philosophical principles is an essential goal of this work, but it is equally essential to differentiate his thinking from the Prussian social thought that informed Germany’s emerging absolutism. The primary aim of this ‘*Herrschaft* ideology’ that informed

¹⁹⁶ Toews, *Becoming Historical*, 294.

¹⁹⁷ Reimann, "Nineteenth Century German Legal Science," 858.

¹⁹⁸ Toews, *Becoming Historical*, 282.

Bismarck's political aims was the maintenance of power for the Prussian aristocracy under an absolutist monarch—the benefits of this political order for the rest of society were seen as subordinate and consequent goods. Because Ketteler's thought bore some resemblances to the pre-modern social imagination of the *Herrschaft* ideology, it is critical to show that, in fundamental ways, he differed from that system in his essential beliefs, values and aims. Ketteler was profoundly influenced by his German and Prussian world, and most importantly by the historical school of jurisprudence. It was, in many ways, aristocratic, monarchical, hierarchical, and skeptical of democracy and capitalism—and the list could continue. Yet, his use of rights, and his political principles in general, were ordered to the Thomistic principle of the 'common good,' a key element of what would later be known as Catholic Social Thought. This teleological system recognized the merits of different forms of governments insofar as they were able to achieve the 'social goods' necessary for human flourishing, like peace, security, religious practice, and food, to name a few. Thus, the priority of the common good fundamentally differentiated Ketteler from the principles of the *Herrschaft* ideology, which prioritized the rights and privileges of a single group within society.

Charles Taylor's term 'social imaginary' is helpful in filling out all that is contained in the principle of the common good. A social imaginary describes the "ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations."¹⁹⁹ More than an

¹⁹⁹ Taylor, *Modern Social Imaginaries*, 23.

intellectual scheme, the social imaginary contains the background understanding that informs a group's sense of what is right, what constitutes 'a foul,' and what is appropriate for human social life. Taylor's thesis is that some aspects of a modern social imagination have become ubiquitous, and even attempts at 'reaction' are forced to adapt to modern expectations and forms. For example, 'reactionary' movements in the nineteenth century established quite modern authoritarian regimes.²⁰⁰ This was what happened in a Prussian context informed by the *Herrschaft* ideology. Ketteler's social imagination, however, was rooted in different sources that made it adaptable to some aspects of modernity, as well as a critique of other aspects.

Ketteler's social imagination, though open to modernity in many ways already noted, fits within Taylor's description of a pre-modern "hierarchical complementarity."²⁰¹ It idealized medieval Christendom, understood human society in some relation to divine society, and considered the political form as co-original with society, such that the law actually constitutes a people, rather than being a subsequent creation. Hierarchical differentiation was seen as part of the 'order of things,' and the 'society as organism' served as a dominant metaphor.²⁰² This all fit with Ketteler's Romanticism, historical predilections, legal mindset, and his principles, which would later be associated with subsidiarity. After his university training, Ketteler's allegiance to a historical legal sensibility was reinforced by his priestly preparation, which was dominated by the study

²⁰⁰ Ibid., 179.

²⁰¹ Ibid., 11.

²⁰² Ibid.

of Munich and Tübingen theologians.²⁰³ In both cities, the Romantic influences reinforced a deep appreciation for history and tradition in the study of theology. Romanticism was more than an academic approach; it was a worldview that viewed liberalism and bureaucracy as enemies of history and tradition. A letter written by Ketteler as a seminarian in 1842 illustrates the peculiar nature of his Romanticism and his social imagination in general.

For many years here, all of the noble courts have been abandoned and transferred to Tyrol's furthest valleys. This has drawn the bureaucrats to take their place—they are the same the world over. But, thank God, the Tyrolians remain aloof from all this. They stand fast with their religion and are well able to develop as a people/nation, because they have been less corrupted.²⁰⁴

Written while hiking in the Tyrolean Alps, this letter associated the virtues of the Tyrolers with that of the original German people over against the encroaching bureaucratic tyranny, the *Beamtenwelt*.²⁰⁵ He made this association and identified with the Tyrolean people even though there was relatively little in common between the marshy plains of Ketteler's Westphalian home and the small mountain villages of the Tyrol. This animosity towards 'civilization' was standard anti-Enlightenment fare, as illustrated in the Romantic landscape painters' dramatic mountain-scapes with the stout little towns tucked in green valleys. Yet the animosity provides an important insight into

²⁰³ Kaplan's "Chapter Three" details the founding and composition of the Catholic faculty in Tübingen. Grant Kaplan, "Answering the Enlightenment: Friedrich Schelling, Johannes Kuhn and the Recovery of Historical Revelation" (Doctoral Dissertation, Boston College, 2003), 155.

²⁰⁴ *SWB II*, 1:203. Ketteler's letter #56 to his sister Sophie v. Merveldt, September 9, 1842. "Seit Jahren sind hier alle adeligen Patrimonialgerichte aufgehoben und statt ihrer landesherrliche bis zu den entferntesten Thälern Tirols eingeführt worden. Mit diesen sind viele Beamte eingezogen, die eben dasselbe wie an allen ändern Orten der Welt sind. Aber Gott Dank stehen sie dem Leben des Tiroler Volkes so fern wie überall, und da neben ihnen die Religion ihre volle Kraft entwickeln kann, so sind sie für das Volk weniger verderbenbringend."

²⁰⁵ *SWB II*, 1:203. Ketteler's letter #56 to his sister Sophie v. Merveldt, September 9, 1842.

his social imagination as Ketteler viewed this encroaching of bureaucrats in specifically legal terms. The conflict was between natural culture and artificial civilization. On the one side, there was the law inherent in the culture, permeated with religious beliefs, and under the jurisdiction and care of the ‘patron’ or local lord with limited authority. On the other side, there was the colonizing influence of rationalizing paper-pushers forcing the Tyrolers out of their natural valleys. Faceless bureaucrats represented the interests of an external power oblivious to, and destructive of, the local organic social body.

What differentiates Ketteler and his colleagues in the Catholic political movement is that even as they worked and lived within the Prussian dominion, their social imagination was different from that of the vastly Protestant-dominated tradition that informed Prussia’s political and legal traditions. Alexander Hollerbach makes note of the relative absence of Catholics in Germany’s early modern period of legal and political thought—the time when *Vernunftsrecht* held sway.²⁰⁶ Catholics did appreciate some few Protestant intellectuals like Schelling and Savigny, but both of their vast conceptual systems were distinctive from the great majority of Protestant intellectuals in that they did not challenge basic Catholic principles—not that they shared them. Even Savigny’s system of law, which was directed to “the moral destination of human nature, as it exhibited itself in the Christian view of life,”²⁰⁷ was far closer to Hegel’s notion of religion than any Catholic notion.

²⁰⁶ Alexander Hollerbach, "Das Verhältnis Der Katholischen Naturrechtslehre Des 19. Jahrhunderts Zur Geschichte Der Rechtswissenschaft Und Rechtsphilosophie," in *Katholizismus Und Jurisprudenz: Beiträge Zur Katholizismusforschung Und Zur Neueren Wissenschaftsgeschichte*, ed. Alexander Hollerbach (Paderborn: Schöningh, 2004c), 265.

²⁰⁷ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 43.

For Ketteler and the Catholics of the Munich Circle, Christianity was essential for the ordering of society in more than a strictly ethical sense, and the church was continually essential for the flourishing of German society. For Ketteler and Savigny both, German society was historically founded on Christian principles that baptized a Roman civilization. They held that the church was essential to the development of the law through the centuries. Ketteler separated himself from his teacher, however, in believing that the church continued to play an essential role. Ecclesiology, therefore, offers the most evident example of difference: Prussian political and constitutional theories, as a group, did not grant independent and potentially adversarial authority to the church. Ketteler's view of the continuing legal relevance of history benefited from Savigny's view that the law must continually reflect the inner consciousness of a people, the *Volksggeist*. "The collective consciousness of the people, however hidden and inarticulate it may have become, remained the final judge of whether or not the interpretations, elaborations, systematizations, and revisions of the jurists remained in harmony with the national will."²⁰⁸ For Ketteler, the customary Germanic law that stretched back to pre-Roman times provided insight into the culture, and as such continued to have legal relevance. Ketteler, however, rejected the essential and yet inaccessibly detached legislative role granted to the state in Savigny's monumental 1840 work.²⁰⁹

Less conspicuous, but equally important, is that Prussian jurisprudence, including that of Savigny, moved away from traditional metaphysical foundations and principles.

²⁰⁸ Toews, *Becoming Historical*, 288.

²⁰⁹ *Ibid.*, 291.

When it tended towards natural law sources, the natural law was from the non-metaphysical tradition of *Vernunftsrecht*, which reached a highpoint with Kant's purely rational system. When new metaphysical foundations emerged later (after 1830) in Hegel and Stahl's idealist political philosophies, positive law was conceived instrumentally, as a means of ordering a population according to a higher law. While Stahl's system was developed in opposition to Hegel's, both granted the state the legislative role of interpreting the 'higher law' for the nation. "[Stahl held that] law was not the articulated letter of the communal spirit, the conscious structuring of spontaneous life relationships, but a command, backed by punishing, coercive power, that regulated human relations according to absolute norms. As the enforcer of such norms, the state and its public institutions dominated the sphere of civil society and civil law."²¹⁰

The Catholic philosophers and jurists who influenced Ketteler maintained ontological and metaphysical elements in opposition to the *Vernunftsrecht* of the early century, and they rejected the specific metaphysical developments of Hegel and Stahl as the century developed. Both Hegel and Stahl, it should be remembered, identified German Protestantism as the most advanced religious form and the model for devotion within their 'Christian states.'²¹¹ Catholic political thought had been previously taught in German universities by Jesuit scholastics, up until the suppression of the order in the late eighteenth century. As a result, up until the early-nineteenth century, there were relatively few Catholic political theorists scattered in German universities until Munich emerged

²¹⁰ Ibid., 311.

²¹¹ Ibid., 312.

after 1826 with a rare wealth of talent.²¹² Political theory continued to be a hazardous academic field during the tumultuous early-nineteenth century. The politically relevant Catholic thought that did develop, however, did so within theological and philosophical faculties that drew clear distinctions between themselves and their Protestant colleagues.

While political theory remained a source of denominational difference, political practice in the form of rights claims did allow for common ground. Still, there were important theoretical differences between Catholics and Protestants. For the Protestants Pufendorf, Thomasius and Wolff, rights could only be substantiated through the mediation of a ruler who represented the will of the people. For Locke, representing a British version of Protestant natural law thinking (or *Vernunftsrecht*), these rights could be known such that their significant violation gave ground for revolution. That radical course of political action was supported neither by the German Protestant natural law thinkers, nor later by their successors, Kant and Hegel.²¹³ There were probably mutual influences among the German natural law theorists, but their fundamentally distinct social theories drove a theoretical wedge between Protestant and Catholic conceptions of justice, law, and even rights as having independent and objective validity in opposition to the state and its representative ruler. Institutionally, German political Catholicism also

²¹² Hollerbach, "Verhältnis Der Katholischen Naturrechtslehre Des 19. Jahrhunderts," 265.

²¹³ Loos and Schrieber suggest that at least in theory Wolff allowed this possibility, but as mentioned above, Krieger disputes this. Interestingly, both Kant and Hegel had been favorable towards the French Revolution, at least before the Terror, but neither of their systems allowed for such action.

maintained a view of the church as independently viable and an effective brake on the power of the state.²¹⁴

Görres is an early representative figure whose writings would increasingly represent Catholic opposition to Prussian absolutism. Originally identified with the Enlightenment, and subsequently a leader in the fight for national and civil freedoms, he was never enthusiastic about surrendering liberties or social principles in the cause of civil unity under a monarch, especially not a Protestant monarch.²¹⁵ Already in his 1819 *Germany and the Revolution*, Görres was arguing that “since German governments continued to rule in an absolutist manner, ... social institutions were in danger of being engulfed by the rapacious state. Thus an extra-étatist sphere, in particular, the independence of the church, had to be tenaciously guarded.”²¹⁶ A constitution was needed, he argued, but it had to be connected to the old German constitutions that protected ancient rights, including the rights of the estates and the church to prevent absolutism from above and despotism from below.²¹⁷ This ‘center’ way between absolutism and despotism (a code word for liberal democracy) characterized subsequent German Catholic politics. It

²¹⁴ It is notable that while Febronism (Habsburg provinces) and Hermensianism (Western German provinces) had some traction in Germany, it was nowhere near as strong as Gallicanism. The Cologne Incident is important also for this point, because it demonstrates the distinctive identity of German Catholics. They saw themselves as Germans, but in a way that did not compromise their religious beliefs. They also did not identify that growing national identity with Prussia’s national ambitions.

²¹⁵ Rudolf Uertz, *Vom Gottesrecht Zum Menschenrecht: Das Katholische Staatsdenken in Deutschland Von Der Französischen Revolution Bis Zum Ii. Vatikanischen Konzil (1789-1965)*, *Politik- Und Kommunikationswissenschaftliche Veröffentlichungen Der Görres-Gesellschaft* (Paderborn: Ferdinand Schöningh, 2005), 119.

²¹⁶ Vanden Heuvel, *Görres: German Life in Age of Revolution*, 245.

²¹⁷ *Ibid.*, 247.

demonstrates a practical reasonableness, a prudence, ordered to the principle of the common good.

Ketteler's 'realistic' conception of law was rooted in traditions that both persisted and evolved in times of instability—times affected by revolutions, war, foreign occupation, and shifting national identities. The rights language in his legal writing was influenced by his study of Prussian legal codes, but also by his study of canon law, Germanic law, and Roman law. It must be emphasized that he was probably at best a good student of law, and I do not want to imply that he was anywhere near the status of a learned jurist. Rather, the parallels between his mode of legal thinking and Savigny's are meant to demonstrate his sympathies with that form of legal philosophy, which: 1) contained a whole conceptual structure of the law based upon philosophical underpinnings compatible with Catholic Social Thought (as it later came to be known); 2) recognized a role for religion in political life; and 3) had a definitive role for subjective rights while rejecting a liberal individualistic anthropology. The historical school provided Ketteler with an integration that did not undermine his basic Catholic social conceptions.

Regarding rights in the historical school, Savigny's great work *System of the Modern Roman Law* is exemplary of his approach and insights.²¹⁸ Rights have persisting value, are "the power justly appertaining to the individual person: a territory in which his will rules and rules with our consent,"²¹⁹ and thus must be protected by the state. They have reality, however, insofar as they accurately describe 'juristic relationships'

²¹⁸ Savigny, *System of the Modern Roman Law* (Holloway 1867 Translation of 1840 Ed.).

²¹⁹ *Ibid.*, 6.

(*Rechtsverhältnisse*) or the matrix of legally definable human relations that order social interaction. When defining a subjective right, he is careful to point out that the power of a right is

synonymous with a privilege... [and that it] does not exhaust the essence of the matter... This we find in the [juristic] relation, of which each individual right [*einzelnes Recht*] shows a particular side separated from it by abstraction, so that the very decision upon the individual right can only be correct and convincing in so far as it proceeds from the complete perception of the [juristic] relation.²²⁰

Savigny's great efforts to differentiate his system from that of liberal forms of jurisprudence demonstrate how much the exercise of rights and the practice of law depend upon the question of where the law comes from, i.e., what Taylor describes as a key element of a social imagination. Savigny rejects a liberal approach that builds the law in abstraction from a hypothetical 'state of nature' or some other system positing 'original rights.' Liberal constitutionalists had used this philosophical approach to create systems of positive law to reorder society. Savigny also distanced himself from the absolutist jurists by granting the law an origin in the "spirit of the people living and working in common in all the individuals."²²¹

Savigny was interested in defining and distinguishing rights so that the law could most aptly serve society, not, as liberal jurists would have it, so that the law could reorder society. Further, for him, obligations were inherent elements of rights, just as a contract—to name one juristic relation—granted powers and obligations to all involved in signing the contract. Savigny spent significant effort in his 1840 work refuting not only

²²⁰ Ibid.

²²¹ Ibid., 12.

liberal jurisprudential methodology, but also its underlying social contract ideas based upon individualistic anthropologies. In a discussion of juristic relations, he argued against the reasonableness of many liberal social theories' first principle of an original right of all persons over themselves. Upon this 'original right,' liberal social theories build all subsequent 'acquired rights.' A system of positive law can be based on such an abstraction, Savigny argues, even as he grants the "rightful power of men over themselves and their own faculties."²²² This power, however, which is already assumed in positive law as "the basis and preliminary of all genuine rights,"²²³ is not the foundation of positive law. That 'original right' describes a meaningless juristic relationship, has no functional meaning, and is thus a pointless abstraction. The distinction between original and acquired rights only adds confusion.²²⁴ Savigny's analogy of the law to speech serves as an example—the idea that people absent of juristic relations could independently agree to a social bond is as absurd as the idea of men without the power of speech agreeing to a fully formed language.²²⁵

This was the legal school most compelling for Ketteler, who framed his arguments using the historical school's methods. His approach was neither haphazard nor merely theoretical. Rather, law and administration were essentially his family's business, and the structure of social life in Westphalia was deeply dependent upon legal philosophies. Ketteler's patently historical arguments benefited from Savigny's notion of legal progress: the advances of rights claims made under the influence of new social structures

²²² *Ibid.*, 273.

²²³ *Ibid.*

²²⁴ *Ibid.*, 271.

²²⁵ *Ibid.*, 15.

and ideologies. Within this conceptual framework, the concept-jurisprudence, *Begriffsjurisprudenz*, can be seen to be a necessary historical influence even without accepting its underlying presuppositions.

Ketteler's approach to the law also bore the influence of his native Westphalia, a land that had struggled with the opposition between the historical and conceptual schools for the entire first part of the century, since the time when the French had granted a constitution to the short-lived Kingdom of Westphalia following the advances of Napoleon's armies. The French-influenced constitution differed from the Prussian Civil Code by being based directly upon the *Code Napoleon*. Its actual effect was minimal because its reception was so strongly resisted, but for Savigny it remained important as an example of foreign legislation imposed artificially upon a people. The law was imposed by the occupying French 'from above' with little regard for the openness of the population receiving it. The French, from the perspective of Enlightenment jurisprudence, believed that their constitutional law was based upon principles derived from reason and ordered to human freedom. It legislated the emancipation of serfs, the introduction of religious toleration, the rationalization and centralization of administration, the elimination of the old regime's privileges, and the distribution of secularized church lands. As part of the Napoleonic reforming agenda, this constitution was to make Westphalia a model German state, but the reform was tainted by the French grab of Westphalian estates as booty for loyal French military officers and the exploitation of local resources.²²⁶

²²⁶ *Ibid.*, 75.

The constitution's discernible consequence was the shoring up of French annexations with a centralizing administration that facilitated continued control over the region. There was, however, less evidence that the constitution achieved progress in reforming the material conditions of the people in the region who suffered terribly from the continuing devastation of the Napoleonic Wars. The constitution came to symbolize French aggression and the Westphalians resisted it, but some legislative achievements were recognized as rational and emancipatory and could not be reversed. Redrawing confusing political boundaries according to "rationalizing symmetry" and freeing the serfs were two examples of this.²²⁷

The critical element of Ketteler's historical jurisprudence was sharpened by a hermeneutic of suspicion that emerged from his Westphalian context, from the distrust of self-proclaimed enlightened government and its secularizing and colonizing rationalization. His analysis always focused upon the practical consequences of public policy and specifically upon its effect on religious practice and the material conditions of the working classes, i.e., upon elements of the common good. His legal background and the legal environment of the early part of the nineteenth century influenced him profoundly; he continued to think, write, and act like the lawyer he was trained to be, even after he was a bishop for many years. The influence of nineteenth-century jurisprudence introduces a complexity into this dissertation, but the fruit of this study is significant. In addition to being able to see analogues of Ketteler's use of rights in other

²²⁷ Blackbourn, *Long Nineteenth Century*, 75.

legal schools, such principles as subsidiarity are found to be revered juridical concepts employed for centuries in German law.

His style of writing, rooted in the historical school both rhetorically and theoretically, also effectively developed traditional Catholic social principles to respond to issues of the nineteenth century, most specifically prudence and the common good. Intellectually rigorous, most of his writing was still addressed to the large public audience of journal readers. His writing avoided the intricacies of theological speculation and focused upon applying practical reason and prudence by making arguments like a lawyer about issues within his legal competence. His books and articles ‘make a case’! They begin with historical analyses. They use careful analytical arguments with a nod to reason (as opposed to power) as their necessary legitimizing element. In addition, his writings recognize the need for intermediate judgments of right and wrong, as opposed to claims for universal and unchanging moral truths. He was a man of prudence who, like his father before him, preserved his dignity and moral sense even while adapting to and in some ways thriving amidst unwelcomed political circumstances. That prudence was possible because the principles of the common good transcended the more limited goods of social classes, government systems, and traditional forms of culture.

In the mid- to late nineteenth century, Bismarck both represented the vestiges of *Herrschaft* ideology in Prussian society and manipulated it to his own political ends. Protestantism was an element of the *Herrschaft* ideology, and Bismarck considered himself a Christian, though according to his biographer Erich Eyck, no proof can be

found that he was ever influenced by a Christian teaching or any religious principle.²²⁸ German Protestantism consisted of Lutheran, Calvinist and Pietists traditions, which, like the rest of German society, was further divided into conservatives and liberals.²²⁹ Though diverse in many ways, Protestantism was unified in the sense that it posed no challenge to Bismarck's rule. Conservative Protestantism identified closely with the monarchy and the established order that Bismarck represented, and liberal Protestantism identified with the economic and national aspirations that Bismarck embodied. This is not to say that German Protestantism was not a powerful social force. Rather, the opposite is the case. It was greatly affected by secularism and church attendance declined precipitously over the course of the nineteenth century, yet for many, "German cultural *was* Protestant."²³⁰ The *Kulturkampf* itself is enough to demonstrate that Bismarck viewed Catholicism as inimical to his vision of a unified Germany. Bismarck's projection of a Catholic 'threat' is also consistent with his manipulation of religious issues to serve his political ends. With the *Kulturkampf* he united diverse Protestant groups by giving them a common enemy. Conservatives were placated by the illusion he was protecting a true German cultural value. And liberals were content to overlook evident violations of basic rights as Bismarck's marginalized a political threat to liberal economic and national goals.

Sometime before 1870 Ketteler sketched an outline for an article (never published) that summarized his thoughts on Bismarck and described the 'Iron Chancellor's' essential political principles. Bismarck, for Ketteler, had a single governing principle: protect the

²²⁸ Eyck, *Bismarck and the German Empire*, 15.

²²⁹ Blackbourn, *Long Nineteenth Century*, 291.

²³⁰ *Ibid.*, 293 Italics Blackbourn's.

structure of the Prussian aristocracy, i.e., maintain the rights of the Junkers and their relationship with an absolutist Prussian monarch. “With him and through him, they have achieved everything that they are. With him and through him, they will achieve everything that they desire.”²³¹ Whereas Krieger describes Bismarck’s “new and lasting [religious] faith”²³² after his marriage to a pious wife, Ketteler granted that the chancellor was probably not an atheist, but was convinced that religion was a secondary matter that never troubled the interests of “Prussiandom.” Further, Ketteler noted the complete lack of political scruples which the “Napoleonist” Bismarck demonstrated in his political dealings with Napoleon and the Italian Cavour. Krieger uses the term “Bonapartist” to describe Bismarck as “willing to break with monarchical legitimacy, balance himself above the social classes, wield the weapon of mass suffrage on behalf of conservative authority, and use foreign policy for domestic purposes.”²³³ This makes sense if one recognizes the single principle of “Prussia over all.”²³⁴ This, to say the least, was not compatible with Ketteler’s political principles or his social thought.

Ketteler’s legal background makes him an important historical bridge figure because we can trace the persistence of his sociological beliefs during the course of his encounters with nineteenth-century liberalism. His social theory was rooted in aristocratic ideals of social order and political stewardship, but was not too fixated on power to realize the

²³¹ *SWB I*, 5:423. Ketteler, unpublished notes: “Ist Bismarck Grundsätzlich Ein Feind Der Katholiken?” in Krieger essentially grants Ketteler’s points: “Nor is there any doubt that Bismarck was fundamentally committed to the untrammelled authority of the Prussian monarch and army. That was a constant.” Krieger, *German Idea of Freedom*, 253.

²³² *Ibid.*, 252.

²³³ *Ibid.*, 255.

²³⁴ *SWB I*, 5:425. “denn Preußen über Alles.”

benefits and necessity of adapting to the circumstances of constitutional democracy. His use of Prussian legal methods and language must be studied together with his principles of social theory because they reveal a whole social imagination that differentiates him from the inherently immoral principles of the *Herrschaft* ideology. The *telos*, or purpose, of the *Herrschaft* was to retain power, whereas the *telos* of Ketteler's social theory was a common good characterized by human flourishing, in general, but also by the inviolable protection of individual, or 'subjective rights.' In sum, Ketteler's use of rights language according to a Prussian form does not prove that he held dominant Prussian or liberal philosophical presuppositions. His competence in both law and theology gave him a unique capacity to defend religious principles in the expanding public sphere, as well as to incorporate secular insights into Catholic social doctrine. The context of his defensive actions, however, did not undermine the universal character of his social principles.

3. Ketteler's Early Nineteenth-Century Westphalian World

3.1. Ketteler's Aristocratic *Ständisch* Identity, University *Bildung* And Social Formation

Unlike many great theologians, philosophers, and jurists whose works perhaps transcend their particular time and place, Ketteler's contribution must be seen in light of his response to historical circumstances. Any consideration of his works must stress the fact of his essentially German character despite the moral issues raised by nationalism and the mixed blessing a nation without Austria would be for Catholics in Germany. Catholics would eventually fare poorly as a marginalized minority in the German state Bismarck unified in 1870, but this fact should not obscure the social confidence and loyalty to the idea of a German nation held by the Catholics in Ketteler's Westphalia and the political strength (though less loyalty to Prussia) of Catholics in southern German states, especially in Bavaria. German Roman Catholics were thus not merely passive passengers on the route to the nation-state, and in any case it was impossible for Catholics in any German state to remain aloof from the developing German national identity during the course of the nineteenth century.

Ketteler's family had deep roots in Westphalia and their Catholicism was an essential element of their identity. A walk through the Munster Cathedral reveals that the Ketteler family was among the dozen or so great patrons of the diocese for many centuries. An ancestor of Ketteler's brother-in-law, Christoph Bernhard Graf von Galen, was the bishop of Munster (1650-1678) directly after the Westphalian Peace treaty was signed in that city (1648) following the Thirty Years War. The significant advance of

Protestantism during the previous century had been reversed and Galen, as prince/bishop, ruled as an absolute monarch. He consolidated the province's character as an *Adelsstaat* (aristocratic state) and reinforced the region's close church/state relationship that persisted until Napoleon's secularization in 1802.²³⁵ It is notable, however, that following the upheavals of the French Revolution and the ensuing Napoleonic Wars, it was actually a mostly Protestant Prussia that defended Westphalia's main city Munster from its many foes. Rhineland and Westphalian Catholics were wary of Prussia, but they also appreciated its role as unifier of German interests and its reputation for tolerance.²³⁶

“This personal localism [of Catholic Westphalia] should not be interpreted as anti-Prussian particularism. It had been Prussia that defended Munster (however unsuccessfully) against the Austrian-inspired encroachments of Cologne. Prussia had rescued Munster from incorporation into France. Given the Prussian crown's carefully guarded reputation for religious tolerance, there was little to prevent a Westphalian nobleman from swearing allegiance either as soldier or administrator. Accordingly, this group continued to staff the higher echelons of church, government, and army, as it had for generations.”²³⁷

²³⁵ KG Bolte, ed., *Münster Münsterland: Polyglott-Reiseführer*, 8 ed. (Munich: Polyglott Verlag, 1992/93), 9.

²³⁶ The principle of tolerance was incorporated into its legal documents such as the Prussian Civil Code as early as 1812 under Stein. The Prussian position at the Congress of Vienna reveals its position: “Die katholische Religion in Teutschland wird, unter der Garantie des Bundes, eine so viel als möglich gleichförmige, zusammenhängende Verfassung erhalten.” Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte Seit 1789*, Dritte wesentlich überarbeitete Auflage ed., 6 vols., vol. 2. *Der Kampf um Einheit und Freiheit 1830 bis 1850* (Stuttgart: W. Kohlhammer GmbH., 1988), 1:412 V, 424, “Die katholische Kirche in Deutschland,” III,413.

²³⁷ Bolten, “Watch, Pray, Fight: Ketteler as Priest-Politician”, 25.

The proud but pragmatic Catholicism of Westphalia is, therefore, of a variety different from both the independent Gallicanism of the French to the west and the defiant ultramontanistism of the Bavarians to the southeast. This proud pragmatic Catholicism was the religious context of Ketteler's family for many centuries. And perhaps it explains the character of the man who, on the one hand, as a priest proudly reintroduced the Corpus Christi procession into the streets of Protestant Berlin and, on the other (perhaps left) hand, as a bishop in the First Vatican Council was counted among those reluctant to vote with the majority advocating papal infallibility and the rejection of modern innovations falling under the principles of rationalism, liberalism, and materialism. He was at heart a practical man who abhorred the inflexibility of ideologues on all sides of political questions, but he was also a clear thinker who recognized the need for a forthright and intellectually coherent Catholic engagement in German politics. The span of his life, from 1811 to 1877, corresponds with many of the social, economic, and political transitions in Europe that shape our contemporary period. Given his prominence in all three of these fields, his own biography is a window into this history.

Fritz Vigenier, Ketteler's most thorough and critical biographer, notes that Ketteler's life can be best understood as one of constant and enthusiastic conflict in a time of significant conflict for the church. "[He] was one of the most important religious leaders during a whole generation of church conflict. His own life history is itself a piece of the history of church politics."²³⁸ Ketteler grew up just a few miles from Munster's famous hall where the Westphalian Peace Treaty was hammered out and signed in 1648, ending

²³⁸ Fritz Vigenier, *Ketteler: Ein Deutsches Bischofsleben Des 19. Jahrhunderts* (München: R. Oldenbourg, 1924), viii.

the religious bloodshed of the Thirty Years' War. Munster had become Protestant and then was violently returned to Catholic control during the war—a period punctuated by the torturing and killing of three leaders of the Protestant movement in the steel cages—cages that still hang as a reminder of those bloody times from the steeple of a city church. Though without bloodshed, the religious issues continued to hold a central place in nineteenth-century German politics, and Ketteler's entire priestly career was situated in the midst of those fierce battles. Importantly, he participated in these battles well armed with weapons of modern law and communication, but even more importantly with the resources of a solid theological foundation to deal with the new relationship of the church and the state within a modern secular government.

Otto Pfülf S.J., writing the earliest significant sympathetic biography in 1899, begins his two-volume work on the same theme: “Among those participating in the battles (*kämpfen*), which in the past decades have been played out in the arenas of the church and church politics, [Ketteler's] name deserves to be listed in the first row.”²³⁹ Pfülf adds, less enthusiastically, that as a writer he was also fruitful and successful.²⁴⁰ This readiness for conflict cannot be seen apart from the world into which Ketteler was born, i.e., from a family of proud though minor nobility that managed the complexities of political dependence upon Protestant governments, but all the while maintained strong ties to the Catholic Church.

²³⁹ Otto Pfülf, *Bischof Von Ketteler (1811-1877): Eine Geschichtliche Darstellung*, 3 vols. (Mainz: F. Kirchheim, 1899). page iii. (Significantly, the Jesuit Pfülf wrote his preface from Holland. Jesuits had been sent out of Germany during the Kulturkampf.)

²⁴⁰ *Ibid.*, 1:iii.

It was no contradiction for Ketteler to recognize the important protections that a constitutional system provided. He recognized those protections, however, as rights, within the context of an ‘organic’ *ständische Verfassung* as opposed to the ‘mechanical’ *konstitutionelle Verfassung*. His respect for formal positive law did not indicate a latent liberalism or *Begriffsjurisprudenz*, even though he acknowledged achievements of the liberal system from time to time. The goal of a constitution was one shared by advocates of both the conceptual and the historical schools of law. What differentiates them is the method of recognizing the emergence and priorities of rights in a social body. For the liberals, they are abstractly formulated. For the historical school, rights are reflections of a properly ordered and socially integrated community—a community that may retain strong hierarchical elements. In addition, rights are not merely descriptive or passive, but function to maintain that proper social order. Later as a bishop and the leader of a marginalized Catholic minority in Bismarck’s German state, Ketteler will demonstrate his ability to utilize rights language for social protest.

He tended to be generally allied to the conservative Romantic movement, which valued tradition, the ideal of the family as a social model, religious education, devotion, and responsibility for the poor. He also recognized, however, that there were some common causes shared by the Catholic Church and social reform liberals (as opposed to *laissez faire* liberals) in Germany. These included constitutional limitations upon absolutist government, the protection of individual rights including religious worship, and the stress upon more access for the poor to social goods such as education and employment opportunities. With the liberals, he was wary of the great disparity between

the rich and the poor as the aristocracy manipulated a conservative ideology to maintain their great wealth during the shift towards a capitalist economy—even while they were shedding their traditional responsibility for the common good. And with the liberals, he was wary of a form of government that was dominated by a single religious and propertied class. It is no coincidence that the political party founded later in the century to represent Catholic interests was named the ‘Center’ party.

As a theologian, Ketteler was acutely aware of the importance of the political realm. In his political writings, he never put aside his religious purpose or identity. He made two fundamental contributions to Catholic Social Thought in his life. First, he formulated a practical response to the blatant injustice of the industrial period, and, second, he mounted a political and intellectual defense of religious freedom as a response to the dangers to religious life he recognized in the modern nation-state. My claim is that Ketteler’s genius was particularly informed by his legal background as well as by the creative theology of early nineteenth-century Catholic Germany. Ketteler used rights in a way that adopted that legal background without jeopardizing his principles of Catholic natural law.²⁴¹

²⁴¹ I stress here and elsewhere that Ketteler’s natural law is explicitly Catholic. I do this to differentiate the natural law of Ketteler and other Roman Catholics from that of Enlightenment thinkers, especially those thinkers responsible for developing the legal codes in Europe in the tradition of Hobbes, Grotius, Spinoza, Pufendorf, Leibniz and the eighteenth-century German school of Christian Wolff. For a concise history of natural law in nineteenth-century jurisprudence, see Reimann, "Nineteenth Century German Legal Science."

3.2. Young Westphalian Catholic Aristocrat Under Prussian Jurisdiction

3.2.1. Ketteler's Early Life

Ketteler voted to abolish aristocratic privileges and he advocated the extension of legal protections for all in society as a member of the 1848 Parliament in Frankfurt, but he was the product of his German aristocratic social context and he was also an advocate for its moral ideals. His political worldview, although distinct from that of the *Herrschaft* ideology, was shaped far more by pre-Enlightenment 'feudal' values, though nostalgically, than by modern democratic principles. Thus to understand his career trajectory and his political rhetoric, we must know about his formative years in a hierarchical world where class differences were considered part of the natural order. This worldview shaped his relationships and informed his understanding and expectations of the family, the church, society, and political structures.

He was born on Christmas day in 1811 in Munster, Westphalia, and christened William Emmanuel von Ketteler. The name Emmanuel was not common for the Ketteler family and was an obvious reference to the feast day on which he was born. As Vigener notes, however, "the anointed one" was a fitting title for the single Ketteler, who was able to stand out from the centuries of his family's generally minor role beyond the borders of its small territories in Westphalia.²⁴² Though his family was relatively minor nobility without great wealth, political power, or significant positions in the church, it is clear from Ketteler's letters that he inherited an 'aristocratic' sense of purpose, duty, and order—noble ideals quite different from those lampooned by the late eighteenth and

²⁴² Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 7.

nineteenth-century French Enlightenment. His letters glowingly describe his parents' principles of stewardship, their immaculately run house, the modesty of their table, and the works of charity they performed for their own servants as well as the poor in the local area.

Whatever the reality of the Ketteler family's good order, it is clear from his own recollections that William Emmanuel did not immediately acquire those virtues for himself—at least not as a boy. Many references in his later correspondence point to his early stubbornness and lack of discipline that could not be corrected at the local gymnasium—an institution held in little regard by the Ketteler family. William's oldest brother Clemens received all his education at home until university, and his next oldest brothers Wilderich and August were sent to a Prussian cadet school.²⁴³ William himself, in 1824 at the age of thirteen, was sent to a newly reestablished Jesuit boarding school in Brig, Canton Wallis, Switzerland. The Jesuit order of Roman Catholic priests and brothers had not been allowed to reestablish schools on German soil after their reinstatement in 1814, but they had preserved their reputation for 'humanizing' youth during the years of suppression. Young William's lonesome years away from 1824 to 1828 without home visits were difficult, but he himself credited the Jesuits with giving him good discipline, and he was loyal to the order during his tenure as bishop.²⁴⁴

²⁴³ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 35. Bolton's biographical material is essentially dependent upon Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 11-15 Vol 11.

²⁴⁴ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 36. Ketteler writes of his time with the Jesuits in a letter to his brother, Wilderich von Ketteler Harkotten, January 1841. *SWB II*, 1:135.

The young William's correspondence with his family demonstrates the strong will and passions of a young man with aristocratic pretensions. Those letters and his later admissions indicate that he was not an especially stellar student, but he recognized the importance of a good *Bildung*. More than simply an education, a *Bildung* expressed, in the language of the Romantic educational theory he would later champion, a good intellectual, moral, and physical formation. He seems to have also accepted the significance of his noble status without either bemoaning the responsibility or crowing about the perquisites. Rather, his privileged social standing or *Stand* seems simply to have been taken for granted and accepted as part of the natural order of things. In Brig, he worked at least hard enough in order to place well and advance to the university. He seemed to enjoy the benefits offered him in his social situation, especially hunting, that activity reserved for the aristocracy and symbolic of the paternal system.²⁴⁵ This seemingly trivial point of social class could be easily missed by a democratic and egalitarian audience, but hunting for the German aristocracy of the nineteenth century distinguished them as much as the salons of the eighteenth century defined the Enlightenment figures. Hunting identified Ketteler with an aristocratic status that both distanced him from the ideals of liberalism and united him with Protestant peers of similar noble origins. For a young nobleman, it was the activity that signified passage into a politically charged adult society.²⁴⁶ Ketteler's discernment for the priesthood in Munich was as influenced by his hunting acquaintances and contacts as by the intellectual figures that orbited Görres' circle, the *Görreskreis*.

²⁴⁵ Berdahl, *Politics of the Prussian Nobility*, 73.

²⁴⁶ Boltzen, "Watch, Pray, Fight: Ketteler as Priest-Politician", 41.

Westphalian nobles, according to Ketteler's critical biographer Vigener, were a group rooted in the past who gloried in their minor dignities. They were rooted to the country districts and disinclined to move into the cities—preferring to clutch their fleeting social privileges and “to rule a little rather than be ruled.”²⁴⁷ Of Ketteler's biographies, Vigener's (1924) is both the most thorough and the most unsympathetic work, using 750 pages to argue that Ketteler's great influence was marred by his misapprehension of liberalism.²⁴⁸ Vigener mocks Ketteler's traditionalism as archaic and scorns noble privileges as unmerited, yet he argues that Ketteler's life was plainly shaped by his birth. His noble status ranked him above the growing bourgeois classes even though the family estate and resources were relatively modest—it was much more important for social status and a potential political position that the family could trace their lineage to the twelfth century.²⁴⁹

There is much evidence of the Ketteler family's prudent adaptation, despite Vigener's criticism of their Westphalian traditionalism. The heavy weight of tradition, for example, did not overload the future bishop's parents, Freiherr (Duke) Friedrich von Ketteler zu Kaldenhoff and Franziska Clementine Freifrau (Lady) von Ketteler (born von Wenge zu Beck, daughter of Munster's Governor General).²⁵⁰ The historical

²⁴⁷ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 4. (“im Kleinen zu regieren, als regiert zu werden”)

²⁴⁸ Hogan, “Ketteler's Interpretation of the Social Problem”, xiii.

²⁴⁹ Norbert Elias, Michael Schröter, and Eric Dunning, *The Germans: Power Struggles and the Development of Habitus in the Nineteenth and Twentieth Centuries*, trans. Eric Dunning and Stephen Mennell (New York: Columbia University Press, 1996), 63.

²⁵⁰ “Maximilian Friedrich Freiherr von Ketteler (1779-1832), Herr auf Harkotten, preußischer Kammerherr und Landrat... Franziska Clementine Freifrau von Ketteler (1778-1844), geborene

developments of their times gave them little choice but to be pragmatic and adaptable. Their lives spanned the transition from feudal lords including the German prince-bishops, to French rule under a form of the Civil Code when their fourth son William was born, to Prussian control after the treaty of Vienna in 1815. When the Prussians gained possession of Westphalia, the Ketteler family was actually following a ‘tradition of pragmatics’ by adapting to their new circumstances. Friedrich possessed an estate in Harkotten, but he provided for the family as a bureaucrat, *Landrat*, for the newly established Prussian government in Warendorf.²⁵¹ The elements of aristocratic and Catholic identity together with practical adaptability mirror their bishop son’s personality traits.

3.2.2. University: 1829 to 1833, In Göttingen, Berlin, Heidelberg and Munich

Ketteler’s Catholic identity was not a significant hindrance to his career advancement within a Prussian administration. In fact, his social status, or *Stand*, in this rigidly hierarchical society was much more important for determining his life options.²⁵² His *Stand* explains his rapid career advancement despite sufficient but not stellar test grades as a young student, and after his ordination it provides the context for his rapid advancement in church hierarchy. Ketteler’s religious identity did separate him from his Protestant peers during university study and advancement in the Prussian bureaucracy, and his religious identity was a critical element of his intellectual self-understanding, but his Catholic identity did not significantly subordinate him in relation to his Protestant

Freiin von Wenge zu Beck, Tochter des General-Gouverneurs von Munster, Clemens August von Wenge zu Beck.” *SWB I*, 5:2n1,n2.

²⁵¹ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 8.

²⁵² Berdahl, *Politics of the Prussian Nobility*, 73.

peers. The separation was social rather than theological or denominational in nature, and involved a kind of provincial rivalry. In any case, the choice of study and career seems to have been a matter of course for young Prussian aristocrats of all denominations. This was the case for Ketteler who, Vigener claims, exercised little careful discernment in following his father's path into the bureaucracy.²⁵³ He began his university education at Göttingen, one of the first German universities in the late eighteenth century to raise its standing by recruiting top professors with serious research interests, and law was one of the most important fields of study.²⁵⁴

Law was the most attractive course of study for men with secure backgrounds, ample resources, and high ambitions. In his efforts to improve the social and academic scene at Göttingen, Münchhausen knew that jurisprudence was of primary importance: 'That the legal faculty be filled with famous and excellent men is necessary, above all, because the faculty must induce many rich and distinguished people to study in Göttingen.' In fact, almost four-fifths of the aristocrats at the university in 1777 were enrolled in the law faculty.²⁵⁵

Fifty years later, Göttingen had lost its preeminent reputation in comparison to Berlin and other rising German universities. Nevertheless, when Ketteler arrived in 1829, Göttingen was still a respectable university that could boast of a faculty that included Jacob Grimm and Gustav Hugo. Grimm (who with his brother also assembled folk tales for children) was a Germanist, a legal historian and close associate of Savigny.²⁵⁶ Hugo was "the most prominent scholar of the Göttingen *Rechtsschule*."²⁵⁷ Thus, the university was still a reputable place to prepare for a career in the civil service. Ketteler could be

²⁵³ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, ?

²⁵⁴ Sheehan, *German History, 1770-1866*, 138.

²⁵⁵ *Ibid.*, 140.

²⁵⁶ Wieacker, *History of Private Law in Europe*, 322-323.

²⁵⁷ Reimann, "Nineteenth Century German Legal Science," 848.

confident he would be prepared for an administrative career, just as his father before him,²⁵⁸ his older brother Clemens,²⁵⁹ and his university contemporaries Ludwig Windhorst (1812-1891) and Otto von Bismarck.

Three aspects of Ketteler's unusual university experience are worthy of note because they locate him in the middle of the complex political crosscurrents of the larger German world. First, his study eventually included four different universities representing very different philosophical and religious worldviews. This was not initially intended, but an unusual dueling injury interrupted his university career at Göttingen, motivating him to begin his peripatetic training. Ketteler had been active in the student fraternities (*Burschenschaften*) famous for their valorization of dueling. Dueling was forbidden both by the university and by the Catholic Church, and yet it was considered an honorable activity for a socially conscious young man and member of the Westphalian Corps. The risk of punishment (or sin!) was hardly a serious obstacle for him, just as it posed no obstacle for his fellow student Bismarck, who also received his "*Schmiss*" or scar as a mark of honor during his university days at Göttingen.²⁶⁰ The code of honor trumped the laws of state or religion, and the duties of the *Stand* trumped the obligations of a citizen.

²⁵⁸ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 26.

²⁵⁹ *Ibid.*, 41.

²⁶⁰ Schröter notes that "The role of the duel in the social relations of the nobility... was symptomatic of how the balance of power between the central rulers and the warrior nobility developed, especially in Prussia. The aristocracy's determination not to submit personal quarrels between men of their own group to the authoritative verdict of the king and his courts of justice, claiming instead the right to deal with them independently—thus breaking the royal monopoly of violence by fighting each other with a weapon in hand according to the rules of their own code of honour—was... a symbolic expression of the nobility's self-conception not only as the highest-ranking stratum but also as the real embodiment of the state." Elias, Schröter, and Dunning, *Germans: Power Struggles*.@65}

So we get some idea of his early loyalties and temperament from the famous duel that separated him from the tip of his nose. The joust was instigated by a modest slight of honor; someone had stepped on his toe.²⁶¹

Dueling was generally tolerated and even expected in that martial culture, but in the face of such blatant evidence, the transgression could hardly be ignored by the university authorities. Ketteler avoided punishment in Göttingen by resuming his studies in Berlin where he was to undergo graft surgery for his nose. He did not dodge punishment with the transfer, insofar as he still had to serve two weeks of house detention, but it took him from the university where legal Romanticism had first taken root and deposited the admonished young aristocrat in the university where it was continuing to thrive under the influence of Savigny's lectures on jurisprudence.²⁶² Berlin was also the center of German national ambitions quickened by the emerging Prussian military power. Despite Hegel's dominant influence in philosophy at the university, his impact upon politics and jurisprudence was minimal in the first half of the nineteenth century. In any case, Hegel did not seem to make much of an impression on Ketteler. What did leave an impression was the graft surgery to repair his nose. In Berlin, he reluctantly obeyed his father and underwent a surgery that was followed by a long convalescence until the graft from his arm was successfully attached.²⁶³ More importantly for his education, however, he

²⁶¹ Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 42. Bolton quotes Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 1:28. It was actually Ketteler's fourth duel and it was spawned by a fellow stepping on his foot.

²⁶² On Savigny, see Sheehan, *German History, 1770-1866*, 548-550.

²⁶³ Hogan, "Ketteler's Interpretation of the Social Problem", 23.

continued his legal training for two semesters and attended the lectures on historical jurisprudence given by Savigny, who was well established as its “chief spokesman.”²⁶⁴

After Berlin, Ketteler moved to another center of Romantic activity, the university in Heidelberg.²⁶⁵ There, by spending the academic year studying the jurisprudence of the ‘conceptual school’ (*Begriffsjurisprudenz*) he branched out from his earlier training in Romantic jurisprudence. The conceptual system contested the historical approach and was represented by Savigny’s adversary, the celebrated (*gefeierten*) constitutionalist Anton Thibaut (1774-1840).²⁶⁶ After having experienced a range of different legal approaches, Ketteler moved to King Ludwig I’s new Catholic university in Munich for courses in church law (*Kirchenrecht*) with Professor Schmidlein and George Phillips.²⁶⁷ Finally, in 1832 Ketteler returned to Berlin and ‘visited’ (*besuchte*) the lectures of jurists, including Eichhorn (a legal historian) and Homeyer (a Germanist). Eichhorn was famous for his work in establishing the historical school, and Homeyer earned a name by publishing an edition of the *Sachsenspiegel*. That Ketteler returned to Berlin after Munich to attend their lectures signals not only his sympathies with the historical school, but also with its ‘Germanist’ wing, which would later oppose the overly ‘Romanist’ direction in which Ihering would lead the school.²⁶⁸ Thus, during an extremely vibrant and exciting

²⁶⁴ Sheehan, *German History, 1770-1866*, 548.

²⁶⁵ O’Meara, *Romantic Idealism and Roman Catholicism*, 56.

²⁶⁶ Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 1:32. Pfülf’s claims are somewhat fawning and hagiographic, but he recounts Ketteler’s marks during these days as especially admirable, “ausgezeichnet fliessig, mit rühmlichsten Fleisse.”

²⁶⁷ *Ibid.*

²⁶⁸ *SWB I*, 5:3. Regarding the development of legal history, see Gerhard Wesenberg and Gunter Wesener, *Neuere Deutsche Privatrechtsgeschichte Im Rahmen Der Europäischen*

time in the German intellectual world, Ketteler had a firsthand experience of the various theological, political, and legal movements of its major academic centers.

A second aspect of Ketteler's education worthy of note was the focus of his academic work: his legal studies were from the start historically oriented and integrated with theological and ecclesial interests. His last year in Munich was spent studying church/state issues and canon law with Schmidlein and Philips.

Thirdly, Ketteler's independent paper after the conclusion of his legal studies shows his interest in legal rights and demonstrates his early use of rights language. The paper was titled "A Survey of the General Principles followed by the Prussian State in Governing the Jews and Mennonites since the year 1815 and the Legal Condition of these Religious Groups in the Administrative District of Munster."²⁶⁹ In this paper, he addressed precisely the rights of these two religious groups within the legal structure of the Prussian state.

Though a Catholic, he prepared for his legal career in three predominantly Protestant universities at a time when religious confession was academically still relevant. Antagonism and distrust between denominations existed even among the most prominent intellectual figures. Goethe, for example, helped to block a Jena university appointment for Schelling because of the suspicion that he might convert to Roman Catholicism. And Hegel "lectured in Berlin that Protestantism caused and included all that was German, all

Rechtsentwicklung, Revised 4 ed., *Boehlau-Studien-Buecher, Grundlagen Des Studiums* (Vienna: Böhlau, 1985).

²⁶⁹ Hogan, "Ketteler's Interpretation of the Social Problem", 22-23.

that was progressive.”²⁷⁰ Ketteler’s education would have exposed him to this religious tension as well as the wide spectrum of German legal theories, from those influenced by Kantian and Hegelian views of rights established by and dependent upon the state, as well as the more ‘personalist’ Catholic understanding of rights that emerges from society’s matrix of social relationships. Whether Ketteler’s motivation for his itinerant education was a general interest in the most important legal minds of his day or rather simply a desire to avoid the consequences of his earlier dueling escapades, the result was that Ketteler had studied with some of the most important and influential legal thinkers of the nineteenth century. Ketteler’s training was analogous to an American jurist having studied with Hamilton, Jefferson, Madison, and Jay, both for the timeliness of the studies as well as the importance of the figures for their later influence in law and politics.

In opposition to the more adoring biographies and popular hagiographies, Vignier disparages Ketteler’s academic industriousness and piety during his university years. Vignier allows that Ketteler was an enthusiastic student of history, but as a rule followed the path of self-indulgent young aristocrats—a path mostly devoid of intellectual stimulation. Regarding piety, Ketteler’s own mature reflections indicate that as a youth he was Catholic by default and habit rather than conviction. Vignier rules out qualms of conscience or intellectual doubts about religious matters, since these required deep and serious thought that Ketteler would only demonstrate later in life. Vignier himself quickly qualified this disparagement with Ketteler’s own reflections just a few years later

²⁷⁰ O’Meara, *Romantic Idealism and Roman Catholicism*, 91. O’Meara bases his Hegel statement on the *Vorlesungen über die Philosophie der Weltgeschichte*.

regarding the precarious state of his soul during this time of his life, saved from the brink of desolation only by God's grace.²⁷¹ A fair conclusion is that he was a basically competent student who pursued his studies with the confidence of, if not enthusiasm for, a secure position in the Prussian bureaucracy. The choices he made regarding his legal study did, however, demonstrate a significant enthusiasm for history, and specifically, the legal scholarship of the historical school.

3.2.3. Ketteler's Career As "Gerichts- und Regierungsreferendar im preussischen Staatsdienst" 1833 to 1838

Following the typical 'noble' career path of his father, in 1833 Ketteler moved from law school to an administrative post in the Prussian bureaucracy (*Als Gerichts- und Regierungsreferendar im preussischen Staatsdienst*). As a Prussian Catholic, he had studied the legal system from the perspective of a religious minority, and he saw great value in Prussia's *Rechtsstaat* principles that included legal toleration for religious minorities. The Prussian Civil Code (*Allgemeines Landrecht für die Preussischen Staaten*), 1794), was initiated by Frederick the Great: "The Philosopher of Sans-Souci, ... [a] celebrated correspondent of Voltaire and author of philosophy, poetry and music, he advocated religious toleration and employed enlightened jurists."²⁷² Blackbourn argues that Frederick's 'enlightened' policies of legal codification were also effective means of consolidating state power in a growing and diverse absolutist state.²⁷³ Without surrendering his skepticism of Prussian motives, Ketteler recognized that the code

²⁷¹ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 11.

²⁷² Blackbourn, *Long Nineteenth Century*, 23.

²⁷³ *Ibid.*, 23.

contained the legislative elements necessary for a *Rechtsstaat*—the legal framework that insured political and social order and justice in a diverse land. Krieger argues that the Prussian legal framework was structured to absorb aristocratic independence and prerogatives within an essentially absolutist Prussian state. He argues that they ceased to pose an opposition to state power, but he recognizes that German aristocrats would continue to be a political force well into Bismarck’s tenure. Ketteler’s political resistance poses a challenge to this thesis.

Ketteler’s early career already demonstrates the ideals and willingness to act that would later define him as a leader of Catholic thinkers and political leaders whose political principles fundamentally rejected the ideologies of liberalism and absolutism. His early conception of rights demonstrated his independence of thought and his willingness to confront state power both from within the bureaucracy, and, when that was not possible, by resigning his position in the bureaucracy. From within, his 1836 legal brief (discussed below) on the rights of Mennonites and Jews showed a coherent conception of the importance of rights such that their violation is a threat to the entire system.²⁷⁴ From without, or outside of the Prussian bureaucracy, the Cologne Conflict was a violation that led to his conscientious resignation from his official state position. While Krieger limits opposition to the Prussian state only within the economic realm, Ketteler’s actions demonstrate a conception of freedom that is embodied (not merely rhetorical), practical (not merely theoretical or abstract), and active (not merely moral or

²⁷⁴ *SWB I*, 5:43. Ketteler, “Darstellung Der Allgemeinen Grundsätze, Durch Welche Der Preussische Staat Bei Behandlung Der Juden Und Mennoniten Seit Dem Jahre 1815 Geleitet Worden, Und Der Staatsbürgerlichen Verhältnisse Dieser Religionsparteien Im Regierungsbezirke Munster,” 1836.

personal). Krieger argues that since German liberalism was so disempowered, its society possessed no force of opposition to the state. Yet even Ketteler's early biography reveals a quite active opposition with characteristically German roots, i.e. within the emerging movement of political Catholicism spawned by the Cologne Conflict. His later biography as bishop of Mainz is better known and demonstrates the maturity of Catholic opposition to the Prussian state—hardly a marginal group.

In 1835 Ketteler demonstrated his competency in the legal field by passing the required exams and entering into the professional field of law, or at least a bureaucratic position that required a legal education. The exams demanded an understanding of the Prussian legal system—a complex matrix of overlapping legal jurisdictions, but defined according to certain fundamental codes and methods. He then accepted a post as *Oberlandesgerichts-Referendarius* at the superior court of Munster.²⁷⁵ As with most civil service posts, family ties were probably very important in Ketteler's appointment as an intern (*Referendar*) before the age of twenty-five, especially since it appears that he did not undergo the usual preparatory period of clerkship (*Auskultator*) in the Prussian bureaucracy.²⁷⁶ Sheehan notes that this clerkship normally precedes the internship by fifteen months to up to four years, though the pay of an intern, like a clerk, was quite low and anticipated an independent source of income.²⁷⁷ He, like Krieger, stresses that the transition of the German nobility into the bureaucracy marked their conservation of status and power in society even as it transitioned their loyalty away from the matrix of feudal

²⁷⁵ Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 1:39. Hogan, "Ketteler's Interpretation of the Social Problem", 22.

²⁷⁶ Sheehan, *German History, 1770-1866*, 520.

²⁷⁷ *Ibid.*, 519.

relations. In the bureaucracy, allegiances are directly to the state as represented by the crown.²⁷⁸ Ketteler was a typical university student, was a member of a dueling fraternity, seems to have quite happily entered into the bureaucracy, and was generally willing to adapt to the social and employment pressures of the early nineteenth century. Though he may have been unique among his contemporaries, however, his primary loyalties were not fundamentally altered by the various processes of socialization.²⁷⁹

While the university preparation had a heavy theoretical element, the work of the Prussian bureaucracy was practical. They were focused on the application of reforms in Prussian society, though not necessarily as a positive agent for those reforms. Sheehan argues that “nineteenth-century legal education did not have much practical value,” and that “legal training and fluency in ancient languages were supposed to foster a political elite... The official’s education was meant to train his mind, build his character, and encourage to develop certain values.”²⁸⁰ The more practical skills were developed on the job. Ketteler certainly held to this notion of education as a *Bildung* and his letters of the period offer no insight into his particular legal reading list, but it is clear that for the role of *Referendar*, he needed a grasp of Prussian legal principles and codes. Westphalia was included in the 80 percent Catholic Rhenish Confederation that passed into Prussia’s control after the decisions of the Congress of Vienna in 1815.²⁸¹ Interestingly, Ketteler’s father would have been engaged in the administration of the new laws in Munster during

²⁷⁸ *Ibid.*, 509.

²⁷⁹ *Ibid.*, 519.

²⁸⁰ *Ibid.*

²⁸¹ The Prussian Civil Code was not a universally applicable law, and its introduction into the Rhineland did not eliminate all aspects of the Code Napoleon which had been promulgated there in 1803.

this time. Westphalia itself, including Munster, came under the specific jurisdiction of the Prussian Civil Code ten years later in December of 1825,²⁸² just eight years before Ketteler received his first bureaucratic position. This was a time of reform for many areas of Prussian society, regarding property, taxation, military service, labor, family, and religious minorities. All of these reforms required legal codification and interpretation, and this was the work of Ketteler's bureau of government.

3.3. Ketteler's *Darstellung* (1836) Shows His Early Understanding of Rights And His Identification With The Historical School And Its Romantic Organic Social Theory

Ketteler's 1836 paper had an unwieldy title: "A Survey of the General Principles followed by the Prussian State in Governing the Jews and Mennonites since the year 1815 and the Legal Condition of these Religious Groups in the Administrative District of Munster."²⁸³ Within this *Abschlussarbeit*, or final thesis, Ketteler argued that rights emerge historically as elements of a stable, well structured, and traditionally rooted social order. Rights are concrete expressions of social values recognized empirically within the matrix of just human relations. The codification of rights in the positive law, on the one hand, provides a legal framework that safeguards society's fundamental social values. On

²⁸² Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:26.

²⁸³ Iserloh adds the following quote from Pfülf describing the context of the work: "Kurz nach seiner Ernennung zum Referendar am Oberlandesgericht im September 1835 stellte Ketteler das Gesuch, ins Verwaltungsfach überwechseln zu dürfen. Dem Gesuch wurde entsprochen. Vom 23. November 1835 bis zu seinem freiwilligen Ausscheiden am 28. Mai 1838 arbeitete er als Referendar bei der Königlich Preußischen Regierung in Munster. Aus dieser Zeit hat sich die vorliegende Probearbeit [test paper] erhalten, zu deren Abfassung Ketteler durch Verfügung des Regierungspräsidenten vom 16. Februar 1836 aufgefordert worden und die am 6. Mai abgeschlossen war. Sie ist mit jener Ruhe und Klarheit abgefaßt, welche auch später die Schriften v. Kettelers stets gekennzeichnet hat." *SWB I*, 5:43, quoting, Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 1:41n.

the other hand, the codified rights function as moral benchmarks illustrating society's progress, the common good being the measure and goal of that progress. What Ketteler rejected is the construction and imposition of rights as timeless universals—discovered in a way analogous to the discovery of the laws of the physical sciences.

In this *Darstellung* Ketteler put forward a defense of the rights of Jews and Mennonites in Munster, as the title suggests, but with implications and suggestions for the entire area under Prussian control, including those territories acquired following the Congress of Vienna. Though it is important to not give too much weight to this work, it was an early grappling with the law and the structure of rights in Prussia, it reveals the nature of his legal mind as he formulated an argument defending religious minorities using the rights language of the Prussian legal system. Also importantly, it reveals his allegiance to Savigny's historical school of jurisprudence over and against the liberal and positivist legal tradition (*Begriffsjurisprudenz*) of their most important representatives, Anton Thibaut and Anselm Feuerbach.²⁸⁴ Two points are critical here: First, Ketteler's reliance upon a historical method of analysis allies him with Savigny and against the German liberal jurists and the philosophical foundations that underpinned their political positions—including their theories of rights. Second, though Ketteler follows a historical method, his conclusion to defend Jewish rights is independent of Savigny's own conclusion to "modify and even reverse the process of Jewish emancipation, which he perceived as a threat to the development of an authentic communal consciousness."²⁸⁵

²⁸⁴ Anselm Feuerbach was the father of Ludwig Feuerbach, whose writing famously influenced the young Karl Marx.

²⁸⁵ Toews, *Becoming Historical*, 298.

Ketteler's *Darstellung* was written at a time when modern secular law was emerging in the German states in the decades after the French Revolution. Kant's decisive critique of natural law as a basis for law came at the end of a century of legal complexity for Germany. Two schools of legal philosophy emerged after Kant to compete for control of the legal structure.²⁸⁶ The struggle between *Begriffsjurisprudenz*²⁸⁷ and the *Geschichtsjurisprudenz* was a manifestation of the larger social and philosophical struggles between, respectively, the Enlightenment liberals and the more conservative Romantics.²⁸⁸ Not surprisingly, Ketteler's *Darstellung* places him squarely in the historical school in both his method and conclusions. These two schools represent the general philosophical poles between which all jurists would place themselves, though, interestingly, neither of these poles rejected subjective rights. Rather, rights were claimed by a variety of groups using various philosophical arguments and traditions. Differences were not to be found in the rights claims themselves, but in the diversity of existing legal and philosophical traditions used to support those claims. Potential sources included feudal law, Roman law, Germanic law, and canon law.

The following analysis of Ketteler's early work foreshadows his later work as a bishop, showing how he was rooted in the German legal traditions without compromising his strong Catholic identity; he held these together simultaneously despite the pressure of

²⁸⁶ That structure includes both making of law and the interpretation of that law by jurists.

²⁸⁷ Literally, 'Concept' jurisprudence, this developed out of the natural law school.

²⁸⁸ Norbert Brieskorn suggested the distinction between *historische Rechtsschule* and *begriffsjuristischer Positivismus—Pandektistik*. An important resource here is Hans Schlosser and Erich Molitor, *Grundzüge Der Neueren Privatrechtsgeschichte: Studienbuch*, Completely revised edition of work begun by Erich Molitors, 5 ed. (Heidelberg: Müller, Juristischer Verlag, 1985).

their oppositions. His idea of the state as a *Rechtsstaat*, i.e., structured by law, as well as the basic legal principles noted here, remained important for him later during his early ecclesial career when he became more publicly associated with the Catholic Romantic movement and its ‘organic’ theory of state. This organic theory of state, which will be discussed more fully with Ketteler’s 1848 writings, rejected the ‘liberal’ impulse to fix social ills with abstract and timeless legal codes. The Romantics tended to shun such law as lifeless and dangerous social tinkering. They looked instead for legal reforms that emerged from within society, from a conversion of heart and not from the external impositions of state authority.

3.4. Analysis Of Document: *Darstellung Der Allgemeinen Grundsätze: Rights Entail Entering Into A Matrix Of Sustained Social Relations That Are Legally Recognized*

Ketteler’s *Darstellung* was an analysis of the legal condition of the Mennonites and Jews. In it, he determined that the relevant laws in the states under Prussian control lacked the necessary clarity for them to be justly applied. This ambiguity made the law ‘defective,’ in Savigny’s terminology, and therefore in need of an ‘Interpretation of Written Law.’ Ambiguity in laws makes them defective because the role of every written law is the “establishment of the nature of a juristic relation,”²⁸⁹ i.e., a relationship that can be recognized and protected by the legal system. In the case of Jews and Mennonites in Prussia, Ketteler found laws containing protections for legal minorities in the form of established rights. However, he found other laws that restricted those theoretically protected rights. The inherent contradiction, or ‘defect,’ leaves a jurist with confusion

²⁸⁹ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 171.

about the law's application and ground. In its application, the law is defective because there is confusion as to which rights can be effectively claimed by Jews and Mennonites in Prussian courts. In its ground, the law is defective because the Prussian legislative system continued to express contradicting principles regarding the status of Jews and Mennonites within the *Rechtsstaat*, i.e., within what is supposed to be a unified legal system. In sum, contradictions and confusion about the law are defects, and every healthy legal system has a process to remedy defective law. This was Ketteler's role in the *Darstellung*.

For Savigny, all interpretation has four basic elements: grammatical, logical, historical, and systematic, and as a principle of juridical judgment, a jurist may never reject a case because of either not enough evidence or not enough law. "The obscurity of a written law ought never to deter [a judge] from forming a definite opinion upon the import of the law and from pronouncing a decision accordingly."²⁹⁰ When settled law clearly defines juristic relations, the jurist's interpretation and thus application of the law is straightforward. Only in cases of ambiguous juristic relations must the jurist go deeper and probe the ground, or basis, of the incomplete or ambiguous, i.e., defective, law. For the juristic relation in difficult cases to be appropriately determined, the interpreter places himself in the standpoint of the original legislator. "That is the business of interpretation which we may therefore define as the reconstruction of the thought dwelling in the law."²⁹¹ In Ketteler's analysis of defective law in his *Darstellung*, the grammar and logic of the case were secondary to its systematic and historical elements. The inconsistent

²⁹⁰ Ibid., 168.

²⁹¹ Ibid., 172.

rights of religious minorities called into question the systematic element of law that was based upon the *Rechtsstaat* principle that “all the institutions and rules of law are bound up into a great unity.”²⁹² Thus the nature by which the law had entrance, i.e. its historical element, must be probed to reveal its special ‘ground,’ i.e., its meaning as it was originally conceived by the legislator. The remedy for such a defective law, which in this case contains an “incompleteness of expression”²⁹³ as well as contradictions in expression, required an explanation with reference to other existing laws, laws that were in principle innately connected with one another.

Since Ketteler was in fact not a judge, but a bureaucrat recommending legislation, the form his analysis takes is a recommendation for reforming legal inconsistencies. His approach is therefore analogical to that of a judge, with one important distinction: Whereas a judge is limited to the actual content of the written law and may only consult its grounds to determine tough cases, the legislator may move beyond interpretation to actually make law. Even when, again in tough cases, the judge must look for the grounds of the law to understand defections, he is limited to the specific grounds of that law and may not appeal to such broad grounds as ‘justice’ or ‘equality,’ for example. New legislation, on the other hand, must appeal to broad grounds as it adds to the breath of the law and fills the gaps of older incomplete or ‘defective’ laws. Savigny describes the process this way: “If UNITY is wanting we have a CONTRADICTION to remove—if COMPLETENESS, we have a GAP to fill up.”²⁹⁴ No independent legislature existed in

²⁹² Ibid.

²⁹³ Ibid., 182.

²⁹⁴ Ibid., 212. All caps in reprint edition.

the Prussian monarchy from 1815-1840. The king relied upon the *Staatsrat*, the bureaucratic structure, to recommend legislation.²⁹⁵ Exercises like Ketteler's *Darstellung* were relevant to the governing structure and showed how the ideas of academic schools filtered into state ideology. According to the *Geschichtsjurisprudenz*, it is entirely justified and exemplary when new legislation taps universal principles to solidify and simplify juristic relations and by such a method to remove defective law.

Ketteler's analysis in the *Darstellung* begins with a broad historical outline of the legal definition and treatment of Jews in the Middle Ages, when the Jews held no rights *qua* citizens, but were entirely dependent upon the largess and self-interest of the nobility for protection. Ketteler's potential prejudices regarding the Jews, whatever they may be, are not clear from this descriptive account of their legal status. If a moral tone can be perceived, it is in the disapproval of the legislators' inconsistency—they granted rights inconsistently and in different locations, they granted rights and then retrieved them, and they granted rights in such a way that their exercise caused more harm than good.

The *Darstellung* uses the word *Recht* as a subjective right in Savigny's sense.²⁹⁶ It is a privilege describing a judicially defensible power: *Im Mittelalter war das Recht die Juden aufzunehmen und zu schützen, gleichsam eine Reg[e]l, welches nur der Landesherr auszuüben berechtigt war.*²⁹⁷ Yet, the right here was a right not of the Jews to demand protection but, depending upon the region, a right of the ruler to both grant protection and receive taxes in return for that protection. This unstable protection that the

²⁹⁵ Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:16.

²⁹⁶ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 6.

²⁹⁷ *SWB I*, 5:44. *Darstellung* (1836).

Jews received, a *Schutz*, is distinguished from the ruler's right as well as the right of citizens, a *Staatsbürgerrecht*, which was really a bundle of stable rights granted to persons holding a legally persistent status that could be passed down to heirs. For the Jews under *Schutz* protection, as opposed to *Recht* protection, each generation was at the mercy of the king directly, or of the local ruler with the king's permission.

The understanding of rights is clear here because, as Ketteler described, the Jews did not possess them. They had no rights, i.e., claims (*Ansprüche*), by which they could demand protection or, after a violation, seek redress in virtue of the right. In sum, because of their exclusion from official status in society, they held no rights. This is different from the modern 'human' right, which is based simply on one's humanity and cannot be alienated. The right that was being denied the Jews in the Middle Ages, but presumably being granted to Christians, was a privilege right based upon membership or social participation. It gave the possessor a power, or claim (*Anspruch*), that could be defended by legal means if necessary.²⁹⁸

Ketteler appeals to two kinds of political principles in his argument: a participatory principle and a more fundamental principle. First, the participatory principle of citizenship grants civil rights (*Staatsbürgerrecht* or *Ortsbürgerrecht*) to a person based on participation in the civil community. Once granted the participatory right, a citizen may make claims based upon that membership status in the community. Second, Ketteler analyzes this situation in light of what he claims to be modern principles of equality and

²⁹⁸ Of interest regarding the situation of the Jews in nineteenth-century Germany is Jacob Katz's *Out of the Ghetto: The Social Background of Jewish Emancipation* (1973), and his *Jewish Emancipation and Self-Emancipation* (1986)

the freedom of conscience (*die herrschenden Grundsätze der Gleichheit und Gewissensfreiheit*).²⁹⁹ These principles are of a more fundamental type and are expressed in the “desires of the subjugated religious sects for emancipation.” I distinguish these ‘principles’ from rights because Ketteler himself does not refer to them as rights, but as principles, *Grundsätze*, which if respected are expressed by the state as rights. Thus, rights have a critical role, but they are secondary in that they are the juridical expression of more fundamental principles.

The *Darstellung* begins with a historical treatment, analyzing the historical development of rights in Germany for Jews and Mennonites. It then discusses the confusing legislation that followed Prussia’s emancipation legislation of 1812. The legislature embraced principles of equality and freedom, and yet it continued to pass restrictive measures that withheld rights from Jews in specific cases. The *Darstellung* concludes with a judgment that is both progressive and conservative. It is progressive in its adoption of expanded rights that are consistent with existing laws and principles and that contribute to the common good. It is conservative, first, in its critique of legislation that is ‘imposed’ from without, and, second, in its critique of rights legislation that is not uniformly and consistently applied.

The Mennonites provided an effective contrast to the Jews for Ketteler because in their citizen-less status they had shared the Jews’ precarious civil existence. Yet apart from their refusal to take on military service and to swear oaths, they were readily incorporated into German society. Ketteler pointed to the 1830 legislation that granted

²⁹⁹ *SWB I*, 5:44. *Darstellung* (1836).

full civil rights to Mennonites who accepted military duty. Those who refuse may do so according to the principle of freedom of conscience, but they are burdened with taxes and restrictions in their purchase of land, i.e., in their incorporation into the society. This is reasonable, argues Ketteler, because it preserves the principle of religious freedom, while requiring a sharing of society's burdens among citizens. If the burden of military duty is not assumed, some other burden must take its place.³⁰⁰

The Jews were a more complex case given their long history of marginalized status in Europe. Ketteler referred to the differences of the Jews as based not upon their free choice, but upon discrimination against them. This situation was so rooted in religion and history that the government's declarations of equality or emancipation were of dubious value, thus explaining why local governments were not enforcing the laws.³⁰¹ Ketteler addressed the specific elements that posed obstacles to the Jews' shared civil status of citizenship. There was the religious accusation against the Jews for being responsible for Jesus' death, which led to their dispersion. History, Ketteler argues, supports this religious truth as the Jews throughout history have continued to lack a homeland and are in a constant state of waiting for the messiah. The attempt to use legislation to make the Jews fellow citizens was thus seen as powerless and running counter to the divine order. Thus, historically, the most practical solution to this problem of incompatibility was to make laws that limited the danger Jews posed to the social order: "*durch gesetzliche Einschränkungen diese feindliche Menschenklasse möglichst unschädlich zu machen,*

³⁰⁰ *SWB I*, 5:46. *Darstellung* (1836).

³⁰¹ *SWB I*, 5:46. *Darstellung* (1836).

[translated as] through legal restrictions make this hostile class of people as harmless as possible.”³⁰²

These are not Ketteler’s positions, but are given as the general ground of the old laws. The general ground for the new laws of emancipation extending rights to the Jews are the principles of equality and freedom of religion (conscience). Yet the defect in the law is clear from the numerous examples Ketteler provides detailing rights reserved from the Jews. Ketteler uses the example that Jews were restricted from the official office (*Staatsamt*) of surveyor (*Feld[ver]messer*)³⁰³ in the bureaucracy. Jews had been given the rights to other *Staatsämter*, but were being denied this position because of a claimed lack of moral virtue. This was an open contradiction in the “spirit of the law” and thus was strongly condemned.³⁰⁴ The contradictions in principle were not only damaging to the persons denied the right, but they also created a situation of blatant injustice and were thus deserving of condemnation. The Jews invested funds, time, and effort in preparing for positions that were later denied them by the shifting law. The greatest evil posed by the government’s oppressive measures, however, would be that Jews would renounce their own religious beliefs in order to regain the legal claims that they had previously been granted, but were denied them because of their religious affiliation.³⁰⁵

³⁰² *SWB I*, 5:47. *Darstellung* (1836).

³⁰³ *SWB I*, 5:49. *Darstellung* (1836). Ketteler uses the term “Feldmesser” for surveyor. Modern German uses the word “Feldvermesser.” “Statt daß man, wie zu erwarten gewesen war, die völlige Gleichstellung der Juden mit den Christen in Bezug auf die Fähigkeit, Staatsämter zu verwalten, durchführte, wurde das Amt eines Feldmessers für ein Staatsamt erklärt, welches ein Jude nicht bekleiden könne.”

³⁰⁴ *SWB I*, 5:50. *Darstellung* (1836).

³⁰⁵ *SWB I*, 5:50. *Darstellung* (1836).

Ketteler's conclusion is that the decrees from 1815 to his time had consistently restricted and injured the civil status of the Jews. Further, this negation of personal rights had negative consequences for the whole of society. "Such a violation (*Kränkung*) can never be required for the common good (*das allgemeine Beste*). Indeed the true common good exists in the well-being of individuals and in the protection of their rights (*dem Schutze ihrer Rechte*).³⁰⁶ Rather, there is a need for consistent laws that extend to the newly acquired territories as well. Specifically in Munster, since the region experienced two separate legislative systems, including the French Civil Code, the equal citizen rights of Jews that already existed should not be removed. In this, Ketteler argued using a legal principle analogous to *stare decisis*, such that legal privileges, decisions, and precedents, once valid, should be preserved. Rights are 'sticky' in the sense that the present validity and application of rights should reflect a historical consistency; a consistency over time and also place in various local districts contributes to reasonable expectations within society.

This final section of Ketteler's work offers recommendations for legislative reform in the composite Prussian territories. He advocated, first, a realistic assessment of the rights already extant. Second, he advocated the stabilization, unification, and protection of already existing rights for the Jews. Third, he argued that this process is necessary for the legitimacy of the entire system of law. Ketteler's argument is that though it may not be possible to simply eradicate differences between Jews and Christians, acceptance of citizenship brings with it a commitment to a social order. Mennonites may enter into

³⁰⁶ *SWB I*, 5:51. *Darstellung* (1836).

citizenship with either their acceptance of military service or some compromise to compensate for the loss of their participation, e.g., in the form of extra taxes. Jews too, ought to be able to negotiate a way of participating in the state without compromising their religious beliefs and enjoy those rights of citizenship proportionate to their contribution.

The newly acquired states of Prussia stretched across many miles and were often not contiguous. These states lacked a uniform, stable, and thus predictable legislative system. Unlike the liberal constitutionalists, Ketteler did not think that Prussia could simply legislate laws or rights in abstraction from the actual historical situation. Like the liberal advocates of constitutions (*konstitutionelle Verfassung*), however, he recognized the need for uniformity and predictability in the courts and governments. Instability and legal capriciousness were critiqued because they created hardships. Laws, when unpredictable, caused waste and resentment, i.e. social disunity. For example, Jews were led by the law to believe that they would be eligible for teaching positions. They then dedicated much time preparing, only to later find contradictory laws keeping them from such teaching appointments. Similarly, once rights are offered to a people, even under previous regimes, it is a grave injustice to then remove those rights. Therefore, the Jews governed even temporarily by the French in the Rhineland ought to continue to enjoy the freedoms of the French Civil Code.

Rights are 'sticky' in that they adhere to society, and they gain legitimacy to the degree that they are habitually received within a social order. This is a very different understanding of rights than that expressed in the rights declarations of the French

Revolution. According to Ketteler, there was a sense that greater legal universality was important on some levels, but the legitimate claims of local legal bodies had to be respected. The value of this position will be demonstrated in the discussion of his theory of subsidiarity below. The *Darstellung* reveals, performatively, his application of Savigny's principles of jurisprudential interpretation: the jurist's role is not to dictate law to society, but to find the law already present in society, recognize its development, and then to make it rational, consistent, and in conformity with an understanding of the good for that society. The goal is preserving advances and resolving legal contradictions with a view to the common good, or in Savigny's terminology, the greater unity.

Thus the *Darstellung*'s critique is explicitly leveled at the reformers' lack of consistency, but Ketteler's evaluation and recommendation to his superiors is to protect those emancipation rights once they are achieved. Thus, there is a limited recognition and even defense of the liberal influence in German law. If the Jews have been granted civil rights, those rights represent the collective will of the legislator, and thus backsliding is an insult not merely to the Jews, but to the structure of law itself. This is therefore as much a critique of the obstinate aristocracy as it is of the liberals.

3.5. Three Points On Ketteler's Position Regarding Jews

Ketteler's *Darstellung* offers a legal opinion on the rights of Jews from preceding periods to his own time, which were by all accounts shamefully lacking even after Prussian attempts of 'emancipation' legislation. Ketteler's own regard for the Jews is problematic in itself, if the few troubling comments in his correspondence reflect his

settled opinion.³⁰⁷ But in light of later German history, his prejudice also demonstrates a potential weakness in his theoretical system, which so influenced the German Catholic Church. When the tradition substantiates and shelters unjust prejudices, as it did with the German Jews' social marginalization, it cannot be trusted as a sufficiently just source of theory. The fact is that without the liberal pressure of 'external' constitutional reforms, Ketteler's model of law seems static and biased towards society's 'haves' to the exclusion of its 'have-nots.'

With that caution, it is creditable that, in his probationary document coming well before his earnest theological/political study, Ketteler argues unambiguously for a position that rejects religious difference *per se* as a basis for legal discrimination. Further, in light of Germany's twentieth-century legal catastrophe, there is no trace of the jurisprudential moral disinterestedness that could grant a jurist a purely bureaucratic and thus innocent role in government-sanctioned injustice. That said, the question remains: To what extent is this tradition-laden system open to points of objective justice? In other words, a legal system must be ultimately judged by an affirmative answer to the question: Is it just?

In response, Savigny addressed this issue for *Geschichtsjurisprudenz* by arguing that the legal tradition is one source of law among others, including social mores, religious teaching, philosophical principles, and other academic scholarship. These sources are part

³⁰⁷ In a letter to Wilderich, Ketteler mentions a pamphlet, *Kampf und Sieg des Glaubens. Eine Erzählung von einem katholischen Geistlichen, über das erste Gebot*, by Joel Jacobi (1810-1863), a Catholic convert from Judaism. Ketteler notes that the pamphlet completely changed his mind to sympathy from his former ideas of oppression and persecution. *SWB II*, 1:55. Ketteler's letter to Wilderich, from Munich, February 3, 1840.

of a web of human understanding that is itself embedded in a tradition that he calls “the practice of culture.”³⁰⁸ It is ‘just’ to the degree that it is critical and reasonable, i.e., to the extent that it practices its most authentic traditions and also confronts its inconsistencies and paradoxes in a public way without resorting to violence. As Savigny argues, the legal tradition does not assert a mastery over the present, but provides the present with an understanding of those principles that have contributed to its successful ordering.³⁰⁹

When speaking of his own project, he gives insight into resolving the problem posed to Ketteler’s system:

It follows that it will have an especially critical character... Our intellectual life would be easy and comfortable if we could let merely the clear simple truth operate exclusively upon us and thus ever progress undisturbedly to fresh knowledge; but we are encompassed and hemmed in on all sides, by the rubbish of false or half-true ideas, through which we must make a path for ourselves... Our intellectual power therein finds its general education and each single truth, won through this conflict with error, becomes in a higher sense our property and shows itself more fruitful for us than if we had, passively and without effort, received it from others.³¹⁰

Ketteler seemed to have made a disappointing moral error in his Jewish prejudices, but his legal principles are all the more important as they advocated the extension and enforcement of rights for the Jews in Prussian jurisdiction—thus overruling the moral blindness in his personal opinions. This is precisely the point of the Romantics’ respect for tradition—that potentially capricious present human opinion is continually disciplined, directed, and enlightened by the centuries of social and moral wisdom. As

³⁰⁸ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, xiv.

³⁰⁹ *Ibid.*, v.

³¹⁰ *Ibid.*, xvi.

bishop, the law and the nature of its development remained important sources for Ketteler of moral and rhetorical insight for dealing with social questions.

Certain points should be made regarding Ketteler's attitude towards Jews in the *Darstellung* and elsewhere. The first is that outside of the matter-of-fact descriptions of discrimination and injustice against the Jews in the *Darstellung*, there are very few references to Jews in his papers and books. Secondly, though his few references to Jews are not enlightened, they are also not malevolent. There is nothing to be found in his papers to identify him with the racism that informed late nineteenth-century genocidal anti-Semitism. That racism is also directly incompatible with his biblical anthropology based upon God's Creation of all human beings—an account that demonstrates God's special regard for the Jews. Yet Ketteler's early position seems to be that the Jews were a fractious element in German society.³¹¹ Though the Jewish population in nineteenth-century Germany grew to over one million souls, including a significant population in Mainz, there seem to have been no Jews in Ketteler's close circle. Some consolation may be taken by his praise of Stahl and Jacobi, converted Jews. Thirdly, as was argued above in Ketteler's favor, his argument in the *Darstellung* and elsewhere is uncompromising in advocating basic non-negotiable human principles of freedom of conscience, and later for human dignity.

These are 'human' principles that do not exclude people because of religion or race. This language is more universal than the 'citizen' or 'German' rights language of the 1848 Frankfurt Parliament's *Grundrechte* that protected all citizens. Moreover, his

³¹¹ *SWB II*, 1:55. Ketteler's letter to Wilderich, from Munich, February 3, 1840.

developing argument leaves no room for harsh treatment or for excluding the Jews from basic civil rights. These legal and moral principles are not concessions or compromises to preserve the peace. Rather, the preservation of these rights is conducive to the legitimacy of all rights and the protection of the common good. It is also in Ketteler's favor that he was a resolute opponent of the absolutist elements in the Prussian government, with its nascent fascist tendencies already apparent in Bismarck's tenure. He recognized the dilemma posed by legal positivism's independence from moral criticism, an independence which has been cited as one necessary pre-requisite for the rise of National Socialism.

Finally, some insight into Ketteler's leadership as bishop can be gained by his support for Peter Reichensperger's defense of Jewish equal rights in 1854 in the Westphalian local assembly (*Gemeindeämter*). Jews had been made *de jure* equal citizens by the Prussian constitution in 1850, but there was continuing reluctance to allow them access to official positions in the state bureaucracy (*Ämter*).³¹² Reichensperger, one of the founders of the Catholic 'Center' party, made the case that excluding Jews from religious freedom would destroy the integrity of the Prussia law, thus endangering all religious freedom. During the ensuing public debate that essentially formed the Catholic political stance towards Jews up until 1870, Ketteler sent a letter to Reichensperger supporting his "view of the constitution's value for freedom of the church."³¹³ This was no appeal to

³¹² Uwe Mazura, *Zentrumspartei Und Judenfrage 1870/71-1933: Verfassungsstaat Und Minderheitenschutz*, vol. Reihe B, Forschungen; Bd. 62, *Veröffentlichungen Der Kommission Für Zeitgeschichte* (Mainz: Matthias-Grünwald-Verlag, 1994), 47. Mazura notes the context that gives Ketteler's following fragment context.

³¹³ *SWB II*, 2:565. From a fragment of a letter to Peter Reichensperger, April 13, 1854.

justice for justice's sake, but Catholics' own precarious position in Germany made them sensitive to other religious groups' situations, and gave them all the more appreciation for the value of constitutionally defended rights.³¹⁴

³¹⁴ Mazura, *Zentrumspartei Und Judenfrage*, 52.

4. Ketteler And The Rise Of German Political Catholicism After The Cologne Conflict 1837

4.1. 1837/38 Cologne Conflict (*Kölner Wirren*): Protest Resignation From Prussian Civil Service After Arrest Of Archbishop Clemens August von Droste-Vischering

An incident on November 20, 1837, radically changed Ketteler's life and made a further career in the Prussian bureaucracy impossible. In his mind, the events of the Cologne Conflict delegitimized Prussian rule and its *Rechtsstaat* principles by revealing the absolutism that lurked behind its exercise of law with regard to the church. It began when the archbishop of Cologne, Clemens August Freiherr von Droste-Vischering, was jailed for refusing to recognize Prussian directives regarding mixed marriages and the education of children from such marriages. This happened just two years after Droste had been appointed to the archbishopric 1835. Under Prussian law from the beginning of the nineteenth century, the church minister served not only as a church representative, but also as a state official in that the state recognized the legal validity of the church ceremony.³¹⁵ The Prussian Civil Code had required daughters to follow the religion of their mother, and sons of their father, but that changed in 1803 when the king legislated that all children would follow the religion of their fathers.³¹⁶ This was the law that

³¹⁵ Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:191.

³¹⁶ Huber explains the constitutional situation after 1803: "Das Allgemeine Landrecht bestimmte in Teil II Tit.2 §§76-78 über die Mischehen, daß Söhne in der Konfession des Vaters, Töchter in der Konfession der Mutter zu erziehen seien, entgegenstehende Vereinbarungen der Brautleute ß damit auch alle Versprechungen vor dem Priester ß erklärte die Vorschrift für nichtig. Die salomonische Härte dieses Rechtsgrundsatzes, der die konfessionelle Einheit der Familie aufhob, war dadurch etwas gemildert, daß niemand berechtigt war, einer abweichenden Praxis der Eltern zu widersprechen, solange diese sich über die religiöse Erziehung der Kinder einig waren. [new

became valid for the mostly Catholic Rhineland provinces in 1815. Prussian officials considered the change a neutral and a reasonable effort to unify families. However, Catholics were sensitive to the fact that the extension of Prussian jurisdiction brought an influx of Prussians officials who were disproportionately Protestant men. That sensitivity merely intensified Catholic distrust of the cultural politics pursued by Prussia's Frederick William III.

The Prussian king and his ambassador to the Vatican, Christian Carl Josias Bunsen, shared a hope that the various German peoples could be united under a common German Christianity. This hope was behind the state-imposed unification of Calvinist and Lutheran confessions (1817) as well as efforts to create a unified liturgy to be imposed upon all Protestant churches.³¹⁷ Bunsen had served as ambassador to the Vatican for a decade before being dismissed for his mishandling of the conflict, yet his view that German Protestantism was the most advanced form of human culture and an inevitable development of all religion in Germany was one that he shared with the king. It was also a view that directed a Prussian cultural policy that attempted to 'reform' individual German Catholics with state-supported education while it, obviously unsuccessfully,

paragraph] Nach dem Reichsdeputationshauptschluß von 1803, der Preußen eine weitere Vermehrung seiner katholischen Territorien brachte, änderte der König den Grundsatz des ALR ab. Die Deklaration vom 21. November 1803 schrieb vor, daß für alle ehelichen Kinder die Konfession des Vaters maßgebend sei. Die Deklaration verbot alle abweichenden Vereinbarungen. Den Geistlichen untersagte sie, Versprechungen über die religiöse Erziehung der Kinder von den Nupturienten zu verlangen. Doch wiederholte sie den Satz des Allgemeinen Landrechts, daß eine Interention unzulässig sei, solange die Eltern über die von der Regel abweichende Kinderziehung einig blieben." Ibid.

³¹⁷ Toews, *Becoming Historical*, 88-89.

attempted to gradually dilute the authority of the Catholic bishops by avoiding direct confrontation.

Bunsen was convinced that the Catholic Church could only assert disruptive claims if it could muster strong popular support. Such support, however, could be prevented or dissipated through a concerted policy of cultural education... Education of the Catholic clergy was particularly crucial: 'To further the historical and philological education and scholarship of the catholic clergy, and thus improve, through such educated clerics and scholars, the education of the Catholic populace, is to rob religious and hierarchical fanaticism of its power, to annihilate it.'³¹⁸

The Cologne Conflict demonstrates the continuing identity and loyalty of Rhineland Catholics to the structures of their church and the persisting tensions of their incorporation into the Prussian state. Catholics shared a sense of national German identity, but that identity did not diminish their willingness and ability to reject what they perceived to be overreaching state authority. The addition of distrust to the situation only fueled the passions concerning the bishop's incarceration. Görres assumed a leadership role of resistance with his book *Athanasius* and conducted continued political criticism in the public sphere with his journal articles. Joined with other outraged Catholics, their books and articles stirred the population in a way that was distinctly modern.

Regarding the essential question of the Cologne Conflict, namely, whether the church or the state has priority in recognizing marriages, Savigny's specific instruction is mute, but generally supports the Prussian state.³¹⁹ Insight into his position is found in the inestimable value he placed on the family for the state. His *System of the Modern Roman Law*, published in the midst of the crisis, gives significant attention to marriage in the

³¹⁸ Ibid., 93. Toews is quoting Friderich Nippold's 1868-71 collection of Bunsen's letters, I:531.

³¹⁹ The contemporary German solution of two distinct ceremonies, one for legal recognition and one for religious or sacramental purposes, was seemingly never seriously entertained.

sections on family law. In his organic theory, family relations are most essentially and naturally elemental, but they are also subject to juridical definition. “In families are embraced the germs of the state and the completely formed state has families, not individuals immediately for its constituent parts.”³²⁰ The juridical nature of family relations is an important buttress and protection of the institution, but its natural and moral natures are more primary. On the one hand, Savigny prescinds from over-emphasizing the juristic relations of family members to the detriment of more fundamental natural relations; “the most important elements of that relation stand under the protection of morals not of law.”³²¹ On the other hand, he asserts that “marriage has the following operations upon other juristic relations: ... the arising of the paternal power over the children born of the marriage.”³²² This ‘paternal power’ confirms the 1803 Prussian law regarding the religion of children following that of the father, and thus tips Savigny’s hand to the Prussian position in the crisis. Savigny had placed the churches beyond the state’s legal purview, but did not grant the churches any authority independent of the state. This position was consistent with a protection for the churches’ independent internal functions, *jura in sacra*, but he essentially left it to the state to determine its own limits.

For the Roman Catholics, the importance of the subject of marriage is underscored by the papal documents dealing with the topic in the German regions. Pope Pius VIII’s 1830 letter “Litteris” to the German bishops “granted German priests permission to

³²⁰ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 279.

³²¹ *Ibid.*, 283.

³²² *Ibid.*, 287.

accept mixed marriages up to the point of, but not including, active participation in the marriage ceremony.”³²³ However, this was hardly a solution given the essential role of the church in conducting such ceremonies and dealing with the Catholic participants whose actions placed themselves outside of the church’s membership. Further, Pope Gregory XVI’s 1832 encyclical on mixed marriages, *Summo Iugiter Studio*, begins with the claim: “The Apostolic See has always ensured that the canons forbidding the marriages of Catholics with heretics have been observed religiously.”³²⁴ Gregory offers the rare possibility of an exception to prevent greater evils, but, like Pius before him, he offers no possible avenue of regular compliance to the Catholic bishops and priests under Prussian jurisdiction.

Droste, unlike his predecessor as archbishop of Cologne, was unwilling to compromise and work within secret face-saving arrangements. He effectively upended previous agreements and forced a confrontation between the Catholic Church and the Prussian state under the now quite old Hohenzollern monarch Fredrick William III. Because the king was essentially the legislator in the Prussian system, and given the strongly contradictory principles of the Prussian state and the Catholic Church, this conflict between ‘princes’ was not surprising. Droste’s appointment to the bishop’s seat in Cologne was itself a signal away from the more liberal and rationalist tendencies in the diocese of Cologne and its Rhineland suffragan dioceses of Trier, Munster, and

³²³ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 71.

³²⁴ Gregory XVI: *Summo Iugiter Studio*, On Mixed Marriages, to Bavarian Bishops. Promulgated May 27, 1832.

Paderborn.³²⁵ Droste zu Vischering was from a much more prominent and wealthy Munster aristocratic line than the Kettelers, and as bishop he followed a long line of Munster Droste-zu-Vischerings to the episcopacy, all accustomed to ruling as princes as well as pastors. By replacing Count Ferdinand August von Spiegel, a conciliatory figure more sympathetic to some liberal aspirations, Droste's appointment signaled a move closer to the Vatican's position as articulated in the recent papal documents under Pius VIII and Gregory XVI.³²⁶

Droste was also an old adversary of Georg Hermes, and he sought to reverse the influence of the rationalist theologian's significant influence in the University of Bonn where the Catholic seminarians were required to study according to Prussian law. Bonn was also a center of Febronians, whose ecclesiology included principles of greater autonomy for local bishops and closer identity with national governments.³²⁷ Support for these forces in the university was part of a larger effort by the Prussian state to remove Vatican influence in the German Catholic Church. Berlin, preferring the control they enjoyed in the Protestant churches, instituted policies to infuse Febronian and Gallican 'national church' ideals into the Catholic seminaries. Droste thus countered their efforts when he forbid his seminarians from studying in the university after the professors of

³²⁵ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 65.

³²⁶ An example is Pius VIII's letter "Litteris" to German bishops March 30, 1830 and Gregory XVI's 1832 encyclical on mixed marriages: *Summo Iugiter Studio*. Bolton notes that Pius VIII's "Litteris" "granted German priests permission to accept mixed marriages up to the point of, but not including, active participation in the marriage ceremony. This did not, in fact, authorize obedience to the Prussian law." *Ibid.*, 71.

³²⁷ *Ibid.*, 61.

theology refused to officially acknowledge the condemnation of Hermes' theology in Gregory XVI's 1835 encyclical "Dum acerbissima."³²⁸

Through Hermes the University of Bonn had become a center for introducing an entire generation to modern conceptualities... The establishment of the University of Bonn in 1818 with Catholic and Protestant faculties had been a move by Berlin to influence Catholic clergy and intellectuals. Consequently the condemnation of Hermes was seen as a move by Rome to control theology and church life.³²⁹

Droste's action regarding the mixed marriages and the university went against a secret 1834 Berlin agreement with Spiegel in which he agreed to abide by the Prussian laws requiring toleration of mixed marriages despite papal pronouncements to the contrary. Droste's actions to the contrary were considered treasonous and led to his imprisonment on November 20, 1837.³³⁰ Not immediately, but gradually, German Catholics began to build up a steam of protest until it became the pivotal moment in German church-state relations, labeled variously as the 'Cologne Incident' (*Kölner Wirren*), 'Cologne Affair' (*Kölner Ereignis*), or more recently and perhaps most appropriately, 'Cologne Conflict' (*Kölner Konflikt*).³³¹ It marked the great awakening of Catholic political activity in

³²⁸ Sheehan, *German History, 1770-1866*, 617. Dietrich shows that Hermes, who died in 1831 before "Dum acerbissima," was opposed to the Romantic style of Catholic theology and emphasized the rational faculty, but actually enjoyed much Catholic favor in his early career for his critique of Kantian rationalism. Dietrich, *Catholic Theology in the Age of Idealism*, 45-47. The theological and philosophical issues raised by Hermes were obscured and overshadowed, rather than resolved, by the political crisis of the 'Cologne Conflict' (ibid., 61).

³²⁹ Thomas F. O'Meara, *Church and Culture: German Catholic Theology, 1860-1914* (South Bend: University of Notre Dame Press, 1991), 13.

³³⁰ Bolton argues persuasively that a compromise that had been worked out by a nuncio in Berlin could have saved face for both sides and avoided a provocation of Berlin. Droste's rejection of the compromise makes clear his willingness to challenge Prussian authority over certain matters deemed essential to Catholic faith. Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 75.

³³¹ These various terms reflect the politicized nature of historical accounts of the 'incident,' 'affair,' or 'conflict.' Protestant historical sources have tended to use *Ereignis*, and Catholic sources have tended to use *Wirren*, which can be translated as 'incident,' but could also be

Germany that eventually became institutionalized in the Center Party. Görres' *Athanasius* (1838) was the author's famous response that articulated the principles of that movement in defending the rights of the church.³³²

Ketteler's indignation rose sooner than most German Catholics, and he submitted a letter only ten days after the bishop's arrest requesting a six-month leave from his administrative duties. At first, he indicated that it was only a leave for further studies, but, six months later, he made it permanent in an official letter of resignation.³³³ Both his private letters at that time and his later reflections point to this pivotal time as the moment when he felt the stirrings of a religious vocation. Relinquishing the official administrative post clearly changed Ketteler's career path, but the transition did not shatter his appreciation for the value of the legal and political process. It is also important to note here that he was connected to Droste by family and social relations and that his resignation was tied up with political opposition to Prussia's encroaching bureaucratic and ideological power.

Sheehan notes that the Catholic response to the Cologne Conflict is analogous to the liberal protest of the seven Göttingen professors, in that it was a protest against the encroaching heavy hand of the Prussian state's power. "During the 1830s, liberals' commitment to constitutional government and the rule of law was most dramatically

translated as 'troubles.' See Vanden Heuvel's discussion on the terminology, Vanden Heuvel, *Görres: German Life in Age of Revolution*, 322. I follow the most recent works on Ketteler by Uertz and Petersen (both 2005) in labeling it 'conflict.' Huber also uses the terms *Kölner Konflikt* and *Kirchenkonflikt* in Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:239,250. Sheehan deals with the topic in Sheehan, *German History, 1770-1866*, 618.

³³² Vanden Heuvel, *Görres: German Life in Age of Revolution*, 329.

³³³ *SWB II*, 1:4-5.

expressed by the conflict of the so-called Göttingen Seven.”³³⁴ The coincidence of the protests is interesting in light of Ketteler’s swift, if not quite so dramatic resignation. The Göttingen Seven submitted their public protest letter on November 18, 1837 after the Hanoverian monarch had dissolved the state’s constitution. It is quite possible that Ketteler was inspired by their courageous act when he submitted his meek request for a sabbatical less than two weeks later on the first day of December.

It seems strange that Ketteler would be inspired by what Sheehan calls a liberal protest, but included among the seven professors of Göttingen, Ketteler’s former university, were men with strong ties to the historical school: Wilhelm Eduard Albrecht (1800-1876), a legal historian and disciple of Eichhorn; the historian Friedrich Christoph Dahlmann (1785-1860); and Jacob and Wilhelm Grimm, both students of Savigny.³³⁵ Sheehan characterizes their protest as a liberal one, namely that they protested the monarch’s dissolution of Hanover’s state constitution, but their cause of disagreement was not specifically liberal, but rather constitutional according to the principles of the *Standesverfassung*. The Göttingen Seven had strong ties to Romanticism, and the constitutionalism at the heart of their protest had more in common with Savigny’s theory of state than liberalism’s. They had argued that the constitution to which they swore their oath of office had a legitimacy based upon the public will, not a person, even if he was a monarch. They argued that their oaths of office were rendered moot by the dissolution of the object of their oath. The symbolisms of their actions were characteristically Romantic rather than liberal: the sacredness of the oath of office; the constitution as representing

³³⁴ Sheehan, *German History, 1770-1866*, 618.

³³⁵ Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:98.

the collective unity of the people; and the defiant, though orderly appeal in the form of, essentially, a guild protest. The liberal constitutional drive, to the contrary, supported the monarch's dissolution of local constitutions in favor of a single overarching national constitution. German liberals viewed the persisting local jurisdictions as obstinate relics of a previous time.

The important parallel between the Göttingen professors and the Catholics upset by Droste's imprisonment, is that their responses to the absolutist tendencies of nineteenth-century monarchists were not particularly liberal. Liberals had no love for Hannover's monarch, King Ernest August, a reactionary monarch originally from Britain, who heavily-handedly removed one of the few achievements of the 1830 revolutions. Nevertheless, they did share one tendency with the monarch, namely the willingness to disrupt the pattern of juristic relations for ideological purposes. In addition, the guiding principles of many German liberals interested in a secularized national government overlapped with those of the monarchy, which was interested in removing obstacles to centralized power. It should be remembered that Hannover's bicameral legislature included a house of lords and guaranteed the church legislative rights even as it extended voting rights to all male citizens.³³⁶ The two protests were therefore similar in that their standing up to state authority was not a rejection of the traditional social structure or the role of the church in society. Further, the respect for law as embodied in a constitution that restricted the reach of the state was a 'conservative' value, though that appellation can be misleading in nineteenth-century German politics.

³³⁶ Ibid., 2:90.

Droste became a martyr of unjust authority and was seen as a model of both religious and political resistance, which influenced Ketteler's own engagement of political issues from a clerical role. The young Westphalian nobleman's priestly vocation was never a separation of himself from the secular world or of his previous legal work. It was a conversion of purpose and direction rather than of deep belief or conviction. The priesthood was a quite acceptable path of life for a person in his social position. Ketteler had an uncle, a brother, and many family friends who were priests. The 'secular' priesthood, as opposed to a monastic vocation, was a career path with many political options. His life after ordination involved him profoundly in the political life of the emerging German nation. Ketteler was probably less interested in the justice of the mixed marriage controversy or the quagmire that the bishop had presented the government. What incensed him was the insult perpetrated by the Prussian state upon a prince of the Catholic Church. The arrest by the government ultimately violated Ketteler's sense of honor that was informed by his Romantic ideas of an independent church and an organic state. The violations of both made it impossible for him to remain a part of government with a clear conscience. His leave of absence turned into a full resignation and a move to Munich, where he discerned his vocation to the priesthood.

4.2. Mindful Of History In Munich's Catholic And Romantic Circles: Ketteler's Theological And Intellectual Formation, 1838 to 1841

Ketteler's path to the priesthood seems to have been both spiritually and politically motivated. Intellectually, the discernment and preparation for the priesthood was a continuation of the interests he had developed as a student of law. Specifically, there is nothing to suggest that his becoming a priest implied a rejection of the positions he held

as a lawyer. In fact, there is a great deal to suggest that his theological training built upon and developed his legal education and way of thinking.

Generally speaking, his religious predispositions predated the Cologne Conflict, but the idea of a priestly vocation emerged only afterwards. He saw himself as part of a great cultural movement playing out in Germany, and his letters to family indicate that he was anxious to take part in the valiant struggle where priests were in the front lines of battle.³³⁷ His enthusiasm did not make him rash, however, and two years of reflection passed between resigning his Prussian post and his entering the seminary in 1841. Ketteler's correspondence reveals the fusion of political and religious ideas in his intellectual engagement. Just two weeks after submitting the letter confirming his resignation, his political act, he described the difficulties and delights at working his way through Görres' first volume of *Christliche Mystik*, published in 1836. Ketteler had already devoured Görres' politically charged *Athanasius* and had moved on to this meatier theological work that eventually morphed into "a three-thousand-page epic of supernatural psychology and history."³³⁸ Ketteler's reading materials reveal more about his ambitions and interests, and he pretended no great understanding of Görres' tome, which attempted to use religious mysticism as the lens through which all physical, metaphysical, and political sciences could be analyzed and synthesized.³³⁹ In that letter, he also noted his interest in another work dissecting and disputing the philosophy of

³³⁷ Ketteler's letters to his brother indicate this.

³³⁸ O'Meara, *Romantic Idealism and Roman Catholicism*, 132.

³³⁹ *SWB II*, 1:9. Ketteler's letter to his brother, Wilderich von Ketteler, from Munster, June 19, 1838. Reference is to Joseph von Görres, *Die Christliche Mystik*, 5 vols. (Regensburg: 1836-1842).

Hermes, Droste's adversary. In sum, the political issues and figures of the Cologne Conflict appear to have directed his path, and that path led him to Munich—first intellectually and then literally.

Ketteler's protest resignation was not a rejection of his previous social, intellectual and religious convictions. If anything, the consequent contemplation roused in him a deeper commitment to the somewhat idealized values of his Westphalian milieu. By July 1838 he was already struggling with the questions of his future career and the possibility of becoming a priest. In a letter to his brother Wilderich, he disparaged the previous ten years of his life. He confided languidly that he had not yet shed the flab of adolescence, and that he was too lazy and used to the comforts of an easy life with ready pleasures. He feared the challenges and discipline necessary to make something of himself. He knew he could not marry, whether because as Iserloh suggests he had no worthy inheritance, or because he was contemplating the priesthood. But despite his fears, he was reconciled to beginning a journey that would require a great deal of determination. The emotional letter reveals the classic Romantic elements of character, virtue, destiny, journey, and desperate sacrifice. It shows him acutely aware of his aristocratic class/status (*Stände*), his noble sensibility (*Sinnesart*), and his advanced education (*Bildungsstufe*). The letter reveals the religious beliefs central to discerning his career as a priest, even though such an outcome would be "a greater wonder than waking the dead," as he claimed. He then reminded his

brother to use his time more usefully by hunting—shooting a stag, “at least another sixteen pointer.”³⁴⁰

Just as the priesthood was consistent with aristocratic pursuits such as hunting, it was consistent with intellectual objectives of the university. To continue his discernment and study, Ketteler moved to Munich, the center of Catholic political and intellectual thought under the patronage of Ludwig I. The Wittelsbach monarch wanted a German version of Florence, with the university as a center of scientific and religious revival.³⁴¹ He was also interested in being seen as a legitimate power equal to Prussia to the north and Austria to the east.

Ketteler’s new life was not so radically changed, as he continued to spend a great deal of time hunting with Bavarian aristocrats on the Isar. He also spent his Munich years, however, in the company of the “Munich Circle” or *Görreskreis* where Görres was the acknowledged leader and Baader was the grand old man—despite his being in hot water with Rome from 1838 until before his death in 1841. Baader’s complex philosophy, his early efforts at ecumenism, and his disagreement with the growing papal authority were the reasons for the church’s scrutiny, yet he maintained his stature as one of the most important intellectuals of the Catholic Romantic movement. Ketteler’s specifically theological education, though informal, had begun in the days after the Cologne Conflict and he continued it in earnest by moving to Munich. The environment of increasingly political Romantic Catholicism confirmed his already established

³⁴⁰ *SWB II*, 1:13. Ketteler’s letter to his brother, Wilderich von Ketteler, from Munster, July 7, 1838.

³⁴¹ O’Meara, *Romantic Idealism and Roman Catholicism*, 113.

intellectual sympathy with the Romantic worldview and his related historical and developmental patterns of reasoning. As opposed to his experience of studying with well-established faculties of law, Catholic theological faculties in Germany were still developing distinction in the universities of Tübingen (moved in from Ellwangen in 1817) and Munich.

Roman Catholic academic theology in the first half of nineteenth-century Germany was, professionally speaking, not yet equal to the Protestant faculties, but it was filled with a sense of discovery and relevance during Ketteler's formative years. Following the suppression of the Jesuits, the Napoleonic Wars, and the secularization at the very beginning of the nineteenth century, Catholic theology in German seminaries and universities had fallen into disarray.³⁴² In Tübingen, and later Munich, Catholic theologians began to regain confidence and competence in a way that responded to the challenges of the Enlightenment, and especially of Kant. Distinct from the scholastic theologians of the Jesuit-dominated universities of the seventeenth and eighteenth centuries, these theologians were influenced by Kantian philosophy as well as reactions to that philosophy in the form of Romanticism. They developed a theology that paid careful attention to Christian scripture, the patristic sources, and St. Thomas Aquinas—though not in a classical scholastic method. Their Romantic-idealistic scholarship was distinguished by their engagement with non-Catholic sources, especially Schelling, as

³⁴² O'Meara, *Church and Culture: German Catholic Theology, 1860-1914*, 3. O'Meara notes Paul Schantz's determination that German speculative theology was in a "period of decline" from 1760 to 1830. McCool's 1977 judgment is more positive, but still calls the first few decades "rebuilding" years. Gerald A. McCool, *Catholic Theology in the Nineteenth Century: The Quest for a Unitary Method* (New York: A Crossroad book, Seabury Press, 1977), 30.

well as their appreciation of historical and organic development of the church.³⁴³ They emphasized a positive anthropology and the essential role of human reason and freedom in Christian faith, and they re-emphasized the central role of scripture for all aspects of Christian living. Though Ketteler is often labeled a ‘conservative bishop,’ this innovative theology influenced him greatly.³⁴⁴ Even with the reappearance of Catholic scholasticism in the second half of the century, including in his own seminary in Mainz, Ketteler did not distance himself from the theology that was best expressed in Möhler’s clearly Romantic book *Symbolik*.

Ketteler’s correspondence after his resignation resounds with Romantic themes. For example, his trip to Munich in the spring of 1839 included a stop in Cologne, where he admired the great cathedral. In awe of its grandeur and size, he meditated upon his own path in terms of such existential topics as infinity, eternity, and the relative smallness of individual humans to all of God’s Creation. His prayerful attitude in Droste’s church was interrupted only by “the painful thought” that the priest saying the Mass “in this holy place” leaned towards Hermes.³⁴⁵ Along the way, the Tyrolean Alps took the place of the cathedral in Ketteler’s theological musings. And upon arrival in Munich, his focus turned to the pious life of the Catholics in their religious, liturgical, and intellectual lives. He

³⁴³ O’Meara’s Introduction outlines the book’s argument for Schelling’s influence on Roman Catholic theology. O’Meara, *Romantic Idealism and Roman Catholicism*, 9-10.

³⁴⁴ Grant Kaplan’s 2003 dissertation describes how the Catholic theologians of Tübingen used Romantic philosophy to answer the Enlightenment critique (specifically of Lessing, Kant, and Fichte) of Christian scripture and institutional religion as a whole. Kaplan shows the centrality of revelation, and thus scripture, for the most important representatives of the Catholic faculty in Tübingen: Drey, Möhler, and Kühn. Kaplan, “Answering the Enlightenment”.

³⁴⁵ *SWB I*, 4:14. Ketteler’s letter (#9) to his sister Sophie von Merveldt from Munich, May 9, 1839.

was quite happy to have made acquaintance with the *Görreskreis* and was as impressed by their character as he had been by their articles and books.³⁴⁶

Johann Joseph Görres (1775-1848), the center of this *Kreis* or circle, became a central figure of Catholic political opposition to Prussia's action after the Cologne Conflict with the publication of his book *Athanasius* (1838) just weeks after the crisis, and later, with *Kirche und Staat nach Ablauf der Cölner [sic] Irrung* (1842). He was one of the first figures recruited for the revamped university in Munich, and he had put his own disagreements with Rome far behind him by 1838. As the center of this *Kreis*, both derisively and affectionately nicknamed the 'Congregatio,' he was surrounded by like-minded Catholic intellectuals intent upon fulfilling Ludwig I's dream of making the university in Munich the equal of the great Protestant universities. Görres' leadership on the political question was conveyed personally through the relationships in Munich and nationally through his editorship of and influence upon political and theological journals, his countless articles, and the two pivotal books articulating his position on the church/state question.

Ketteler showed his sympathy with Görres in letters, proclaiming unreservedly that *Kirche und Staat* contains the solution to the difficulties facing Prussia, presumably in terms of the church/state conflict with which the book was concerned. "Indeed, if our king would only read such a book from cover to cover! It is written in such a way, that the truth of its argument is plainly evident. If the reader is at all open to the truth, they

³⁴⁶ *SWB I*, 4:14. Ketteler's letter (#9) to his sister Sophie von Merveldt from Munich, May 9, 1839.

must be impressed by the book's presentation."³⁴⁷ Ketteler gained entry into the inner circle of the younger members of the circle, or *Congregatio* (congregation), and became close friends with Guido Görres, Joseph's son and the editor of the *Historisch-Politische Blätter*. Together, they participated fully in the social and intellectual movements of the day, excitedly reading and discussing the latest important books, journals, and intellectual tracts and meeting with figures such as Clemens Brentano who were drawn to Munich as a center of Catholic thought. This social affiliation was political in nature, since it formulated a form of conservative resistance to both Prussian centralization and liberal rationalism. The *Görreskreis* in Munich would become critical for the political Catholicism of the 1848 Parliament and later for its influence in starting the Center Party, the party that resisted Bismarck's *Kulturkampf*.³⁴⁸

Even though Krieger focused his work on primarily Prussian sources, it is still strange that he gives such scant recognition to this movement. Speaking generally about the early nineteenth century, he claims: "Convinced Catholics in Germany remained, by and large, politically disinterested and insofar as they did assert themselves in politics gave their support to the established monarchical order."³⁴⁹ This quote comes from

³⁴⁷ *SWB I*, 4:198. Ketteler's letter (#55) to his sister Sophie von Merveldt, July 30, 1842.

³⁴⁸ In the difficult internal Catholic discord symbolized by the oppositions regarding the *Syllabus of Errors* and the doctrine on infallibility later in the century, Ketteler never renounced his affiliation with the theology, politics or his friends in Munich. He even intervened in 1868 to defend Tübingen's Kühn from attacks of unorthodoxy from the neoscholastics, as Iserloh notes "In den sog. Rottenburger Wirren von 1868 ging es einmal um die Angriffe der Neuscholastiker F. J. Clemens (1815-1862) und C. v. Schüzler (1827-1880) gegen einzelne theologische Sätze des Tübinger Dogmatikers J. v. Kühn (1806-1887). (in *SWB I*, 3:28). Ketteler did express disappointment with the more public and strident opposition of Döllinger to the developments and pronouncements from Rome.

³⁴⁹ Krieger, *German Idea of Freedom*, 298.

Krieger's chapter on liberal intellectuals and can be explained by his appropriate judgment that a relatively small number of Catholics participated in the German liberal movements. "Where small Catholic groups did join the liberal movement they contributed no characteristic political ideas or doctrine, for they were moved only by the specific and necessary practical requirements of their clericalism."³⁵⁰ Krieger's judgment is based upon a narrow view of reform as only possible within liberal movements.

It is true that Catholics became active in response to practical necessity. Yet once begun, political Catholicism was not marginal ('small groups'), and it was held together by a comprehensive and principled intellectual system. Krieger's argument is based upon the origin of Catholic actions as "religious" and cites the Cologne Conflict to prove his point. That his footnote for this makes two mistakes evidences his misunderstanding of the whole movement. He calls the Shroud of Turin a "sacred coat," which is not so remarkable. More glaring is his misdating of the Cologne Conflict by ten years, locating it in 1827, in the period before the 1830 revolutions.³⁵¹ The 1844 Trier exhibition of the Shroud was indeed an example of the nature of German Catholic piety in 1844. The pilgrimage of 1.5 million German Catholics to Trier for the shroud's exhibition, however, was an unmistakably political act, something Sheehan is more perceptive in granting.³⁵² It followed a distinctly modern form of organization and motivation, as Sperber details, that was self-consciously aware of its power as a form of mass politics.³⁵³

³⁵⁰ Ibid.

³⁵¹ Ibid., 511, n.539.

³⁵² Sheehan, *German History, 1770-1866*, 626.

³⁵³ Jonathan Sperber, *Popular Catholicism in Nineteenth-Century Germany* (Princeton: Princeton University Press, 1984), 70-72.

Ketteler's association with the Catholic movement in Munich underscores the complexity and inter-relatedness of politics and religion during this period. Catholics were not liberals, but they were certainly politically active. Political Catholicism's rejection of liberal premises did imply a different understanding of, and relationship to the Prussian monarchy, but Catholics maintained a critical independence from the government based in Berlin. The decisiveness of Ketteler's resignation foreshadows this resolve that would be most later demonstrated during the Kulturkampf. Interestingly, Ketteler and the members of the *Görreskries* agreed with Krieger's criticism of German liberalism—that its liberalism was powerless in its theoretical abstraction, that it was essentially faint-hearted on the level of political opposition to the monarchy, and that it was primarily interested in economic gain at the expense of social and political freedoms. Where Krieger is entirely off base is his dismissal of the intellectual rigor, resources, and relevance of political Catholicism. These are outlined below.

4.3. Intellectual Rigor, Resources, And Relevance Of Political Catholicism: Baader's Social Doctrine & Möhler's Incarnational Ecclesiology

4.3.1. Baader's Social Doctrine: The Organic World In Need Of God

Franz von Baader was a key figure in the intellectual environment of Munich who demonstrates that political Catholicism was hardly a marginal endeavor. There seems to be a consensus in the secondary sources that Baader rightfully holds the title as the "first to create the concept of 'Christian Socialism' as he was also the true initiator of Catholic

sociology and social doctrine in Germany.”³⁵⁴ Baader’s influence upon Ketteler is difficult to establish through direct attribution, but circumstances do place them together in Munich when Ketteler was a law student (1833) and when he was discerning his priestly vocation (1838-1841). Baader died in Munich in 1841 as Ketteler was studying in preparation for his ordination to the priesthood (November 1841 to June 1844). Even Görres’ biographer, Vanden Heuvel, acknowledges Baader for laying “the cornerstone for the Catholic social criticism that would gather political momentum under the aegis of Bishop Ketteler around midcentury.”³⁵⁵

The most convincing connection to Baader is the remarkable theoretical correspondence of his system and Ketteler’s *Sermons*. Baader’s influence on Ketteler was probably not immediate, but rather was mediated by the figures of the Munich Circle and other Catholic intellectuals.³⁵⁶ Ketteler was a practical man with no personal ambition for

³⁵⁴ Edgar Alexander, *Adenauer and the New Germany, the Chancellor of the Vanquished*, trans. Thomas E. Goldstein (New York: Farrar Straus & Cudahy, 1957), 395. Though I think Baader is ultimately most fundamental, there are others with similar systems, concerns and recommendations. One example is Johann Baptist Hirscher (1788-1865), a Catholic professor of theology in Tübingen from the generation between Baader and Ketteler, who also wrote on social topics. Like Baader and Ketteler, he argued in his *Die sozialien Zustände der Gegenwart und die Kirche* (1849) for the church as necessary for the whole structure of society, including its defence from socialism. “The secular and simultaneously Christian concepts of human dignity and of equal rights for all men as well as the notions of human freedom and community responsibility for the material welfare were appropriate ideals for improving the quality of life in the state... Unlike socialism and political liberalism, true liberty should always be infused with the Christian spirit.” Donald J. Dietrich, “Priests and Political Thought: Theology and Reform in Central Europe, 1845-1855,” *Catholic Historical Review* LXXI, no. 4 (1985): 526.

³⁵⁵ Vanden Heuvel, *Görres: German Life in Age of Revolution*, ?

³⁵⁶ Fastenrath states that *Ein direkter Einfluß Baaders auf Ketteler ist schwer nachzuweisen*. Elmar Fastenrath, *Bischof Ketteler Und Die Kirche: Eine Studie Z. Kirchenverständnis D. Politisch-Sozialen Katholizismus, Beiträge Zur Neueren Geschichte Der Katholischen Theologie; Bd. 13* (Essen,: Ludgerus-Verl. Wingen, 1971), 72. Fastenrath also mentions Staudenmaier, though he was more Hegelian. Beckum mentions the influence of the neoscholastic lawyer turned dogmatic theologian and *Domkaplan* in Mainz, Joh. Heinrich. Heinrich was a contemporary of

academic theology. He read the Catholic journals, especially *Der Katholik* and the *Historisch-Politische Blätter*, as well as the most famous books like Möhler's *Symbolik*, but there is little evidence in his writing that he had done fundamental or in-depth original theological research.

Ketteler's travel and social activities probably did not leave time for academic theology in Munich before or during his seminary training. Given that Baader's written works are by all accounts complex and difficult, it is doubtful that Ketteler devoted significant effort to incorporating Baader's thought first-hand—especially since the extant letters never mention such an effort.³⁵⁷ Still, Ketteler did fully participate in the intellectual world of the *Görreskreis*, reading the books and attending the lectures and events of the day. In addition, he felt competent later in his life to publish letters and position pieces on theological topics—Ketteler did not suffer from self-doubt in theological or political matters. His silence regarding his debt to Baader might be related to the fact that Baader's trouble with Rome corresponds exactly with Ketteler's time in Munich. There would be little rhetorical or political advantage to be gained by association with Baader for Ketteler in his political, social, intellectual, or church circles. Ultimately, however, the overlap in the social theory is still significant enough to demonstrate a connection.

Ketteler who taught for many years in Ketteler's seminary in Mainz. There is plenty of overlap and influence, and Heinrich was the one who pushed for Ketteler to deliver the Advent Sermons, but Heinrich comes a bit late, is more scholastic in style, and there is no direct attribution or indication that I could find that he was a pivotal influence on the development Ketteler's social theory. That said, his editorial hand is very evident in Ketteler's political writing as a bishop. This will be covered in Part Three.

³⁵⁷ No mention in the collected writings (*SWB*). Vigner treats this lack as well: Vigner, *Ketteler: Ein Deutsches Bischofsleben*, 43.

Baader's contribution to the Romantic school included his development of the "organic idea,"³⁵⁸ namely, "the belief that reality is a living whole, all members of which—despite their diverse characteristics and functions—are immediately related to a common center and through the center to each other."³⁵⁹ Baader's Bavarian roots and Roman Catholicism were important elements of his public academic identity and clearly distance him from the Prussian organic theory used to rationalize monarchical immunity from political opposition. His view of history and tradition, appropriated from Edmund Burke, stressed the dependence of the present upon the past, with an implied duty of the present for the future. Baader's system developed in significantly different directions from Burke, however, as Baader was subtle enough to lift the important principles from the English context just as he was able to study the British industrial methods while retaining and even deepening his critique of industry's alienating tendencies.

At the heart of this philosophical system was the conviction that people must have some 'faith,' an existential commitment, to place themselves theoretically in relation to existence, even if they were atheists or Enlightenment rationalists. For Christians, the commitment is religious; it orients them to the world as creatures in relation to the creator through love. This orientation of love is therefore relevant to all aspects of life: familial, economic, political, etc. Whether relying on Baader directly or indirectly, Ketteler also preached and argued that a return to belief in God was a necessary first step towards a better society. In a close reading of Aquinas on law and property, as Baader previously

³⁵⁸ Ramón James Betanzos, *Franz Von Baader's Philosophy of Love*, ed. Martin M. Herman (Vienna: Passagen Verlag, 1998), 34.

³⁵⁹ *Ibid.*, 32.

had done,³⁶⁰ Ketteler contrasted the ideals of Christian common life found in the *Summa Theologica* to those of liberalism. German society, he argued, had reached its calamitous situation because it had lost its belief in God as the ultimate source of social order. In this way, following Baader, Ketteler distanced himself from the dry and purely rational natural law of Christian Wolff and the independent realm of Savigny's system, which in the hands of his successors evolved into a positivist *Pandektsjurisprudenz*.

A summary of Baader's system gives us a background to a few puzzling aspects of Ketteler's (1848) insightful reading of Aquinas. First, Ketteler's sermons have an implicit but only vaguely stated sociology that places God in the center of all social relations—including duties and rights. Second, the rights claimed are individual, subjective, and self-standing, including property rights, but they do not correspond to the most popular political theories of his day on the conservative/liberal spectrum—though there are some recognizable influences. Finally, Ketteler's solutions to social problems raise questions for the proper relationship of the church to the state. Ketteler's sociology simply hangs together better when joined with Baader's system—an explicitly Christian system that held weight among intellectuals as a respected Roman Catholic answer to the social problems of mid-nineteenth-century Germany. Görres political principles are obviously important here, but Baader's basic framework, sources, and conclusions give structure to Ketteler's *Sermons* and locate him best within the Munich Circle and the rich theological resources of the time. Though it is difficult to establish conclusively, it is a fair conjecture that the *Sermons* were received so well because they tapped into and expressed a central

³⁶⁰ *Ibid.*, 68.

position, both intellectually and politically, which included both a language of rights and an anti-liberal Christian sociology. Separated from this background, his not quite accurate attribution of rights language to Aquinas might be read simply as a historically peculiar anomaly, or more misleadingly, as associated with the neoscholasticism that would dominate the Catholic intellectual world later in the century. Thus, Baader gives Ketteler's *Sermons* their proper context, force, and coherence.

Baader's dialectical system has structural similarities with his contemporaries Schelling and Hegel, but it cannot be confused with them. For Baader, the *Aufhebung* or sublimation of antagonisms that preserves what is good and expunges what is false was reflective of God's Creation itself. This overarching and unifying idea is especially apparent in history, which develops through the engagement of opposing forces. It is also relevant, however, for all social and even personal development. Freedom is achieved in this system as God's love emerges from the particulars of human life in all its complexities, and especially at decisive historical moments. This dialectical and theocentric approach to philosophical (and political questions) placed Baader against the Kantian philosophy that attempted to disassociate the person from the things in themselves. This is also distinct from Marx's adaptation of Hegel's *Aufhebung*, which he used to rationalize and legitimize revolutions, wars, and mass human suffering. Edgar Alexander labels Baader's system 'Catholic Realism' to distinguish it from both the idealism of Kant and the overly transcendent implications of many Romantic systems. Baader opposed Kant's philosophy because it attempted to grasp the structure of knowing as opposed to the 'thing in itself.' Baader, like Jacobi, proposed faith as the *a priori* of all

knowledge, which could then benefit from Kant's insights regarding his critique of rationalism.³⁶¹

Despite the fact that Baader had no one monumental work or complete synthesis to represent his mature integrated accomplishments, there is an essential unity to his thought that pivots on the theme of love and that is also found in Ketteler's own anthropology and sociology. Baader saw himself as a sower of seeds whose ideas were to germinate in other thinkers. He was associated with the *Görreskreis* in Munich, having been appointed with Görres to the faculty of the University in 1826. King Ludwig I saw Baader as contributing to his excellent Catholic university, giving glory and legitimacy to his state. Neither Görres nor Baader were true academicians, having both taken circuitous routes to their university positions, but their Catholic credentials were exceptional and they had at least sufficient academic capital for Ludwig to involve himself personally in their appointments. As a layperson, however, Baader was not allowed to teach theology in an atmosphere that moved quickly away from Ludwig's original humanistic idea for the university. Still, Baader retained his chair and simply lectured in another department. Sharing Görres' activism in the public sphere, he contributed articles to Görres' social and political journal *Eos*, which "rejected the dominant political trends of the day, restoration conservatism and liberalism, and offered instead a third approach that emphasized the value of civil society, of historical societal structures and norms as opposed to state institutions."³⁶² *Eos* also insisted on "absolute independence of the

³⁶¹ Ibid., 40.

³⁶² Vanden Heuvel, *Görres: German Life in Age of Revolution*, 295.

Church from the state.”³⁶³ What is most important for the work of this dissertation is the fact that he was there in Munich and was an important foundational thinker for the Catholic intellectuals during the entire *Vormärz* period (pre-1848 revolution), i.e., Ketteler’s intellectually formative years.

Baader’s central philosophical idea, the one that is most important for Ketteler, is inseparably theological and practical. The central philosophical idea begins with theology—that God, the foundation of all being, reflects the reality of love in all ‘being.’ Human beings, as created in God’s image, “must also be teleologically defined in terms of love. The lot of nature, in turn, depends upon the use or misuse its lord, i.e. man, makes of love.”³⁶⁴ This path from ‘Creator’ to ‘creature made in God’s image,’ and then to the rest of God’s Creation, is the logical working out of a holistic system. Faith in God is the source of self-understanding and leads to an understanding of the world. This represents a divergence from the Cartesian focus on self-consciousness and autonomy.³⁶⁵

Baader pointed the way to an authentic Catholic intellectual position with a critique of his German philosophical contemporaries from Kant to Fichte, Jacobi, Hegel, and Schelling. Baader tapped Catholic patristic sources and prevented the marginalizing of religious ideas from the academy—a marginalization that derived from the philosophers splitting the person from the world, trapping the person in the ideas of idealism. He contended with the intellectual giants who dominated the German academy and he conceptualized a rival system that placed theology at the core of its epistemology. For

³⁶³ Ibid., 297.

³⁶⁴ Betanzos, *Baader’s Philosophy of Love*, 31.

³⁶⁵ Dietrich, *Catholic Theology in the Age of Idealism*, 135.

Baader, ever the dialectical philosopher, God's immanence and transcendence were both aspects of a mysterious being who is the "free and personal ground of being of the world."³⁶⁶ Thus, the *knowing* of God is related to the *loving* of God that results in an intellectual and affective engagement with the world.

Conversely, he argued that the outright rejection of belief in atheism, the epistemological neglect of God in deism, and the epistemological distancing from God in idealism (because God is believed to be unknowable and utterly transcendent) all lead to stilted or wall-eyed philosophies lacking foundation and depth. They lead to an impoverished anthropology and to an inorganic and mechanistic sociology. Baader's mysticism did not make him a spiritualist who was unhinged from the material world. He rejected "any spiritualism without natural reality behind it or any static materialism without spirit—both were too reminiscent of the Enlightenment."³⁶⁷ Baader's Eucharistic focus on 'incarnation' and his emphasis on human nature as 'embodied' contrast him with those intellectual heirs of both Kant and Hegel who, as Krieger maintains, were so gripped by the bifurcation between the ideal and the real that they were politically incapable of joining them, and were thus rendered essentially incapable of offering anything more than an essential acquiescence to the given political situation. He claims that a common characteristic of the liberals "was their conscious and desperate striving to bridge the gap between ideal and reality, theory and practice, project and execution."³⁶⁸

³⁶⁶ Betanzos, *Baader's Philosophy of Love*, 46.

³⁶⁷ O'Meara, *Romantic Idealism and Roman Catholicism*, 83.

³⁶⁸ Krieger, *German Idea of Freedom*, 299.

What makes Baader so pivotal for early nineteenth-century Catholic Social Thought and for Ketteler is that his theologically-founded philosophy counters the Enlightenment by offering, first, a strong critique, second, a holistic-organic counter model, and, third, a drawing out of the implications of this system for society. His theologically nuanced philosophy is sacramental and specifically incarnational, and is thus not ‘stuck’ in theory or the ideal as opposed to action in the material world. Baader’s “examples for uniting nature and spirit were the incarnation and the Eucharist, and the organic, corporate evolution of the human race toward the Body of Christ.”³⁶⁹ His concern with the material world was also evidenced in his early medical training, his scientific discoveries, his management of mines for the Wittelsbachs in Bavaria, and, most importantly for this work, his proposals for social reform. Whereas Baader’s colleague in Munich, Schelling, focused his mature scholarship on the rising of all nature into the world of spirit,³⁷⁰ Baader’s collected works show that his mysticism was leading him to practical solutions for political and social problems and that, to this end, he immersed himself in the writings of St. Thomas Aquinas.³⁷¹ This turn to Aquinas as foundational was an important precedent for Ketteler.

³⁶⁹ O’Meara, *Romantic Idealism and Roman Catholicism*, 88.

³⁷⁰ *Ibid.*, 114. O’Meara gives pride of place to Staudenmaier’s late critique of Schelling (post Munich, 1941) on page 145: “Schelling’s thought remained a description of God or of the totality of spiritual consciousness. The human person seems to be no more than the vase where the divine chemicals mix. Redemption is not personal salvation but God’s revelatory presence in finite consciousness. This consciousness, moreover, as the concrete expression of the human return to the divine, never gets beyond being a myth. Anthropology empty of sin and present as myth is feeble, hollow.”

³⁷¹ Volume 14 of Franz von Baader’s *Sämmtliche Werke* is titled: *Franz von Baader, ed., Elementarbegriffe Über Die Zeit, Vorlegungen Über Philosophie Der Societät, Erläuterungen Zu Stellen Aus Thomas V. A., Glossen Zu Enier Reihe Von Schriften Sammt Programm Über Die*

Ketteler followed Baader's example (directly or otherwise) in seeking to bridge the chasm between faith and reason that was found in early nineteenth-century Germany. This was a chasm opened up by Enlightenment rationalists, who viewed reason as a source (not means) of religious and moral belief, as well as by Protestant Pietists, for whom religious belief was an entirely private matter.³⁷² "To Baader, religion is the commanding dimension, the framework of life, value, and thought."³⁷³ Similarly, Ketteler preached to his congregation and (through publication of his sermons) to all of Germany the message that Catholicism should not be marginalized because it clings to religious traditions and beliefs. Rather, it is Catholicism's integrated, organic, and theo-centric worldview that is necessary to save society from its own selfish self. The connection to Baader is crucial because to the extent that Ketteler adopts this foundation, he distances himself from the modern charge that rights are inextricably tied to individualist or libertarian social philosophies.³⁷⁴

4.3.2. The Correspondence Between Baader's And Ketteler's Sociology

William E. Hogan's 1949 dissertation on Ketteler prescinds from answering the specific question of who influenced Ketteler's social and theological development. Ketteler himself gives few references to his influences in his published works, though his letters do reveal his friends and some of his reading material during his time in Munich.

Wechselseitigkeit Der Alimentation., 16 vols., vol. 14, Sämmtliche Werke (Leipzig Verein von Freunden des Verewigten. H. Bethmann, 1852).

³⁷² Kaplan, "Answering the Enlightenment", 228. Kaplan discusses Kuhn's use of Schelling to critique the notion of reason as a 'source' of wisdom in Kant and Hegel.

³⁷³ Betanzos, *Baader's Philosophy of Love*, 47.

³⁷⁴ Hollenbach makes this distinction for Catholic rights theory in the twentieth century. Hollenbach, *Claims in Conflict*, 97.

Hogan notes that Ketteler did know and appreciate Franz Joseph von Buss, a professor in Freiberg who was an early and outspoken admirer of Baader and who also wrote on social issues, though without the effect or foresight of Ketteler.

The most compelling evidence for a connection between Ketteler and Baader is the similarity of their theo-centric sociologies and their related social critiques. On the one hand, they both stressed the essential role for religion and the churches in society. On the other hand, they were convinced that the ills of society apparent in the growing numbers of disaffected poor would not be solved by rejecting private property. Baader addressed the growing disproportion between the rich and poor and advocated strongly for “the right of the proletariat for an improved condition of life (*das Recht der Proletarier auf Erleüchterung des Lebens*).”³⁷⁵ He argued for the ‘naturalization’ (*Einbürgerung*) of the proletariat or working class through state-recognized associations and church’s moral leadership.³⁷⁶ The word *Einbürgerung* is a legal term that literally means the ‘giving of citizenship,’ and thus the rights and duties of citizenship. The masses had lacked this status following the gradual elimination of feudal obligations that had previously defined their status. Baader argued that the socialist and later communist solution had gotten it all wrong by proposing the abolition of private property. Rather, he argued for the extension of private property to the masses, and he preceded Ketteler in analyzing the social problem as a labor problem already in 1835: “Baader argued that Germany was witnessing the advent of an enslaved industrial proletariat, and furthermore, that the

³⁷⁵ Vignier, *Ketteler: Ein Deutsches Bischofsleben*, 109.

³⁷⁶ *Ibid.* Vignier recognizes on this page the importance of Baader’s theory as passed on through Buss.

miseries of the proletariat were not a temporary by-product of modernization, but were built into the industrial economic system.”³⁷⁷ He also led the way in looking to Aquinas as a source for understanding the importance of private property for social developments.

Baader had also left a learned and lengthy treatment on property and its Christian use according to the outline of St. Thomas which Ketteler might well have used as a foundation of his many discourses on property. With as much insistence as Ketteler ever employed Baader held that property rights could not yield to human rights. The slightest infraction of the right of property would lead to grievous infractions.³⁷⁸

Baader addressed the social problems of Germany from a singular position in the 1830s. He was a competent industrial scientist with important patents, such as for the production of glass, for example. He was a competent philosopher who had already played a significant role in the philosophical development of Schelling and Hegel, to name two of the most important figures. In addition, while his role in the Catholic intellectual life of Munich was not as glorified and remembered as that of Schelling, Görres, or, later, Döllinger, Baader was a distinguished member of the Munich faculty since 1826 and cannot be overlooked. Görres himself had considered Baader a “genius of electric power.”³⁷⁹ This is all a way of arguing that Baader was a figure of great importance and competence who had written on topics of interest to Ketteler and who overlapped with Ketteler during his influential seminary years in Munich. Thus a treatment of Baader’s sociology gives us an intellectual structure somewhat missing in Ketteler’s homiletic material, but essentially consistent with it.

³⁷⁷ Vanden Heuvel, *Görres: German Life in Age of Revolution*, 302.

³⁷⁸ Hogan, "Ketteler's Interpretation of the Social Problem", 5.

³⁷⁹ Betanzos, *Baader's Philosophy of Love*, 12.

Baader's social philosophy holds together many elements concurrently in dynamic organic relations that are all ultimately dependent upon God. The person's relationship to him or herself is dependent upon his or her fundamental relationship to God, since the worth of the creature is related to the worth granted the creature by the creator. Conversely, even the deistic skepticism regarding the possibility of a personal relationship with God has significant implications for social relations. Thus, interpersonal relationships are dependent upon this singular relationship of the person with God.

4.3.3. Möhler's Incarnational Ecclesiology & Ketteler's Political Phronesis

While the influence of Baader requires demonstration, Adam Möhler's *Symbolik* was the one book Ketteler explicitly claimed influenced him most. It was also a direct source for his *Advent Sermons*.³⁸⁰ *Symbolik* was the fruit of Möhler's ongoing engagement with Protestant theology, first prompted by the ambitious move of the Catholic faculty from Ellwangen to Tübingen while Möhler was still a young seminarian. The relevance of this book for Ketteler is threefold. First, the book itself represents the academic enthusiasm of the young Roman Catholics in early nineteenth-century Germany. It was a resurgent time for Catholic intellectuals who were engaging Protestants in the German academic world after having been largely absent from the scene since the suppression of the Jesuit order in the late 18th century—and with them, their neoscholasticism in the universities. *Symbolik* represents a Catholic theology in Tübingen that steered clear of the more defensive attitudes struck by Catholics in response to the late eighteenth-century

³⁸⁰ Referenced in Hogan, "Ketteler's Interpretation of the Social Problem". Ketteler's sixth of his *Advent Sermons* is directly influenced by *Symbolik*, Chapter 5.

Enlightenment.³⁸¹ The work's comparative approach also avoided the neoscholastic 'thesis method' of nineteenth-century anti-Protestant Catholic literature. Instead, it presented detailed accounts of original sources such as Luther, Calvin, and others, as well as contemporary Protestant theologians. As important as the conclusions Möhler reached was his example of theological engagement, at once modern, reasonable, traditional, and faithful.

Second, Möhler's *Symbolik* contained a historically nuanced ecclesiology that avoided the static and eternal categories of "post-Tridentine neoscholasticism."³⁸² In the place of that scholasticism was a science of the church that took modern philosophy seriously and that looked anew to the Scriptural and Patristic sources. Möhler "replaced the ecclesiologies of medieval metaphysics and canonical nominalism with the modern developmental philosophy of consciousness."³⁸³ Ketteler's method of reflecting on the social condition was directly related to his ecclesiology and, following Möhler's *Symbolik*, saw the action of the Spirit in the church as being worked out through history.³⁸⁴ In *Symbolik*, Ketteler found a clear articulation of how the church functions as

³⁸¹ See Kaplan on the founding of the Catholic faculty making up the Tübingen school. Kaplan, "Answering the Enlightenment", 155.

³⁸² Donald J.; Dietrich and Michael J. Himes, eds., *The Legacy of the Tübingen School: The Relevance of the Nineteenth-Century for the Twenty-First Century* (New York: Crossroads Publishing Company, 1997), 14 (Introduction).

³⁸³ O'Meara, *Romantic Idealism and Roman Catholicism*, 149.

³⁸⁴ Bradford Hinze shows how Möhler transitioned in his later work, *Symbolik*, to identify Christ incarnate with the Catholic Church, thus effectively downplaying the role of the Holy Spirit. Bradford E. Hinze, "The Holy Spirit and the Catholic Tradition: The Legacy of Johann Adam Möhler," in *The Legacy of the Tübingen School*, ed. Donald J. Dietrich and Michael J. Himes (New York: Crossroad Publishing Company, 1997), 76. Yet Hinze notes that Möhler's transition from a Spirit-centered to a Word-centered theology is not absolute (*ibid.*, 79), and that the "Spirit is not absent in *Symbolism*" (*ibid.*, 85). Traces of this Word-centered tendency can be seen in Ketteler, who cherished his volume of *Symbolik*.

Christ's living image. As Michael Himes describes Möhler's position, "[the church] is the tool which Christ employs in his work of redemption."³⁸⁵ Christ employs this tool 'in history,' in an ongoing process that makes the history of the church a relevant study of God's revelation. Möhler's historically-minded methodology was analogous to, reinforcing of, but also a correction to, Ketteler's historical method of jurisprudence.

This moves to the third point of relevance for Ketteler, that the life of the church and the life of the 'community' (i.e., society) are organically and inextricably interwoven.³⁸⁶ The implication is that the life of the social body is not separate from the life of the church—politics are not separate from faith and concern for the poor and other social problems are not separate from loving God. O'Meara sums up Möhler's thought:

The church is not an archive or museum, but an organism that is not afraid of history and culture but lives from the Spirit and from the times. The gifts of the Spirit contribute to the integral life of his organism—the community. The controversial issue of correct thinking in the church is part of the life process. The consciousness of the church belongs not to one or two members, but is, or should be, really a collective consciousness; it unfolds in fidelity and in newness God's revelation in Christ, but this unfolding happens in history. The articulated, historical side of church life is what we call tradition... Möhler's genius was to apply evolution through dialectic and historical consciousness to the community, to bring together in time the historical reality and the revealed ideal of the church.³⁸⁷

Möhler, like Baader before him and Ketteler following him, opposed the individualism and mechanistic worldview of the Enlightenment by stressing an incarnational ecclesiology.

³⁸⁵ Michael J. Himes, "Divinizing the Church: Strauss and Barth on Möhler's Ecclesiology," in *The Legacy of the Tübingen School*, ed. Donald J. Dietrich and Michael J. Himes (New York: The Crossroad Publishing Company, 1997), 97.

³⁸⁶ The words community and society indicate the sense of the human political association without getting into the presuppositions which the word 'secular society' conveys.

³⁸⁷ O'Meara, *Romantic Idealism and Roman Catholicism*, 150-151.

The mystery of love was rooted in Christ, but without human cooperation God could not implant the essence of love in man. The Church as a human institution was also the body of the Lord; it was his visible form of love, his eternal humanity rejuvenating itself, his eternal revelation. In the Church the priestly, teaching, and pastoral offices of Christ have lived on.³⁸⁸

The Christian mystery of the Incarnation provides the insight into how the visible and physical church can reveal something divine. Yet this leads to a question in Möhler that Himes argues is left unresolved, namely, “how the church can be a fit instrument for the continuance of Christ’s work, ... without itself being the relation established in Christ, i.e., hypostatic union.”³⁸⁹ Himes argues that while Möhler left the question unresolved, a resolution was possible within his scheme. But more importantly for Ketteler regarding the problem is Möhler’s “insistence on the history of the church as fully human history.”³⁹⁰ Like Möhler, Ketteler was well aware of the existence of human sinfulness inside the Catholic Church as it existed, yet the Christian mystery of the Incarnation provided the insight into how the visible and physical church can reveal something divine. It was precisely this sinfulness that reinforced his principle that the social order was endangered when unconnected to Christ.

Möhler’s *Symbolik* underwent significant development in its many editions as the result of the lively debate among Catholics themselves and between Catholics and Protestants, and he was well aware of the sensitivity that the themes of grace and works aroused in his contemporaries.³⁹¹ Therefore, he does not allow ambiguity when locating

³⁸⁸ Dietrich, *Catholic Theology in the Age of Idealism*, 146.

³⁸⁹ Himes, "Strauss and Barth on Möhler's Ecclesiology," 103.

³⁹⁰ *Ibid.*, 107.

³⁹¹ Himes, *Ongoing Incarnation: Johann Adam Möhler*, 272-274. Himes here summarizes the debate between Möhler and Baur on the nature of human freedom.

the initiative of all human love in God. God implants the essence of love, the mystery of love is rooted in Christ, and the actions of church are the ‘living on’ of Christ. At the same time, human freedom is not compromised because human cooperation plays an essential role in the saving action of Christ. Moreover, the church is not a passive instrument but is the location of Christ’s priestly, teaching, and pastoral action in the world. “The first prong of Möhler’s ecclesiology in *Symbolik* is to show that the Incarnation of God in history demands a visible authoritative community such as Catholicism has understood the church to be.”³⁹² Though he does not spend much time on moral or political matters in *Symbolik*, the book clearly envisions a church fully engaged with the world. The actions of the church, as Christ, continually reveal God’s love. This theme is especially evident in Ketteler’s 1848 *Sermons*.

Contrary to Kant’s claim that the ‘freedom from tutelage,’ and thus from tradition, will itself lead to Enlightenment, Ketteler followed Möhler’s lead in holding that social development is achieved through a dialectical engagement with a tradition that also makes objective ‘claims’ in the present time.³⁹³ This means that the historical method can produce results that express something ‘true’ propositionally without exhausting the truth of the matter. Möhler dealt with this issue on a theological level, yet the implications of his ecclesiology for sociology were present in *Symbolik*.³⁹⁴ For Ketteler in his 1848

³⁹² Ibid., 274.

³⁹³ Dietrich, *Catholic Theology in the Age of Idealism*, 89. Dietrich discusses Möhler’s rejection of a purely subjective faith in Enlightenment thought. Scripture, itself, is an objective reality, for example.

³⁹⁴ Himes discusses this issue in a section titled: “Reason: The Church as Guarantor of Truth,” in: Himes, *Ongoing Incarnation: Johann Adam Möhler*, 287. Society’s need for a “visible community of belief,” is treated on page 292.

sermons and later writings, rights were political and legal claims (*Ansprüche*) made as the implications of practical reason based upon his developmental and historically nuanced sociology. This conception is different from rights as static ‘forms’ or universal categories. Within Ketteler’s sociology, when the laws of society are in accord with the natural law, they contribute to the development of the social body. In this sense, Wolff’s basic formula for subjective rights holds: “What the law of nature obliges to as an end, *ius* gives as a means.”³⁹⁵ Rights are not deontological in some Kantian fashion that is demonstrable through reason alone, but rather rights are necessary to protect the proper development of the social body as a natural entity. In addition, rights are not in themselves sufficient for social development such that the space opened up by rights is enough to insure the proper exercise of those rights.

Therefore, as Ketteler spoke and wrote, he appreciated the context of that moment in historical and dialectical terms. His practical thinking was an applied science that used rights language buttressed by an organic sociology as well as the tradition of the church which reveals God’s will for humanity. His use of reason was not autonomous in a Kantian manner, or even as according to the historical method of jurisprudence. Savigny respected the tradition of the law, but still viewed it as autonomous from the spiritual life of society. Ketteler’s sublimation (*Aufhebung*) of the conflicting parties and systems was understood, following Möhler, within the framework of the Kingdom of God being realized (or rejected) by the human community on earth. Thus, his use of rights was a practical effect of his Catholic and counter-liberal position.

³⁹⁵ Quotation from: Tierney, *The Idea of Natural Rights*, 51.

The intellectual influence of Baader and Möhler on Ketteler was reinforced and given direction by the journals of political Catholicism. The “*Hefi*” of the *Görreskreis*, for example, was his constant reference point. Officially titled the “*Historisch-politische Blätter für das katholische Deutschland*,” this un-official public face of the Munich viewpoint was co-founded by Guido Görres (Joseph’s son), Georg Phillips, and Karl Ernst Jarcke. Birke suggests that Jarcke, a convert from Judaism and a former professor of criminal law in Berlin, had great influence on Ketteler. Ketteler read Jarcke’s political work in the “*Hefi*” that made the connection between current events and religious themes. Jarcke maintained that the natural law was rooted in Christian revelation. Thus, politics and religion were fundamentally connected and religious belief benefited the well-being of the state. Jarcke’s *Revolution und Absolutismus* argued against absolutism with full understanding of the Prussian state and yet did not go as far as undermining its legitimacy. His *christlich-germanische* idea became part of Ketteler’s own political thinking, though, as Birke argues, without Jarcke’s submissiveness to the state.³⁹⁶ For Ketteler, following Möhler’s ecclesiology, the Catholic Church is not merely one human institution among many others, but it stands apart and often in conflict with the world, including at times the state, because of its divine foundation.

³⁹⁶ Adolf M. Birke, *Bischof Ketteler Und Der Deutsche Liberalismus; Eine Untersuchung Über Das Verhältnis Des Liberalen Katholizismus Zum Bürgerlichen Liberalismus in Der Reichsgründungszeit, Veröffentlichungen Der Kommission Für Zeitgeschichte. Reihe B, Forschungen ; Bd. 9* (Mainz,: Matthias-Grünwald-Verlag, 1971), 14.

4.4. Ketteler's Priestly Preparation Maintains A Political Edge In His Aristocratic Concerns, His Ignatian Spirituality, His Tutelage Under Bishop Reisach, And His Continuing Interest In Resolution Of The Cologne Conflict

The Cologne Conflict began Ketteler's consideration of the priesthood. The nature of this consideration was sincere in respecting the life as a holy calling, at least as can be discerned from his letters to his family, but it was also a process permeated with political significance. He had resigned his post in late 1837 and it was nearly three years later before he communicated to his brother Wilderich a firm commitment to become a priest.³⁹⁷ Those three years in between were spent in study, travel, conversation, hunting, and ceremonial activities. It was a kind of delayed and extended *Wanderjahr* appropriate for young German men in their year after university. Ketteler extended great effort and funds to travel within middle Europe to German, Italian, and Austrian cities.³⁹⁸ He made retreats, stayed in boarding houses, and was hosted by aristocratic families who shared his significant family and social network. Their time was spent in conversations about property speculation, the well-being of other nobles, and politics—especially church/state issues. It seems as though they spent a significant amount of their time hunting.

Hunting rights were a residual of the feudal privileges left in place even after the “legal and institutional underpinnings of a rural production and social relations” were radically changed with the modern German reforms, which included peasant

³⁹⁷ *SWB II*, 1:109. Ketteler's letter to his brother, Wilderich v. Ketteler, October 20, 1840.

³⁹⁸ Blackbourn notes that Göttingen, Ketteler's university, began offering courses on traveling as early as the late eighteenth century. Travel was an activity associated with the German Enlightenment as it created “an enlightened public, expanding knowledge in developing disciplines like philology, geography and ethnology ...” Blackbourn, *Long Nineteenth Century*, 35.

emancipations.³⁹⁹ The continuation of the rights illustrates the mottled nature of Germany's reform and the continuation of feudal vestiges during the *Vormärz* period leading up to the 1848 revolutions. Ketteler lacked an official position during his travels, of course, but he had an extraordinary opportunity during this time to observe the variety of reforms and their relative merits. He also had an opportunity to observe the economic condition of the various provinces as he, among his other family concerns, scouted and appraised property prospects. Many conservatives bemoaned the agrarian transition marked by the increased failure of estates and the consequent rise in land turnover,⁴⁰⁰ but for Ketteler these conditions provided opportunities for his family and social circle.⁴⁰¹ In addition to economic concerns, his appraisals included the relations of different classes to nobles and the openness of the people to outsiders. He did note the moral state of nobles in general, but wrote almost nothing about the conditions of the lower classes in the cities or rural areas. During this time before his ordination in 1844, the 'Social Question' seems far from his pressing concern. That said, it was really after the successive years of crop failures across Europe, beginning in 1844, that the burdens of the preceding thirty years of social and economic change were acutely felt in Germany.

Ketteler earnestly followed politics by reading his volumes of the "*Heft*," the *Historisch-Politische Blätter*, and he sent home lengthy letters recounting the figures with whom he made acquaintance; they included theologians, academics, and literary figures, but were mostly other aristocrats. These letters to his sister Sophie and his brother

³⁹⁹ Ibid., 107.

⁴⁰⁰ Ibid., 110.

⁴⁰¹ Ketteler describes the condition of Bavarian estates, for example, in his letter to Wilderich, from Munich, August, 1839. *SWB II*, 1:13-16.

Wilderich show that the decision to become a priest was in no way a rejection of his *Stand* that represented the basic values of his family. The letters do become increasingly pious over time and build in their references to God's care and providence. But as much as they might refer to entering a 'new world,' they do not suggest that choosing the priesthood meant separating himself from his former activities. His pivotal vocation letter to Wilderich, for example, transitioned without pause from his vocational decision to hunting matters; Wilderich was not forthcoming with information about a new flint hunting-rifle. Also, Ketteler was so pleased with his favorite hunting dog, Pink, that he was taking steps to insure that the hound's progeny would provide him with talent for many years.⁴⁰² To say the least, this turn to religious commitment was not St. Francis shedding his clothes together with his old life and mundane social responsibilities in the middle of the town square. Ketteler's most dramatic action was his move to Eichstatt in the summer of 1841—yet even that move brought him closer to Bishop Reisach, a central player in the church/state issues of Germany.

Ketteler's piety was one focused on action, as opposed to withdrawing from worldly concerns. The specific nature of his pious life—though a topic meriting much caution—seemed to have been distinctively 'Ignatian,' i.e., influenced by the spirituality of the Jesuits, yet without especially identifying him with the political and theological battles associated with the religious order in Europe during the middle to late nineteenth century. Ketteler's praise of the Jesuits deals primarily with the value of their spiritual guidance and the order's educational competence, though Vigenier is more willing to use the

⁴⁰² *SWB II*, 1:109. Ketteler's letter to his brother, Wilderich v. Ketteler, October 20, 1840.

specter of the Jesuits to paint Ketteler in papal colors.⁴⁰³ That said, the spirituality of Loyola's *Spiritual Exercises* is one immanently associated with social and political involvement. During a retreat, the 'exercises' begin with a reflection on one's past life and sins and the total dependence upon God's gracious gifts as revealed in Christian scriptures. Each retreatant then applies this insight to a committed life path, or to some decision relevant to a life path. In short, it is a spirituality of praxis, directed towards action in the world. For many nineteenth-century Germans and especially for Prussians, Jesuits were associated with political intrigue and ultramontanism. Ketteler's association with the Jesuits was sure to cloud his prospects in a Prussian-controlled state. Yet his Jesuit spirituality and his fondness for many of the works of the order did not seem to impact the nature of his own theology, which remained fairly free from the specific rigors, concerns, and language of nineteenth-century Jesuit neoscholasticism.

His *Gymnasium* studies with the Jesuits in Brig were fundamental in instilling him with character and discipline, as he often mentions in his later letters. More revealing, however, is that he describes his spiritual life using the language of St. Ignatius of Loyola's *Spiritual Exercises*, a form of prayer written by a Basque nobleman that is rich in courtly images and ideals.

I was moved by endless blessings by the Spiritual Exercises of St. Ignatius. From beginning to end, they are remarkable in the deep wisdom of their order and the special graces of God that the Exercises help reveal.

I know of no better means than these Exercises to build a sure foundation for the spiritual life—a foundation to protect against the doubts and uncertainties that one constantly encounters in the world.

⁴⁰³ Vigner, *Ketteler: Ein Deutsches Bischofsleben*, 58. Vigner grants the Jesuits dangerous power over people's consciousness with the use of the *Spiritual Exercises*.

And they are actually constructed for people in everyday life. They allow a spiritual period of solitude to examine and place in perspective your whole spiritual life. And afterwards, you can draw the experiences together to store up your spiritual resources for the future.⁴⁰⁴

Not surprisingly, his praise is especially clear in the notes from a retreat with the Jesuits in Innsbruck in October 1841. “Kingdom of God” images are ubiquitous in Christian scripture, and Ketteler was immediately drawn to the *Exercises*’ image of Christ as a prince/warrior who conquers the enemies of God and establishes a kingdom of justice under his banners of justice.⁴⁰⁵ These particular images—‘kingdom,’ ‘victorious in battle,’ ‘raising the banners of the kingdom,’ ‘conquering the world’—are all oddly present in his reflections on the birth of Jesus in a manger. That said, his later notes on the more martial contemplation of “Two Standards”—the battle banner of Christ as opposed to that of Lucifer—seem curiously lacking in confrontational or feudal rhetoric as Ketteler’s reflections probe his lack of decisiveness and commitment in the face of an easy choice of Christ’s army over the army of the devil.⁴⁰⁶ Though the retreat begins with the enthusiasm for battle, his notes eventually turn to the Christian virtues of humility and obedience. The ‘grace’ of his retreat, as described throughout and emphasized in the final notes, is the faith that his recognized unworthiness is redeemed by Christ’s work through him.⁴⁰⁷ This theme continued throughout his public sermons. Similarly, the Jesuit virtue of ‘holy indifference,’ extolled in the retreat notes, confirmed his family’s ‘noble

⁴⁰⁴ *SWB II*, 1:184. Ketteler’s letter to Sophie von Merfeldt, from Eichstatt, October 27, 1841.

⁴⁰⁵ *SWB I*, 5:11. Ketteler’s notes From “Spiritual Exercises,” October, 1841.

⁴⁰⁶ *SWB I*, 5:15. Ketteler’s notes From “Spiritual Exercises,” October, 1841.

⁴⁰⁷ *SWB I*, 5:20. Ketteler’s notes From “Spiritual Exercises,” October, 1841. “Herr, ich bin dieser Gabe nicht würdig, aber auf dem Altare meines Herzens bringe ich dir das Alles, was ich habe an Kräften des Geistes und Körpers, an Wollen und Hoffen, Alles, Alles!”

simplicity' lifestyle virtues that characterized his (widely publicized) austere private life as a priest and later as bishop. The retreat notes finish with the conviction to become a priest and a further list of commitments regarding his daily order; including daily meditations and prayerful examinations of his life, both according to the 'Ignatian' method he used during the retreat.⁴⁰⁸ His later pastoral letters to the priests of his Mainz diocese show that he held to this commitment.⁴⁰⁹

Ketteler's method of entering into priestly life bears the essential elements of his feudal mindset. Rather than applying himself to a local seminary or diocese, he sought out a prominent bishop as a sponsor or mentor to whom he would commit his future, Karl August Graf von Reisach (1800-1869), bishop of Eichstatt and later archbishop of Munich. It was a kind of personal fealty that crossed diocese lines. This personal relationship assumed primary importance in Ketteler's priestly formation and career right up until he was elected bishop of Mainz in 1850. Reisach shared Ketteler's aristocratic background and political outlook, and was deemed just the right leader during "these troubled times in the German church's history."⁴¹⁰ Again like Ketteler, he had studied law in Göttingen before entering the priesthood. Unlike Ketteler, however, Reisach earned a doctorate in the law before moving to Rome for his theological training. He then worked in the Vatican curia for some years and was squarely marked as a prominent

⁴⁰⁸ *SWB I*, 5:21. Ketteler's notes From "Spiritual Exercises," October, 1841.

⁴⁰⁹ *SWB I*, 5:337. Moufang under the direction and with corrections from Ketteler, "Vorschläge zur Erneuerung des Lebens in Klerus und Volk," (1867).

⁴¹⁰ *SWB II*, 1:62. Ketteler's letter to Wilderich v. Ketteler, February 26, 1840. In this letter, Ketteler pines that if only there only a few more such men in the aristocracy: "Hätten wir doch solche Männer in der Mitte unseres Adels—wie ganz ändern Gebrauch würden bei uns viele von solchem Umgang machen als der hiesige Adel!"

conservative ultramontane. It was Reisach who delivered Pope Pius VIII's message to Droste-Vischering in 1837 approving his confrontation with the Prussian government.⁴¹¹ Ketteler's early acquaintance with Reisach had all the markings of the aristocratic courts. He conscientiously sought an official introduction to Reisach, and socialized with him at aristocratic banquets, such as one hosted by Prince Lowenstein with the nuncio also present.⁴¹² Once acquaintance had been made, Ketteler revealed his desires and qualifications to be a priest, and then he placed his future in the bishop's hands.⁴¹³

Reisach's decision was delayed by some months into the summer of 1841 while he was drawn further into the political quagmire generated by the Cologne Conflict. Probably because of his own diplomatic experience, he represented the interests of the German Catholic Church in talks with Prussia and Rome, which took on new impetus with Frederick William IV's succession to the throne in the summer of 1840. In the meantime, Ketteler moved to Reisach's city of Eichstatt and assumed an urban hermitage existence, as he called it, continuing his private theological study.⁴¹⁴ He stayed informed of political events by reading the newspapers and looked forward to a conclusion to Droste's situation. Previously he had written to his brother Wilderich that the involvement of Rome was a good thing, but only because the German bishops' disunity required such escalating intervention.⁴¹⁵ In September 1841 Reisach returned to Eichstatt

⁴¹¹ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 73.

⁴¹² *SWB II*, 1:63. Ketteler's letter to Sophie von Merveldt, from Munich, March 4, 1840.

⁴¹³ *SWB II*, 1:109. Ketteler's letter to Wilderich v. Ketteler, from Dinklage, October 20, 1840.

⁴¹⁴ *SWB II*, 1:175. Ketteler's letter to Paula v. Ketteler, from Eichstatt, August 25, 1841.

⁴¹⁵ *SWB II*, 1:119. Ketteler's letter to Wilderich v. Ketteler, from Lembeck, December 6, 1840. The principle of subsidiarity is present in Ketteler's judgement that issues ought to be settled on the most local level. The principle's localizing force is balanced by the organic idea that when

and drew Ketteler into his personal orbit, sharing his table and allowing Ketteler to accompany him during his episcopal duties.⁴¹⁶

When the bishop turned his attention to Ketteler's priestly training, however, a number of complications emerged. He did not have the standard structured academic background necessary for the seminary system. He was older than the usual run of seminarians, and his character, talents, and interests required a more personalized plan of preparation. Reisach had first proposed a complete course of seminary studies at the Jesuit-run Roman College, or Gregoriana, while residing at the Germanicum in Rome.⁴¹⁷ Ketteler was quite taken aback by this suggestion, however, and by September of 1841 the idea was no longer on the table. Bolton suggests that Reisach, ever the diplomat, probably wished to avoid the doubly negative associations that a Roman and Jesuit education would pose for the Prussians.⁴¹⁸ The Passau seminary was also floated as a possibility, but in the end Ketteler returned to Munich, where his ambition was to do only what was absolutely necessary to be ordained, dismissing out of hand any ambition for an academic career.⁴¹⁹ Possibly, Bolton also suggests, Reisach's decision was influenced by the awareness of his own imminent move to Munich.⁴²⁰

necessary for the health of the whole body, more universal medicine is needed. "Aber schändlicher Weise war uns die alte katholische Regel abhanden gekommen, daß zur Heilung des kranken Theils des Körpers alle gesunden Theile, und eben sie ganz vorzüglich, mitwirken sollen" (ibid.).

⁴¹⁶ *SWB II*, 1:63. Letter to Sophie von Merveldt, from München, March 4, 1840.

⁴¹⁷ *SWB II*, 1:143. Letter to Wilderich v. Ketteler, from Harkotten, February 7, 1841.

⁴¹⁸ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 102.

⁴¹⁹ *SWB II*, 1:187. Letter to Sophie von Merveldt from Munich, December 13, 1841.

⁴²⁰ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 102.

Ketteler's return to Munich was a homecoming that brought him back to the intellectual and political center of German Catholicism, a center that was literally at home with Görres and his close friends. He also returned to Munich as a cleric with permission to wear a cassock. Ketteler had received a tonsure in 1836 as a formal prerequisite for a benefice; with tonsure came a "right of clerical clothing."⁴²¹ It was not something that Ketteler had given previous religious significance, but when Reisach heard the story, he instructed his protégé to wear the clerical attire. With this event, the years of uncertainty begun by the Cologne Conflict had come to an end. With his outward bearing now reflecting his inner identity, Ketteler wrote to his brother that he finally felt himself to be a whole man.⁴²² Ketteler's professors were men he already knew well and were for the most part hardly older than himself. They were Döllinger for church history, George Phillips for canon law, Max von Stadlbaur (1808-1866) for moral and dogmatic theology, and Franz Xaver Reithmayr (1809-1872) for scripture.⁴²³ Appropriately, his spiritual mentor and confessor during these years was exactly Ketteler's age and a professor of canon law and scripture, Friedrich Windischmann (1811-1861).⁴²⁴

Ketteler's sense of the law and rights during this time of priestly preparation remained concerned with the political position of German Catholics in general and in particular with the justice of Droste's continuing imprisonment. In September of 1840

⁴²¹ *SWB II*, 1:181. Letter to Sophie von Merveldt from Elchstätt, September 11, 1841. The way Ketteler phrases it: "durch die Tonsur das Recht auf die geistliche Kleidung zu haben" (*ibid.*), reminds one of Blackbourn's emphasis of sumptuary codes (regulations on dress) underpinning the corporate social order of the eighteenth century. Blackbourn, *Long Nineteenth Century*, 8.

⁴²² *SWB II*, 1:181. Letter to Sophie von Merveldt from Elchstätt, September 11, 1841.

⁴²³ *SWB II*, 1:187n6.

⁴²⁴ *SWB II*, 1: 210. Letter to Sophie von Merveldt, from Munich, January 8, 1843. Windischmann was also close to Reisach, serving as his "Generalvikar" in Munich from 1846 until 1856.

Ketteler's writing reveals the sense of justice that is independent from the actions of the monarch and the bureaucracy: "Unfortunately, [Droste's] expulsion continues to remain a great injustice/injury to the law (*Rechtsverletzung*) which gives the Catholic side no possible compromise or solution."⁴²⁵ Ketteler's politics, if anything, became more aligned with those of the *Görreskreis* and were especially influenced by his emerging identification as a spokesperson for the church. Before heading to Munich, he was in Munster for a rare convening of the Westphalian province assembly in March 1841. This assembly, or *Landtag*, had theoretically replaced the bishop of Munster as local ruler of Westphalia, but it was effectively only an advisory council to the Prussian monarch. With his brother Clemens representing Prince Wittgenstein at the assembly, Ketteler was privy to its inner political wrangling. His excited and detailed letters reveal significant interest in some reform legislation dealing with forests and hunting, and especially with the provisions insuring that hunting rights would be restored to a previous condition.⁴²⁶ More importantly, the letters concern his overriding interest in a petition to the Prussian king regarding Droste, a petition that had degenerated into a denominational and ideological brawl. A Catholic nobleman's flat-footed attempt to corner the liberal members with their own language with the "Petition Regarding The Granting of Personal Freedom"⁴²⁷ not

⁴²⁵ *SWB II*, 1:101. Letter to Wilderich v. Ketteler, from Dinklage, September 23, 1840. Ketteler wrote: "Leider bleibt seine Entfernung immer eine grobe Rechtsverletzung, bei der ich kein Nachgeben oder Vereinbaren von katholischer Seite für möglich halte."

⁴²⁶ *SWB II*, 1:161. Letter to Wilderich v. Ketteler from Munster, March 25, 1841. Ketteler wrote: "daß die Jagd endlich aus dem Zustande allgemeiner Ächtung hervor gehen und wieder als wahres Recht betrachtet und geschützt werden wird. Die Strafen sind sehr hoch und das Beweisverfahren wesentlich erleichtert."

⁴²⁷ Bolton translates "Petition um Gewährung persönlicher Freiheit": "Petition Concerning the Protection of Personal Freedom," Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 104.

only failed to pass, but the sponsor was thoroughly outmaneuvered and his intentions completely wrangled. The very low stakes of the debate did not motivate the majority Catholic assembly towards compromise on this petition intended to support Droste. The humiliated peer was forced to resign from the assembly and scurry to the king in Berlin to personally apologize for any appearances of treason. Ketteler was aghast at the ineptness and lack of unity of the Catholic members, but was still fascinated by the whole process. He wrote, "We cannot be hindered from protesting the government's violent and illegal actions against the archbishop. And whoever names the person of the king brings the highest treachery upon himself."⁴²⁸ Bolton notes that the mistakes of the Catholics at this assembly were good lessons and preparation for Ketteler seven years later at the Frankfurt Parliament.⁴²⁹

Eventually, Frederick William IV accepted a compromise position that granted the Catholics' position regarding mixed marriages, yet the delay of his decision deflated any potential good relations with his Catholic minority.⁴³⁰ His predecessor, Frederick William III, had ruled a long forty-three years for German Catholics, and Ketteler had shared in the great enthusiasm that came with the young Frederick William's accession to the

Yet elsewhere (Letter to Wilderich, March 27) Ketteler refers to the petition's intention to free Droste, so I prefer my own translation's less general implications.

⁴²⁸ *SWB II*, 1:44. Letter to Wilderich v. Ketteler from Munster, March 28, 1841. Ketteler wrote: "Mann kann uns nicht hinderen, das Verfahren der Regierung gegen den Erzb[ischof] gewaltsam und rechtlos zu nennen, und wer dabei die Person des Königs nennt, auf den selbst fällt der ganze hochverrätherische Theil dieser Beschuldigung zurück."

⁴²⁹ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 105.

⁴³⁰ Sheehan, *German History, 1770-1866*, 617-618. Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:257. Huber's account is more favorable to the Frederick William's position.

throne.⁴³¹ Just months after the coronation, Ketteler conveyed his trust that the Prussian king would unify the German nation in a great battle against France and bring Droste back to Cologne.⁴³² But Ketteler's enthusiasm soon waned. He shared in the general disappointment with a king who quite emphatically rejected any compromise in what he considered a pure "patriarchal regime," i.e., one without limits to his own will, such as a constitution, which he disparaged as "a piece of paper."⁴³³ The final conclusion of the Cologne Conflict was received with no special interest and Ketteler barely refers to it in his letters.

Ketteler's letters during his seminary years actually shun political topics. They are pious, familiar, and curiously introverted during this time that Sheehan describes as, speaking of political activity, "particularly intense in Prussia's western provinces, where regional loyalties, lingering confessional antagonisms, and popular hostility to official economic policies combined to feed a broad opposition movement."⁴³⁴ The letters remain focused upon topics of study, contentment with his present life of study, and the joy he has that his brother Richard has joined him in the seminary. Vignier describes Ketteler's developing religious and political worldview as a shift in focus from Westphalia to Rome, citing an unpublished article from 1841 that bore the influence of Klee's *Dogmatik*.⁴³⁵ The handwritten document idealizes the medieval world where king and pope were like "twin brothers" wielding the swords of state and church according to a

⁴³¹ Sheehan, *German History, 1770-1866*, 621.

⁴³² *SWB II*, 1:107-108. Ketteler's letter to Wilderich von Ketteler, from Dinklage, Oktober 20, 1940.

⁴³³ Sheehan, *German History, 1770-1866*, 623.

⁴³⁴ *Ibid.*, 627.

⁴³⁵ Vignier, *Ketteler: Ein Deutsches Bischofsleben*, 42.

divine plan.⁴³⁶ Ketteler's claim is that the twin pillars supporting the foundation of the Christian German states were shifted by the Protestant Reformation's priority of the ego (*Ich*) as the source of all authority. Once shifted, the pillars have finally fallen and the implications for both society and church are severe, as humanity and not God becomes the measure of all things.

His call was for attention to the signs of the times (*Zeichen der Zeit*) because not blindness but awareness are needed to protect against the present storms.⁴³⁷ If Ketteler was aware of the political turmoil of the times between the Cologne Conflict and his re-entry into politics in 1848, he did not reveal it in his correspondence. During this time, however, he did begin to open his eyes to the reality of poverty and social injustice. He transferred to Munster's seminary in 1843 and he was ordained there in June of 1844. His first assignment was as chaplain in the small town of Beckum, not far from Munster. During his short three years there, he found the lack of care for the poor disheartening and he responded by founding a hospital.⁴³⁸ In January 1847 Ketteler was appointed pastor of the parish in Hopsten, also not far from Munster. Hopsten was the location from which Ketteler experienced profound deprivation and suffering due to the continuing famines and social unrest prior to the 1848 revolutions. The precise nature of that experience cannot be accounted for to the same degree as his previous educational and

⁴³⁶ *SWB I*, 5:56. Ketteler, "Betrachtungen Über Einen Prophetischen Ausspruch Engelberts Von Admont."

⁴³⁷ *SWB I*, 5:59. Ketteler wrote, "Wir sollen Acht haben auf die Zeichen der Zeit. Nicht im Verschweigen der Gefahr und muthwilliger Selbstverblendung liegt das Mittel gegen die Wetter der Zeit, sondern in ihrer klaren Erkenntniß."

⁴³⁸ *SWB II*, 1: 243. Ketteler's letter to Carl von Merveldt und von Meinders, from Beckum, February 14, 1846.

political experiences – but the passion and focus of his later concern show that he had personally felt the documented social distress of those years.

PART TWO:
Revolutionary 1848: Protecting The Organic Society With Rights In 'Transitional Times'

Part Two demonstrates that in the context of the revolutionary 1848 year, German Catholics used a language of rights to defend their central political interests. Among the diverse political parties found in Germany at this time, Catholics could identify with none comfortably, but they united with one another in the face of perceived threats to the church. This context, covered in Chapter Five, forced the German Catholic Church, and Ketteler with it, to come to terms with the emerging modern nation-state. The church could no longer see itself as a 'perfect society' on equal terms with the state, and had to establish itself as a corporate body in need of legal protections provided by a constitution. Chapter Six, dealing with the 'performance' of the Catholics in the 1848 Frankfurt Assembly, demonstrates that this transition was indeed accomplished under the pressure of specific circumstances, but that it was conceived according to rational principles rooted in Catholic tradition. What makes 1848 so crucial for the history of Catholic Social Thought is that the church was not merely reacting to democratic and participatory governments, but was rather a willing and active participant. By participating in the political process, the church performatively accepted the democratically elected parliament's legitimacy and the rights it sought to articulate. The principles that informed this Catholic participation were most fully articulated in Ketteler's *Advent Sermons*, as described in Chapter Seven.

The *Advent Sermons* were written over a decade after the *Darstellung* and the Cologne Conflict, and after Ketteler's immersion in the Romantic Catholic theology of Munich with Görres, Döllinger, and Baader. Yet the *Sermons*, together with his

contemporaneous political speeches and letters, bear the mark of his legal training as well as his association with the historical school of jurisprudence. The discourses reveal a language of rights that is at home in a modern democratic parliamentary forum, in the halls of the 1848 Catholic political caucuses, and in the pulpit of a great German cathedral. Not yet a bishop, Ketteler's rise to the national scene occurred in the midst of the 1848 revolutionary tumult and its democratically charged repercussions. His political speeches confronted what he saw as the dangerous consequences of *laissez faire* capitalist liberalism as well as the equally dangerous proposals of the communists. He rejected liberalism's absolute rights to property on the one hand, and communism's elimination of property rights on the other, and in doing so he framed a political structure with a strong defense of rights that was built upon a foundation of faith relying explicitly upon a close reading of St. Thomas Aquinas' *Summa Theologica*. This interpretation of Aquinas is 'non-canonical' (Brian Tierney's term) in the sense that it attributes a strong and explicit theory of rights to Aquinas that is not accurate, but it is instructive because it reveals Ketteler's predilections and assumptions regarding rights. Rights, including subjective rights, were simply the language of political and legal discourse. Ketteler used the language freely and often without recourse to qualifications or reminders that rights included duties—though he unquestionably believed that rights required qualifications and had force only in society with a complex matrix of responsibilities.

His rights language at this early stage in his career was consistent with the three major 'domains' of his life: church, law, and politics. Ketteler's *Sermons* and more general writings read with the confidence, clarity, and challenge of the political

broadsheets that were his competition. What they do not immediately reveal is the complexity of academic subtlety or philosophical rigor, but I demonstrate that Ketteler was writing with the benefit of both and with a clear understanding of his foundations and the implications of his words. Whereas Catholics like Franz von Baader made their mark with philosophical insights, those like Johann Adam Möhler with their theological developments, and those like Joseph Görres and Döllinger with their appreciation for history, Ketteler's achievement was practical and political. He may not have been a philosophical, theological, or political innovator, but he was aware of the achievements in each of these fields in the nineteenth century, and he put them to use with his determined public voice. The language of rights was a crucial element of Ketteler's public voice at this time of historical transition, as rights are crucial in any modern political situation of conflicting claims.

Part Two makes evident the widespread use of rights by both conservative and liberal Catholics in mid-nineteenth-century Germany. From that general purview, Ketteler's contemporaneous works will be studied to discover his own understanding and use of rights: their theoretical foundation, their proper role in society, and their practical use. Part Two relies on the historical evidence from 1848 that places bishops and priests in the Frankfurt Parliament arguing for the rights of the church, and it relies upon an analysis of their debates, philosophical arguments, and theological beliefs. What emerges is a performative theory of rights that bears the marks of the historical situation and that is consciously rooted in a specifically Catholic worldview. The foundation of these rights is revealed partially in the legal, theological, and philosophical movements of the time,

but these movements, like Romanticism, appreciated the development of theory over centuries and looked to the origin of theories to understand their meaning. Theologians went back to scripture and patristic documents. Philosophers went back to the Greek and Roman classics of philosophy. Legal scholars went back to the Roman law of the republic and the Justinian code. In this tradition, Ketteler went back to Aquinas to understand and legitimate an understanding of society and specifically property, and in doing so he framed a foundation of rights and outlined how they were necessary for the proper realization of personal and social goals.

5. 1848 Context: Transitional Times and The Catholic Romantic Theologians

5.1. The Distinctive Catholic Identity And Response To The 1848 Transition And Crisis Of Legitimation Among Germany's Five Significant Political And Intellectual Cohorts

Ketteler's *Advent Sermons* were delivered in Mainz at the end of 1848—a year of revolution in Germany that followed a series of catastrophic events for the entire population.⁴³⁹ Three successive years of crop failures and related market problems led to concurrent famines, unemployment, inflation, and widespread bankruptcy in Germany and much of Europe. These hardships were felt both in the countryside and in towns and people were reduced to desperate measures. The “psychological impact of the economic double crisis” of falling food supply and rising costs contributed to the ensuing social unrest.⁴⁴⁰

The crisis of 1848 was brought on by material shortages, of course, but equally important was the scarcity of political legitimation, that is, the political order's disassociation with the consensus of the social order. Ketteler shared this dual perception of political illegitimacy and expectation for a new order—a new order he hoped to shape with his Thomistic social theory. His sermons called for re-structuring the social order upon broad Christian principles that were accessible to reasonable people of good will. The revolutions were remarkable for three reasons according to Blackbourn: They spread

⁴³⁹ A dependable historical reference for the Revolutions in English is Jonathan Sperber, *Revolutionary Europe: 1780-1850, Longman History of Modern Europe* (London: Longman, 2000).

⁴⁴⁰ Blackbourn, *Long Nineteenth Century*, 140.

very quickly across Germany; they were relatively bloodless; and though spurred by general hardship, the revolutions were focused in the major cities.⁴⁴¹ The material destructiveness of the revolutions was limited, but the political results were significant as rulers quickly responded with concessions that only supplied further revolutionary momentum. Associations (*Vereine*) sprung up across Germany, providing some avenue for the expression of peoples' strivings. These were formed along interest-lines and for Roman Catholics took the form of 'Pius Associations.'⁴⁴² Though they incorporated elements of 'piety' and were named after the pope, they were unmistakably political organizations with close ties to the Catholic church leaders. Among other achievements, they presented their political concerns with petitions signed by over 250,000 members.⁴⁴³ In such ways, the frustration of economic hardships and social decay gave way to great expectations for a new order emerging from the confounded political system.

Blackbourn describes Germany in the time between the Congress of Vienna (1815) and the March Revolution (1848) as "in transition"⁴⁴⁴ and "marked by ambiguous, conflicting elements... a *Zwitterwesen*, a 'hybrid creature,' symbolized by ... knights in gaiters who were a disagreeable mixture of 'Gothic madness and the modern lie,/ That is

⁴⁴¹ Ibid., 143.

⁴⁴² Sperber argues that in the period leading up to 1848, Catholic associations were in a period of decline. "Chaotic" in 1820s, they became increasingly secular afterwards. Sperber, *Popular Catholicism*, 30-38.

⁴⁴³ Blackbourn, *Long Nineteenth Century*, 147-148.

⁴⁴⁴ Ibid., 91. This is the title of Blackbourn's Chapter 2. Both Hahn and Siemann made similar points regarding Germany in transition in terms of political, social, and intellectual categories. Hans J. Hahn, *The 1848 Revolutions in German-Speaking Europe, Themes in Modern German History Series* (New York: Longman, 2001), 113, Wolfram Siemann, *The German Revolution of 1848-49* (New York: St. Martin's Press, 1998), 121.

neither flesh nor fowl.”⁴⁴⁵ He splits this period between the early “Restoration Germany” (1815-1830) and the “*Vormärz*” period that was covered in the earlier sections of this work. The ‘restoration’ German Confederation created under Metternich’s supervision at the Congress of Vienna did not attempt to reverse all of Napoleon’s basic political and territorial innovations in the German states of the old Holy Roman Empire. In any case, liberal political innovations were still minimal in the thirty-eight separate semi-autonomous states that survived in the German Confederation. Most, for example, were still ruled by aristocrats without elected legislatures. The developments that had been achieved were largely economic, such as Prussia’s German Customs Union (*Zollverein*), begun in 1834, that by 1842 had joined roughly half of the German states.⁴⁴⁶ Prussia and Austria, continuing to hold dominant influence, vied for position regarding the structure of a future German state (the *Kleinlösung* that excluded Austria vs. the *Großlösung* with Austria included).

The bifurcated opposition between ‘conservative’ vs ‘liberal’ is more misleading than revealing when describing the political interests in ‘Germany,’ this ‘hybrid creature,’ before the revolution. Simple right/left wings did not emerge in the German states as they had in France, even when a parliament was assembled in 1848 in Frankfurt. That said, it is necessary to first identify the German political and intellectual cohorts and then to locate Roman Catholic interests in terms of those cohorts. Finally, Ketteler’s own position will be located among these basic allegiances and influences. In 1848, during

⁴⁴⁵ Blackbourn, *Long Nineteenth Century*, 91. quoting Heinrich Heine’s *Germany: A Winter’s Fairy Tale*.

⁴⁴⁶ *Ibid.*, 96.

this still early period in the development of his own thought, he resisted political allegiance and demonstrated significant independence from even some of his Catholic mentors. During the “Leichenrede” and *Advent Sermons*, he showed that he was capable of synthesizing and projecting elements of both conservative and liberal political ideals together with Catholic social principles.

In what is normally considered the conservative side of the spectrum, there were three related but identifiable social groups at play in 1848:⁴⁴⁷

The first group consisted of the ruling aristocrats and the state bureaucracies (including the army) that served their interests. While they clung to patronizing authority and divine right legitimation of the monarchy, they introduced rationalization in administration and worked at incorporating the smaller states into a larger national organization. This group combined neo-absolutism with the liberal commercial policies that would be represented by Bismarck later in the century.⁴⁴⁸

The estate-owning class of mostly Protestant and Prussian ‘Junkers’ formed the second group. Distinct from the ruling aristocrats, this group was most closely identified with the *Herrschaft* ideology. They opposed the centralizing tendencies of the ruling aristocrats and resisted the loss of personal privileges and local legal authority—even as

⁴⁴⁷ These groups are not identical with the factions of the *Paulskirche*. Siemann provides a very good concise account of the factions which took their names from the inns where they caucused between sessions of the parliament. He separates the groups roughly four ways, from the conservatives of *Café Milani* to the Center Right constitutionlist-liberal, to the Center-Left parliamentary-liberal and finally to the Left democrat parties. In any case, there was no one café or *Hof* where Catholics could share political interests. Siemann, *German Revolution of 1848-49*, 123-126.

⁴⁴⁸ Blackbourn, *Long Nineteenth Century*, 232.

they successfully adapted to take advantage of the changing economic situation. Like the ruling aristocrats, however, they found political legitimation in the ‘divinely granted order’ as demonstrated in the real or constructed historical precedents of their forebears. The Junkers generally could be counted upon to support the ruling aristocrats, and they filled the ranks of the bureaucracy and army even while grumbling discontentedly about the compromised situation of the *Stände*.

The third conservative group was not associated with an economic class or *Stand*, but coalesced around the ideals of the Romantic movement even as its star was waning in the middle of the century. These conservatives were bound by the intellectual tradition greatly influenced by the Enlightenment and especially Kant, but were set apart from the Enlightenment ‘rationalists.’ As second and third generation Romantics, they continued to support the monarchical political form, but were realistic about its limitations and advocated constitutional and bureaucratic reforms, parliaments, and checks on authority. The Romantic ‘burghers’ (*Bürger*) were found especially in the universities among the intellectuals and students, and they were inspired by such lights as Schelling, Goethe, Savigny, and the Grimm brothers.⁴⁴⁹ They emphasized the need for governing structures to emerge organically from the people whose community formed a corporate being.

On the left or liberal (continental) side of the spectrum, there were essentially two groups, both united in their claims to the Enlightenment tradition and their hopes for a rationalized and independent system of law, but divergent in their political theory and

⁴⁴⁹ The Göttingen Seven might be considered their martyrs for standing up against absolutist policies by defending the constitution and a “Germanic” ideal. Like the Romantic *Bürger*, they were not revolutionaries and were certainly not liberals, but they were also not lackies to the Prussian king.

poles apart in their political courses of action. The ‘liberal burghers’ were economic liberals who advocated the incorporation of a constitutional government and *laissez faire* economic policy. This group, characterized as top-down reformers, worked for legal consistency and economic predictability in the German states. They saw the benefits of the customs union (*Zollverein*) and supported the monarchy in its centralizing and bureaucratizing tendencies that were far more conducive to the development of economic stability and growth than the balanced but divided states of Metternich’s Europe. Moreover, buoyed by the experience of the hesitant but eventual political evolution of the monarchical governments’ liberal ministers of the first part of the nineteenth century, they had confidence that this progress could continue.⁴⁵⁰ They were accommodationist and saw the *Stände* structure as potentially viable if it was open to the new economic models, i.e., if it was able to co-exist with a rising middle class as well as the new ‘aristocrats,’ the barons of capital. These democratic liberals usually quickly threw their lot in with the forces of order rather than radical change, and therefore were very different from the radicals of the Paris barricades. The liberal reforms of 1811-1825, it should be remembered, were advocated by Stein and Hardenburg, two aristocrats invested in the social status quo and supported by the Prussian monarchs.⁴⁵¹ In addition, while significant popular participation was a stated hope for the elections to the Frankfurt

⁴⁵⁰ Krieger gives Friedrich Dahlmann as an example of the liberal moderate. Dahlmann, one of the Göttingen Seven who had lost their university positions by opposing the duke in Hannover who attempted to nullify the constitution, accepted some theoretical goals of liberalism, but also strove to maintain a historical continuity between the existing political forms and new ones which move towards principles of citizens’ freedoms and rights. Krieger, *German Idea of Freedom*, 307.

⁴⁵¹ Krieger discusses this “identifiable aristocratic factor in the state liberalism of the reform period.” *Ibid.*, 141.

Parliament, the elected delegates actually tended to be established public figures deeply invested in social order and the preservation of the status quo.⁴⁵²

Krieger, whose *The German Idea of Freedom* analyzes the intellectual and social reasons why liberalism failed to take firm root in the German political structure, describes the group of essentially moderate liberals who were to become active during the parliament in this way:

The intellectuals belonged sociologically to that large group of propertied commoners who stood in Germany midway between an estate of burghers and a middle class, and who were therefore at once dependent upon and galled by existing social and political institutions.... common to [this] group of liberal intellectuals as a whole, consequently, were both the desire for modern liberal reforms in state and society and the continuing attachment to the habits or institutions of a politically undeveloped country. Thus on the one extreme, administrative reformers made a part of the liberal opposition, while on the other even the most socially unbound, floating intellectuals were limited in their radical politics by the persistence of their primary concern with traditional issues of philosophy, theology, or aesthetics that lay beyond politics.⁴⁵³

I include in this group both moderate and more strident liberals as they shared a basic striving for constitutional government as a means of securing general political and social rights in a national German government. The more strident liberals, whom Krieger calls 'duelists,' tended more towards explicit democratic ideals, but were united with the more moderate liberals in their allegiance to the monarchy and their unwillingness to use radical measures to achieve their aims.⁴⁵⁴

Opposed to the liberal burghers was the second liberal group comprised of democratic radicals or activists. They were distinguished from other liberals of the period

⁴⁵² Siemann, *German Revolution of 1848-49*, 82.

⁴⁵³ Krieger, *German Idea of Freedom*, 294-295.

⁴⁵⁴ *Ibid.*, 314-316.

by their willingness to challenge state power.⁴⁵⁵ Liberal activists thus included the people who were actually responsible for the revolutions and thus for forcing political change. This group was defined by its dedication to the principles of reason as applied to politics and specifically by its willingness to ‘act’ in order to achieve the goals of equal rights for all citizens. “For the radical, [liberty was] rooted in a cosmic principle of freedom—Hegel’s dialectical reason, Kant’s moral reason, or the reasonable natural law of the French tradition—and the radical’s emphasis was ... upon the absolute principle of freedom, with concrete liberty [being] the locus for its rigorous and integral application.”⁴⁵⁶ The activists were composed of liberals whose basic theoretical convictions were “scarcely distinguishable from more moderate doctrines,”⁴⁵⁷ but also included the socialists and communists, though they were a nascent and still nebulous group in 1848. Germany’s industrialization developed rather later than Britain and parts of France, and the workers were not ideologically radicalized, but remained more tied to their pre-industrial customs than to the identity of the working urban poor—a point that enraged Marx.

The broad mass of workers in 1848 did not work in the factories or build railways. For the most part, they were manual workers employed in small businesses. It was above all craftsmen whose existence was threatened, and

⁴⁵⁵ Democratic activist seems more appropriate than the ‘Radicals’ moniker due to their lack of coordination and commitment to radical social change. “The Radicals, or the democratic Left, were unanimously dedicated to the ‘greater German’ solution, to strong centralized unitary government and a territorial reorganization of Germany into provinces. They demanded the inclusion of Schleswig in the Reich but on the other hand wanted to exclude the non-German territories [belonging to] Austria and Prussia. They rejected hereditary monarchy.” Rainer Koch, ed., *Die Frankfurter Nationalversammlung 1848/49: Ein Handlexikon Der Abgeordneten Der Deutschen Verfassungsgebenden Reichsversammlung* (Kelkheim: Kunz Verlag, 1989), 58.

⁴⁵⁶ Krieger, *German Idea of Freedom*, 323.

⁴⁵⁷ *Ibid.*, 324.

journeymen in particular, who embodied the worker of 1848.⁴⁵⁸

Communism was perceived as a real threat by Ketteler, even though Marx's description of a 'proletariat' as the alienated cogs of the factory assembly-line was an act of foresight, not insight, in the sense that it was not descriptive of the actual situation on the ground in 1848 Germany.⁴⁵⁹ In any case, it is probable that he and Engels were setting their sights upon the 1848 middle-class or bourgeois revolution as a penultimate prerequisite for an ultimate workers' revolution. Relevant for the *Sermons* is the threatening presence of such communist ideas as abolishing private property and restructuring the social order. Ketteler respected the power of these ideas and considered the Communist League a local threat. It had larger associations in Cologne and Berlin, but it had attempted to centralize its efforts in Mainz in April 1848 because Mainz and Frankfurt (less than twenty miles apart) had become the vortex of Germany's political crisis. Ketteler identified the communists' ideas with the general menace of liberalism. Communism was a compelling example of the danger of putting aside the theological underpinning of the moral code and the demolition of long held social institutions.⁴⁶⁰

⁴⁵⁸ Siemann, *German Revolution of 1848-49*, 90.

⁴⁵⁹ Marx depended greatly upon the accounts of factory workers in England, thus recognizing patterns which he predicted would be replicated in Germany.

⁴⁶⁰ Ketteler had read Karl Marx's *Communist Manifesto* and he judged the argument of the socialists dangerous enough that they warranted a detailed counter-argument. I do not want to overemphasize the importance of Marx for Ketteler, however, as Marx was only one among many socialist leaders and by no means the most influential socialist figure for nineteenth-century Germany. Ferdinand Lassalle was the more representative figure for Ketteler, but his *Sermons* were addressed to the general socialist rejection of private property, and so it is not so important to delve into the intricacies of the differences between socialist and communist thinkers in the middle of the century. Two points of agreement between Ketteler and Marx were: 1) their critique of liberal ideals which in fact did little to help the poor, but served the material interests of the few; and 2) the desire not only to understand history, but to change it.

The liberal activists, distinct from the communists, were distinguished by their ability to transform political theory into action. The movement was developed in the 1840s in two stages according to Krieger. They first “began to look to the people as the agents of a philosophically, morally, and religiously conceived reform [and] began finally to develop the foundations of what was to become a democratic doctrine out of their need to provide this people with a framework for political action.”⁴⁶¹ It was only very late in the second stage that they definitively articulated the principles, within an essentially nationalist framework, which were on the lips of the revolutionaries: “universal suffrage, abolition of all privilege, and equalization of economic and social conditions within the individual property system.”⁴⁶² Krieger’s well-substantiated claim is that the lack of unity among liberals in both conviction and policy before the revolution gave it little chance of success in achieving liberal reforms after the revolution. Moreover, given the late articulation of principles of democracy and political action via mass popular involvement, once the revolutionary process had begun, it had little sustainability as a coherent movement with achievable goals.⁴⁶³ The activists were the necessary element for

⁴⁶¹ Krieger, *German Idea of Freedom*, 326.

⁴⁶² *Ibid.*, 327. Krieger identifies some radicals who were not nationalists, like the Young Hegelians, but states that most were swept up in the patriotism of the day.

⁴⁶³ Krieger’s *The German Idea of Freedom* is primarily concerned with the development and ultimate failure of liberal ideas in Germany. In doing so, he covers the period from the mid-seventeenth century, the Age of Absolutism, to the formation of the German nation in 1870. For obvious twentieth-century reasons the failure of liberal reforms can be identified with much of the woes that followed the formation of Germany into a nation in 1870. In structuring his argument as he does, his argument is essentially binary: either Germany could develop into a modern state according to liberal ideals, or it would fall into a state of conservatism—conservatism as embodied by the Prussian monarchists. Again, this is understandable given the date of the book’s first printing, 1957, but it excludes the possibility of the path advocated by Ketteler, which is on its face conservative, but in its foundation and practice quite different from the conservatism that actually emerged in Bismarck’s Germany. My criticism of Krieger, necessary for the argument of

sparking the revolution, but it was a revolution that they were incapable of controlling or even substantially shaping.

The success of the liberal activists in inspiring the “masses” should not be overstated. The great majority of the German population was not actively involved in the political unrest of 1848, and of those who were, it would be hard to argue that most would identify common interests with the liberals, as voting was much more likely to be along regional or confessional lines. The ‘proletariat,’ was still a relatively small German demographic that achieved political weight much later in the century. The potential of the ‘masses’ on the political stage, however, could hardly be ignored. The French Revolution and Napoleon’s mass mobilization of the French people were watched with awe and horror from German states. Writing in 1835, before Ketteler and Marx (b. 1818) are on the scene, Baader was already calling for the enfranchisement of the workers through voluntary associations and corporate liberties. Yet, mention of the masses of rural and urban workers is necessary here only to note their exclusion from political considerations—they lacked a political voice in the events following the revolutions 1848.

Thus, given these political and intellectual groups, it is impossible to simply locate Roman Catholic interests within any single one. Rather, in 1848 it was up to the Catholic leaders in the parliament to first identify common interests and positions, to develop

the dissertation, is that he excludes from his argument about the “German Idea of Freedom” a theory of freedom which is German, but neither liberal nor oppressive, and which was capable of embracing both ideas of representational government and of religious values and insights. That said, Krieger’s intellectual history has been valuable in setting out the framework and participants of the debate.

those positions intellectually in a way that united support for them among the various ideological and geographical Catholic interests, and then to rally support for them despite the many divisive factors.

5.1.1. Catholics And The Diversity Of German Political Parties

The discussion of the various political theories points out two crucial points for understanding Ketteler's language and theory of rights. First, outside of Austria, there is no place where Catholic interests comfortably fit on a national level before 1848, especially given the Prussian hegemony in most of the northern German territories.⁴⁶⁴ The second point is related. While there is overlap in the actual rights claimed, the foundation of Ketteler's language of rights is distinctive from those of the five political-intellectual groups. Thus while Catholics did make political alliances with different existing groups, those alliances were political, not intellectual. They did not entail the adoption of new theories of political legitimacy and rights.

While firmly opposing ... social disorder, the Catholic clergy and lay activists happily accepted the new political situation. Freed from the heavy hand of the authoritarian *Vormärz* government, they sought to use the occasion to ensure a favorable position of the church in the new Germany.⁴⁶⁵

Political Catholicism was a real phenomenon, as argued above, but it was not organized to represent a political party with clear planks. Joseph Görres was an important Catholic representative figure, but he was not a party leader.⁴⁶⁶ Radowitz, on the other

⁴⁶⁴ Catholics' best hope, Bavaria, rose with Ludwig I's ambitions in the 1820s and fell with his political collapse in the 1840s. It continued to represent Catholic political interests up until its incorporation with Prussia in 1870, but it was by no means a match to Prussia's political might.

⁴⁶⁵ Sperber, *Popular Catholicism*, 48.

⁴⁶⁶ Koch, ed., *Frankfurter Nationalversammlung*, 37.

hand, did play the role of Catholic leader at some points during the Parliament, possibly owing to his very close personal ties to the Prussian king, Frederick William IV, but his strident monarchialism and Prussian loyalties were actually a rarity among Catholics. Intellectually, Adam Müller might have served as a conservative figurehead, but the basic fact is that before 1848, Catholics simply lacked a core German political identity. The gathering of Catholics around the sessions of the *Paulskirche* parliament was critically important in uniting the various Catholic factions.⁴⁶⁷ Prior to this time none of the five groups 'fit' Catholic interests.

In 1848, there was no Catholic parliamentary caucus; only when religious questions were discussed did the Catholic deputies in the Paulskirche gather into a separate group across caucus lines. Secondly, political Catholicism did not possess in 1848 an organizational monopoly on politically active Catholics. Indeed, in many places more Catholics were active in democratic associations than in Catholic ones.⁴⁶⁸

Further, of the political factions of 1848, though there were some prominent Catholics in the different factions, they never formed a majority such that the faction could represent Catholic-favored political positions.⁴⁶⁹ Religion continued to play a role in politics throughout the nineteenth century and religious identity was closely allied with ethnic and political identity. With German-speaking Austria marginalized from the

⁴⁶⁷ Even the Catholic association was composed of diverse groups. It was led by a conservative Prussian general, von Radowitz, but was composed of Catholics across the political spectrum. Frank Eyck, *The Frankfurt Parliament, 1848-1849* (New York: St. Martin's Press, 1968), 239. Eyck also notes that Ketteler, as opposed to Radowitz, desired a Catholic political party and said as much to his brother in letter. Eyck calls this immature and half-baked idea the result of an impetuous young man. It does sound like the sort of thing that Ketteler would write in a letter to his brother, but I prefer to judge him by his public actions.

⁴⁶⁸ Dieter Langewiesche, "Revolution in Germany," in *Europe in 1848: Revolution and Reform*, ed. Dieter Dowe (New York: Berghahn Books, 2001), 125.

⁴⁶⁹ This was achieved with Ketteler's help in 1870 in the face of the *Kulturkampf*.

Prussian-dominated regions due to its residual political relationships with the Habsburg Empire, the rest of the German Catholics contemplated the possibility of minority status in a new national configuration.⁴⁷⁰ Though the hope for Austrian inclusion did not die completely for Ketteler until 1866 and his writing of *Deutschland Nach Dem Krieg*, the advocacy for religious freedom in both the Frankfurt and the Prussian constitution testified to the Catholics' awareness of this possibility.

Including all of the states of the German Confederation (including the Austrian states), Catholics, with twenty-five million people, had a majority over the Protestants, who numbered twenty-one million. Protestants were concentrated in the north and were the significant majority in Prussia. With twelve million Austrian Catholics, the balance shifts dramatically when it is excluded from the equation.⁴⁷¹ Ketteler had spent time in Bavarian Munich, but otherwise he grew up and lived in states where Catholics and Protestants had managed some form of negotiated co-existence, despite mutual distrust. He knew the risks of Prussian hegemony for the Catholic population and feared the *Kleindeutsche Lösung* (small German solution), which was ultimately realized after the Prussians crushed Austria on the battlefield in 1866. The separation of Austria from the German Confederation had already begun when they exited the Frankfurt Parliament in 1848, and it spelled the decline of Catholic power in Prussian-dominated politics. In a minority, the Catholics were further marginalized in the government because they were not able to ally with any one of the five basic groups outlined above. Their influence

⁴⁷⁰ The Austrians had the option to pursue the formation of a German-speaking union, but it was unwilling to sever its ties to its non-German neighbors who were formerly united in the Habsburg Empire.

⁴⁷¹ Eyck, *Frankfurt Parliament*, 80.

remained significant primarily on the local level in areas where the local authority remained Catholic. On the national level however, if one can speak of Prussia's growing sphere of influence as a nation, Catholic interests were dissipated.

There were Catholic progressives and the Enlightenment had a significant impact upon Catholic theologians, but taken as a whole the Catholic church was very wary of German liberal political policies. The secularization of the Napoleonic period had meant the permanent loss of many churches, monasteries, libraries, university faculties, and other properties and privileges.⁴⁷² In reaction, the Catholic bishops retreated to a defensive posture in the face of further liberal encroachments upon church life, a defensive attitude that was understandable in the face of explicit liberal political antagonism. The liberals, for their part, viewed Catholics as representatives of much that was wrong with Germany. They believed that priest-led Catholics clung to irrational superstitions and medieval political principles. They thus resisted the progress of Enlightenment reason and its democratic ideals.

Germany's existing conservative factions provided no home for Catholics either. The ruling aristocrats and the bureaucracy sought to centralize authority and bring church order, both Protestant and Catholic, under their control in a national church. They sought to oversee the appointment and training of priests, to provide their salaries, and to build new churches, thereby forming the church into a division of the bureaucracy.⁴⁷³ This would limit influence from Rome and insure a school and pulpit curriculum consistent

⁴⁷² Sperber, *Popular Catholicism*, 10. Sperber's account of the early *Vormärz* (Chapter 1) has a full account of the secularization's effect in Westphalia.

⁴⁷³ Blackbourn, *Long Nineteenth Century*, 99.

with the interests of the state. The contentiousness between Protestants and Catholics in Germany can be overstated and there are examples showing, if not harmony, at least more peaceful co-existence. There were some Catholics in the bureaucracy, including Ketteler's father, his brother, and Ketteler himself for a time. In addition, Josef von Radowitz, the leader of the Catholics in the *Paulskirche*, was a trusted advisor to the Prussian monarch, Frederick William IV, and later served as his Minister of the Exterior for Prussia.⁴⁷⁴ Taken as a whole, however, there was a divergence of interests and philosophy between the Catholics and Protestants that made co-existence very difficult within a Prussian system.

The Junkers, for example, were the estate-owning conservatives who shared some theoretical and cultural sympathies with conservative Catholics, but their political interests were local and their sympathies were insular.⁴⁷⁵ There were many Catholics who, like the Junkers, wanted to preserve the hierarchical society of carefully ordered *Stände* or classes and an agriculturally based economy. Yet, even if there was a desire on the part of the Junkers to ally themselves with certain interests that overlapped with Catholics, there were also great demographic, religious, and ideological obstacles. Catholics were wary of governmental control of the church and had no interest in centralizing power in Prussian hands.

There was a great amount of denominational overlap in the Romantic movement of the universities, where there were even some ecumenical efforts inspired, no doubt, by

⁴⁷⁴ Hogan, "Ketteler's Interpretation of the Social Problem", 35. Krieger, *German Idea of Freedom*, 338.

⁴⁷⁵ Berdahl lays out the fundamental differences between Roman Catholic theology and *Herrschaft* ideology in Berdahl, *Politics of the Prussian Nobility*.

the idealistic ideals of organic, intellectual, and social unity. Schelling, a Protestant, was a leading light for the Catholic as well as Protestant Romantics, and Catholics like Görres and Baader saw the need for cross-denominational coordination for national interests. Möhler's major work, *Symbolik*, recognized the scandal of disunity in the church and offered a path for reconciliation that included Catholics recognizing the sins of its past. Contrary to the liberals' Enlightenment thought, which advocated a strong exclusion of religion from the public sphere, the Romantics saw an integrated role for religion, and thus they were interested in political and social issues. This overlap and consensus were balanced, however, by the fact that the great diversity among the Romantic theorists was matched by the lack of unity among political groups influenced by the Romantics. Summarizing those positions where there was agreement, the Romantics did not want to do away with the monarchy or the striated social order of the *Stände*, but they did reject the monarchy's absolute divine right foundation and the legal preservation of a *Stände* system that was oppressive to the poor. They, for the most part, advocated a middle path of constitutional monarchy that steered between the traditional forms of government and the development of 'abstract' natural law as it had been formulated and applied in the centuries after the Reformation. Regarding the understanding of law and the use of rights language, Savigny was the single most important and influential representative of the Romantic position in the early nineteenth century.

5.1.2. Catholics, United By Desire To Protect Church From Secular Intrusion, Made Rights Claims In New Democratic Context

Deprived of an ideological home in liberal and conservative political parties, Catholics of many political and ideological leanings were united in the desire to protect the internal functions of their church, *jura in sacra*. This defensive response to perceived danger unified them and motivated them to combine their efforts on the specific issues that influenced the practice of their faith.

The Catholics had always fought over ad hoc issues which arose. But now they took the initiative over a much wider field. They learned a great deal from the liberals and the radicals in political theory, but they soon outstripped certainly the moderate liberals in the extent of their political organization. One of the most striking things was that the church, which had a strong autocratic side and which had between 1815 and 1848 preferred to deal with governments, was now prepared to enter the democratic arena. Suddenly, after the revolutions of 1848, from the spring onwards, the greatest reservoir of mass support, the flocks of the Catholic faithful, was tapped for political life.⁴⁷⁶

One need only read Pope Gregory XVI's encyclical, *Mirari Vos* (1832), to grasp the extent of the German Catholics' transformation in 1848. In that encyclical, Gregory scoffed at liberty of conscience for everyone as an "absurd and erroneous proposition" (§14). It condemned the freedom of the press (§15) and any criticism of princes or their authority (§17). It identified anything but "unchanging subjection to the princes" (§19) as essentially heresy inspired by the lust for freedom, a lust associated with Protestantism. Finally, it deplored the separation of church and state (§20) so vehemently that it is hardly a stretch to understand why Protestants in Germany were suspicious of their Catholic compatriots' political intentions.

⁴⁷⁶ Eyck, *Frankfurt Parliament*, 83.

The political context and experience of German Catholics were very different from that of Catholics in the Papal States, as was the corresponding response to liberalism. Thus the political transition for German Catholics, though similar to Rome in its opposition to certain liberal presuppositions, was distinctive and more amenable to representative legislative politics. Theoretically, the Germans saw themselves as ‘conservative’ concerning the state’s treatment of religion. They saw themselves as protecting the tradition and not ‘innovative,’ even as they were adapting to new political circumstances. They were equipped, however, with the theoretical tools developed in Tübingen and Munich to confidently quarry the tradition for resources to deal with their changing circumstances. The ‘rights’ controversy for Catholics in 1848 was not ‘whether’ there were rights, but ‘what kind’ and ‘for whom.’ The theoretical foundations of their rights discourse had much in common with their pre-modern political consciousness, in which rights were derived from one’s social situation and relationships, i.e., the rights of kings in terms of subjects, of nobles in relation to serfs, of parents in relation to children, of church in relation to state, etc... On many levels, it was simply taken for granted that political discussions utilized rights language—even *Mirari Vos* demonstrated this.

What changed in 1848 was the context in which rights were claimed. The social context was changed as the fading *Stände* categories were finally abolished to make way for an egalitarian society, at least ideally. In addition, the political context changed with the introduction of a representational parliament. What is crucial is that the German Catholics continued to talk in rights language even as their pre-modern contexts disappeared, and that they did not see any need to radically alter the theoretical

foundation of their rights language in this modern context. It was seen as a transition of *phronesis*, not *theoria*. That the new context was accepted is demonstrated by the “almost indecent haste” with which “the Protestant and Catholic ‘Christian state’ was buried”⁴⁷⁷ in the parliament without any substantial objection by the dozens of bishops, priests, and theologians in the assembly, a couple of whom would later be cardinals. The fact is that Catholics were confident in this new world, at least for the moment, though there was a need for a new articulation of those enduring foundations, which is why Ketteler is so important. For as he made his rights claims, as a Catholic priest democratically elected (more or less) and without allegiance to any one political party in Germany, his arguments and actions in that democratic forum revealed the foundation of these rights both in its continuation with and its development of the tradition.

5.2. Ketteler’s Rights Language & Political Theory Are Rooted In St. Thomas Aquinas, Not Prussian *Herrschaft* Tradition

Ketteler delivered the *Advent Sermons* detached from existing political parties, but not alienated from the political process. With their language of rights and general theory of political legitimacy, the *Sermons* contain no reference to contemporary political systems or parties and make no claims regarding any single necessary organization of power. Ketteler did make use of German jurisprudence, following Savigny’s juristic methods, but he stood apart from conservative Prussian political theorists and their *Herrschaft* ideology that unmistakably identified with monarchical government. Rather,

⁴⁷⁷ Ibid., 229.

the *Sermons* use St. Thomas Aquinas to describe a foundation more fundamental than those available in the conservative parties.

The context of his argument, a church, is an important first clue. On the defensive and recognizing the dangers posed by political isolation, the forum Ketteler chose to deliver his theory of political legitimacy (within which lies his implicit theory of rights) is symbolic of his solution to the problems posed by the 1848 revolution and by the breakdown of social cohesion in general. The sermons first analyzed the social situation and then offered some solutions inspired by scripture and most explicitly by St. Thomas Aquinas. The reading of Aquinas in the sermons poses a significant problem, however, because Ketteler interjects a strong theory of subjective rights into the Angelic Doctor's thought through a close interpretation of one question from the *Summa Theologica*. By attributing a definition of *ius* as a subjective right to Aquinas, Ketteler offers what Brian Tierney calls a "non-canonical reading of canonical texts... [because] Aquinas taught no such doctrine."⁴⁷⁸ In the "Treatise on Prudence and Justice," Aquinas posed the question regarding "Theft and Robbery: Whether It Is Lawful For A Man To Possess A Thing As His Own?"⁴⁷⁹ Aquinas was concerned with justice (*Gerechtigkeit*), with positive law (*Recht*), and with social order and authority (*Befugnis*), but he did not explicitly treat private property as a subjective right within a matrix of subjective rights (*Rechte als Ansprüche*). Brian Tierney argues convincingly in *The Idea of Natural Rights* that Aquinas' system may be compatible with a system of natural rights as subjective rights,

⁴⁷⁸ Tierney, *The Idea of Natural Rights*, 69. Tierney was not talking about Ketteler here, but the judgement applies to Ketteler.

⁴⁷⁹ Aquinas, *Summa Theologica*. "Second Part of the Second Part (II-II), Treatise on Prudence and Justice," Question 66, art 2.

but the concept as a doctrine is not explicit in his works including the *Summa Theologica*.⁴⁸⁰ Tierney does find an explicit medieval corporatist and Aristotelian precedent for this understanding of rights, including the right to ownership as a subjective power: “it defined an area of free choice where the individual could licitly follow his own will.”⁴⁸¹ He finds this in the work of Marsilius of Padua, however, and not in Aquinas.⁴⁸²

As much as Ketteler’s legal training influenced his rights language, his interpretation of Aquinas differentiates him from the non-Catholic context and locates him in a specifically religious context. His use of Aquinas distances him from the more rationalist German ‘rights’ figures like Christian Wolff, as well as the Romantic figures who followed Savigny. Savigny, whose Romantic *Geschichtsjurisprudenz* was outlined above (Section 2.5), dominated the German legal field in the early nineteenth century. Wolff dominated eighteenth-century German legal scholarship and formed what was, according to Tierney, “perhaps the most clear and coherent account of natural laws and natural rights in a fully developed, eighteenth-century Enlightenment form of the doctrine.”⁴⁸³ For Wolff, rights are the means that fulfill our natural ends just as the right to food is indicated by the human end of self-preservation.⁴⁸⁴ Because of such teleological thinking, Tierney locates him well within the trajectory of natural rights thinking, even given his Enlightenment influences. This is standard natural rights fare on the continent, and

⁴⁸⁰ Tierney, *The Idea of Natural Rights*, 108.

⁴⁸¹ *Ibid.*, 112.

⁴⁸² *Ibid.*, 110.

⁴⁸³ *Ibid.*, 51. Dietrich discusses Wolff’s influence on Catholic moral thought as it entered through the moral philosophy of Benedict Stattler, S.J. (1728-1779). Dietrich, *Catholic Theology in the Age of Idealism*, 43.

⁴⁸⁴ Tierney, *The Idea of Natural Rights*, 51.

Ketteler would have readily agreed with this principle, as far as it goes.⁴⁸⁵ But what separates him from Wolff is Ketteler's spiritual foundation for rights. Despite medieval roots in the tradition of Marsilius, Wolff follows Grotius, Pufendorf, and Locke in their separation of rights from any explicit connection to the society's deeply held beliefs—like religious beliefs, for example. For Wolff, the great reference figure for *Begriffsjurisprudenz*, the strength of the law and therefore rights was dependent upon the coherence of the legal system's rational structure. This Cartesian approach did not remove the law from the ethical context, but it did move the ethical concerns towards an unfettered rational foundation.⁴⁸⁶

Ketteler was undoubtedly influenced by this historical school of law as it informed much of his later critique of the liberal legal codes. Ketteler, like Savigny, had begun his legal training in the home of legal Romanticism, Göttingen, in the state of Hanover—a state whose 'baroque' legal system depended upon the learned jurist's understanding of the land's customary law.⁴⁸⁷ Ultimately, Savigny's theory of law as autonomous and thus free from religious influence (except as a historical remnant) contradicts Ketteler's system, and it is not the main source of his private property argument in the *Sermons*. That said, Ketteler's conclusions regarding private property are entirely consistent with the conclusions reached by the Roman law professor who had taught him and who

⁴⁸⁵ Hollenbach refers to this conception of rights as instrumental, such that they describe conditions necessary for the preservation of a conception of human dignity. Hollenbach, *Claims in Conflict*, 97.

⁴⁸⁶ Wieacker, *History of Private Law in Europe*, 254-256.

⁴⁸⁷ James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton: Princeton University Press, 1990), 115-116.

dominated the German legal faculties in the period between Napoleon (1815) and the 1848 Revolution.⁴⁸⁸

Savigny was a conservative figure who supported the existing moral and political order of the Prussian state. As a legal scholar, he was influenced by Kant's philosophy of law that held law as an autonomous order, but he completely rejected the Cartesian attempt to structure all laws upon simple foundations of abstract rational propositions. It is best to understand him as a Romanticist lawyer, advocating reform of the German political order with the adoption of Roman legal methods and sources together with an appreciation for how they had been historically adopted in the German territories.⁴⁸⁹ For Savigny, the tension between the historical emergence of the law and the rationality of the law was resolved through legal scholarship that was both historical and rational.

The Kantian concept of law remains [Savigny's system's] basis: law as an independent entity which empowers the individual to be independently ethical, but it does not force him to be so; the individual's rights as the space in which he is free to act consistently with the freedom of others; legal transaction and contractual intention as the action-space of the autonomous person.⁴⁹⁰

Savigny rejected Wolff's overly rationalist foundation, and he rejected the liberal attempts to impose abstract and rationalistic legislative formulas or constitutions in Germany. Instead, he located the foundation of law and rights in the historical emergence and practice of law in particular localities. He described the subjective right, still locating himself in the trajectory of the development of Roman law, as a power of the individual, a sphere within which the individual's will rules: "a right entitles the individual person to

⁴⁸⁸ Ibid., 93. Whitman's fourth chapter covers this time and establishes the school's dominance in the universities as well as their method of legal scholarship.

⁴⁸⁹ Ibid., 151.

⁴⁹⁰ Wieacker, *History of Private Law in Europe*, 315.

an area within which he rules according to his own will.”⁴⁹¹ But laws and rights cannot spring “capriciously out of ... the power and insight”⁴⁹² of legal code writers, but must emerge from the culture, with the Roman law of the Holy Roman Empire holding precedence of place. Though initially foreign, Savigny held that Roman law had become German through centuries of use. Juridical scholarship in German states had to therefore recognize the impact of Roman law on the German culture, as well as the continuing validity of Roman legal principles in German law.⁴⁹³

The abundant rights language in Ketteler’s 1848 writing, together with all his references to Aquinas and scripture, point to his learning from, but also his independence from, secular German jurisprudence. Ketteler’s use of Aquinas to support his system demonstrates the profound influence of the Catholic authors of the Tübingen school (especially Adam Möhler) and the *Görreskreis* in Munich. Ketteler’s political involvement during the year was capped with an invitation to deliver the Advent sermons before Christmas 1848. Johann Baptist Heinrich (1816-1891), who facilitated the invitation and helped prepare the sermons, lends even more credence and insight into Ketteler’s specific use and understanding of Aquinas, aided by the Mainz canon, Heinrich.⁴⁹⁴ His assistance lends force to the thesis that Ketteler’s reception and use of Aquinas were influenced by the Tübingen school and not a lingering German scholasticism. He was especially influenced by the social theories of Adam Heinrich

⁴⁹¹ Quotation from Tierney, *The Idea of Natural Rights*, 49n.

⁴⁹² Wicacker, *History of Private Law in Europe*, 309.

⁴⁹³ Whitman, *Roman Law in German Romantic Era*, 109.

⁴⁹⁴ *SWB II*, 1:446n10. Iserloh’s biographical information in footnote of Heinrich’s letter (#211) to Ketteler, 1850.

Muller and Franz von Baader, who both stressed the rights of the workers for fair wages and humane treatment in general.

6. The 1848 Frankfurt Assembly: The Emergence Of A Unified Catholic Position vis-à-vis The German Constitutional '*Rechtsstaat*'

1848 marks a crucial moment in German Catholic history, and possibly in wider church history, because it is the first time the church had come to terms with the modern shift to democratic and participatory government following the French Revolution such that it was a willing and active participant. While Catholic political parties were not formed as such, a Catholic political sensibility and extra-parliamentary organizations were evident. By accepting this political undertaking explicitly and enthusiastically, they performatively accepted its legitimacy as they sought to protect the rights of the church.

In 1848, German Catholics were brought together for the first time as a Catholic parliamentary organization in order to represent the rights of the church—indeed in the German National Assembly—which came together on May 18, 1848 in Frankfurt's St. Paul's Church.⁴⁹⁵

The close relationship of the church and state in German political history made the Frankfurt Parliament a legitimate cause of concern for all members who had any stake in the religious life of the citizens of the state proposed by the constitution. For Protestants, the secular ruler had been the effective leader of the church from the time of the Reformation, the *summus episcopus*, given that the government maintained church properties, appointed pastors, and paid their salaries.⁴⁹⁶ Catholics had also received benefits from the state in the form of financial and other support. The mostly Protestant

⁴⁹⁵ Karl Bachem, *Vorgeschichte, Geschichte, Und Politik Der Deutschen Zentrumspartei: Zugleich Ein Beitrag Zur Geschichte Der Katholischen Bewegung Sowie Zur Allgemeinen Geschichte Des Neueren Und Neuesten Deutschland 1815-1914*, 1967 Imprint of 2nd Edition (Köln, 1927) ed., 9 vols. (Aalen: Scientia Verlag, 1927), 35. Translation mine.

⁴⁹⁶ Krieger, *German Idea of Freedom*, 11.

Prussian state, for example, fostered Catholic church unity by refusing to officially recognize splinter groups like the ‘German Catholic’ church (*Deutschkatholiken*), which had tried to form an autocephalous church—thus rejecting Rome’s authority. The Roman Catholic church in Germany benefited as an institution by the fact that disassociation from an official church was seen as a political act that placed one’s citizenship and therefore one’s *Bürgerrecht* (rights of citizenship) in peril.⁴⁹⁷ In return, the state assumed authority to supervise and possibly intervene in the appointment of bishops and pastors as well other internal church concerns. Though the source of much conflict, these were considered matters of the “*ius circa sacra* (that is, the rights of the state in religious matters).”⁴⁹⁸

Catholic concern was expressed within organizations that emerged in the *Vormärz* period following such events as the Cologne Conflict. This tradition of issue-organization was typical of the period in Germany and for the Catholics the most influential were the *Piusvereine*, societies formed in March of 1848 and named after the recently elected and once relatively liberal minded Pope Pius IX. The *Piusvereine* spread very quickly throughout Catholic Germany, partially due to the Franz Joseph Buss, “the movement’s leading propagandist,”⁴⁹⁹ who was another of Ketteler’s conservative friends and a great devotee of Baader. Catholic leaders immediately understood the stakes of the *Paulskirche* legislation and the *Piusvereine* responded with huge petition drives to protect the church’s role in society. Buss, a theology professor from Freiburg, helped organize a

⁴⁹⁷ Justine Davis Randers-Pehrson, *Germans and the Revolutions of 1848-1849*, *New German American Studies*; 18 (New York: Lang, 1999), 98.

⁴⁹⁸ Eyck, *Frankfurt Parliament*, 229. Also described here as *jura in sacra*.

⁴⁹⁹ Siemann, *German Revolution of 1848-49*, 103.

national association of the local groups and presided over an assembly convened to address Catholic issues in the *Paulskirche*. At this very politically focused assembly, “bishops and deputies from state parliaments and the Paulskirche figured prominently... On 6 October, following detailed debates, the Assembly formulated a ‘Protest to the German National Assembly,’ which voiced its criticisms of the institutional guarantee of the state school and the ban on the Jesuit order.”⁵⁰⁰

Thus, the *Vereine* (associations) were a conscientiously conservative Catholic movement, especially on issues affecting the church, with a broad German organization and carefully articulated principles, and they were led by intellectuals with episcopal authorization. They not only advocated a system of individual rights without reservation and without fear that in doing so they were adopting liberal principles, but they did it to protect themselves against the ambitions of the liberal democratic factions in the parliament. The liberal ambitions included issues such as the “democratic election of priests,”⁵⁰¹ and the exclusion of church influence in society through, for example, the mandatory secularization of schools. The language of the petitions, however conservative the intentions of the *Piusvereine*, was sympathetic to the broader goals of the parliament, harkening to ideals of freedom, unity, and popular expression. They desired not to abolish the parliament, but to influence the debates via peaceful mass demonstration, and did so with the blessings and encouragement of the church hierarchy.

This point is critical. Catholic organizations *qua* Catholic were utilizing popular petitions to influence parliamentary procedures in order to advance their public interests

⁵⁰⁰ Ibid., 103-104.

⁵⁰¹ Ibid., 103.

in the form of rights language. The Catholic members of the parliament who participated in these “Pius Associations for Religious Freedom” (*Piusvereine für religiöse Freiheit*) carried the extra-parliamentary influence into the *Paulskirche*. There they successfully advocated for the freedom from state influence of specifically religious practice, as well as the role of the church in affairs that were not expressly religious, like schools, hospitals, and what would be later called social services. This movement with Pius IX’s name embraced the protection that the Basic Rights (*Grundrechte*) document offered them with its unequivocal protection of religious freedom—a freedom that was not officially recognized as a social good by the Roman church until over one hundred years later. The force of their effectiveness in the *Paulskirche* on this topic was magnified by the unanimity they had built among the Catholic population in these extra-parliamentary associations, which culminated in Mainz at the *Katholikentag*—the October convention organized and presided over by Buss. It should also be noted that despite its unanimity on the issue of religious freedom, they were also able to tolerate a great divergence of various other political standpoints from within their ranks.⁵⁰² In their diversity, however,

⁵⁰² Manfred Botzenhart, *Deutscher Parlamentarismus in Der Revolutionzeit: 1848-1850*, Revision of author's Habilitationsschrift, Münster, 1975 ed. (Düsseldorf: Droste-Verlag, 1977), 336. “Die Piusvereine haben aber nicht nur in bezug auf das Ausmaß ihrer politischen Aktivität keine einheitliche Haltung eingenommen, sondern sie haben dabei auch von demokratischen Sympathien im Rheinland bis zu streng konservativer Ausrichtung in Bayern die unterschiedlichsten Stellungen bezogen. Einig aber waren sie in der Agitation für die Forderungen der Katholischen Kirche, die der Mainzer Verein schon in einer Eingabe an den Fünfgerausschuß formulierte und die dann der deutschen Nationalversammlung in einer organisierten machtvollen Petitionsbewegung vorgetragen wurden. Ihr Kern war das Verlangen nach Unabhängigkeit jeder Konfession “in ihren kirchlichen und religiösen Angelegenheiten, insbesondere in ihrer Lehre und ihrem Kultus, in ihrer Verfassung, in der Anstellung ihrer Geistlichen, in ihrer Disziplin und in der Verwaltung ihres Vermögens.”(Quoting a petition from the Piusverein in Mainz.)

they were unified on this point: They were adamant advocates of the Basic Rights (*Grundrechte*) articles for religious freedom.

In the parliament itself, the *katholischer Klub* (Catholic Club, sometimes referred to as a *Verein*) was the organization of Catholics who met to discuss issues relevant to the church in the parliament. This group elected as chair (*Vorsitzender*) the Prussian General Joseph Maria von Radowitz, who would have distinguished the group with his own significant political standing, but its lack of a definitive membership was indicative of its *ad hoc* agenda. Possibly up to ninety members of the parliament were associated with it at one time or another. At its height, it probably numbered from fifty to sixty out of 587 seats in the whole parliament, including four bishops and six future bishops.⁵⁰³ There was a close relationship between the *katholischer Klub* and the *Piusvereine*, as the Catholic members of parliament were the public representatives of the *Vereine*, and these members, in turn, benefited greatly by the very well organized mass support of these very loyal groups.

6.1. Ketteler's Election To The Frankfurt Parliament: 'Kirche Und Rechtsstaat'

Whether or not Ketteler really desired to hold public office is difficult to determine from the mostly hagiographic accounts of his intentions at the time. What is important is that he accepted the position and that he dedicated his full attention to his political

⁵⁰³ Though comprising 587 seats, over the course of about a year there were around 830 representatives. Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:610. Including the Austrian members, Catholics had a significant minority, though the Austrians exited early when they perceived that their interests would not be served by the parliament. That depleted the numbers of Catholics in the parliament significantly.

position as a representative of his electorate. Publicly, he maintained a low profile befitting his junior status among the bishops, public officials, and great scholars who made up the Catholic delegation. He intended to be vocal only about those matters relevant to religious faith—including education, religious freedoms, the role of the church in the state and such matters. These religious matters were not peripheral or secondary, however, during a time when the major issues of the day were seen in confessional terms. The symbolism of the Cologne Conflict burned brightly in the Catholic Westphalian imagination. Prussian politics, conversely, were identified with a certain kind of Protestantism, and thus resisting Prussian advances was likewise viewed in confessional terms. The location of the parliament was even a church, the Protestant *Paulskirche* in the center of Frankfurt, though it also had a long tradition of hosting important political gatherings.

Vigener, Ketteler's 1924 biographer, paints a picture of the election process that left little chance for revolutionary candidates. Thus for him, Ketteler's clerical status and Catholic loyalties were the main reasons for his being chosen. The church and state connection was so unified in Westphalia that the elections themselves were often held in the churches in para-liturgical contexts: After a pious address by the local pastor, the ballots were distributed, filled out (including one's name), and collected. The ballots were then opened and counted, and the results were announced to the still-seated assembly.⁵⁰⁴ Vigener leaves out whether they began with a hymn, but he assumes that something similar occurred for Ketteler, who was elected in a region where there was a

⁵⁰⁴ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 70. Vigener cites the *Westphälischen Merkur*, May 6, 1848, as his source.

slim but clear Catholic majority. Sperber's more recent account supports Vignier's description of elections in Westphalian parish churches.⁵⁰⁵

The circumstances of Ketteler's election, including why and how he was chosen and why he accepted, reflect upon his role in the parliament as well as his understanding of the political process in those revolutionary times. His noble family background was important to the process and he was very wary of the newfound liberal confidence in democracy, but he shared the general German desire for political unity, for government reform, and for a representative and discursive political process. The election was his first political role, *qua* politician, but he was not a political neophyte. He was ordained a priest in June of 1844 and assigned to a parish in Beckum, Westphalia. It was a small town of four thousand people, mostly farmers, where the parish was both the spiritual and administrative nucleus. "*Stadt- und Land-Seelsorge, Kirchen- und Schul-Dienst waren hier vereint.*"⁵⁰⁶ His role as priest included responsibilities for the general social welfare. Towards that end, he immediately set about founding a privately funded and run hospital. In so doing he rejected the suggestions that it fall under the responsibility of the state because he distrusted the "external interference"⁵⁰⁷ such a policy would entail. The three things to be gleaned from this example regarding Ketteler's mind are, first, that social welfare is the concern of the local community that may be well represented by the church. The second is that the great projects of social welfare are to be achieved through charity, i.e., private giving. Third, Ketteler believed that state government, especially in

⁵⁰⁵ Sperber, *Popular Catholicism*, 48-49. Sperber cites as his source: Schulte, *Volk und Staat*, 161-82.

⁵⁰⁶ Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 1:123.

⁵⁰⁷ Quotation from Hogan, "Ketteler's Interpretation of the Social Problem", 32.

the era of democracy, could be a force of dangerous external cultural interference.

Ketteler's mind regarding the role of the state for the social welfare would change by 1866,⁵⁰⁸ but his understanding of the church's interest in advancing the material circumstances of the poor would, if anything, only increase. Thus, the transition to the political stage was not so great a jump for Ketteler and it was not a transition from 'spiritual' to 'secular' concerns. Rather, Ketteler's priestly vocation was integrally social, as he explicitly stated while holding the mandate of the Westphalian people in Frankfurt.

I make my plea based upon the life I have led up until today. And whoever can discern even the furthest appearance of selfish motives or material gain in the utilization of my spiritual or bodily powers—or the use of my possessions—please speak up now... My calling is this, to be in the church and in the cottages of the poor and sick... to work for the well-being of the people...

This is not the case since yesterday, or since the *März-Tagen*. But from the very moment I entered into this spiritual state (*in den geistlichen Stand getreten bin*), I have repeated to myself: From now on, you may have no other more important concern, as the spiritual care of the people and the alleviation of their poverty (*Noth*).⁵⁰⁹

Ketteler, as a university-trained lawyer, a nobleman, and a priest, was not atypical of the members of parliament. Sixty percent of those elected had studied law and there were quite a few other Roman Catholic clerics numbered among the thirty-nine clergymen.⁵¹⁰ The much larger group of Catholic delegates was very diverse politically and theologically, but religious (i.e., Catholic, Protestant, secular humanist, etc) identity was a critical marker, as informative as political affiliations for predicting voting patterns.

⁵⁰⁸ Hogan's 1948 dissertation outlines this change and is to be treated below.

⁵⁰⁹ Quotation from Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 1:134.

⁵¹⁰ Siemann, *German Revolution of 1848-49*, 122. This is a moderately disputed point. Botzenhart lists the various scholars' numbers: Schwarz 39 (4.8%), Eyck 45 (5.6%), Valentin 33 (4.1%) and 17 Catholic priests, etc. Botzenhart, *Deutscher Parlamentarismus in Der Revolutionzeit*, 161.

Ketteler lamented the initial lack of unity among Catholics that was addressed subsequently in the Catholic associations, but the point to be made here is that though liberal politicians resented religious influence in any public forum, Ketteler's specific religious identity was not an oddity, and it did not handicap him in legislative debate or negotiations. The delegates who took their seats in the *Paulskirche* did so assembled in the pattern set by the French parliament, with conservatives to the right and liberals to the left. And despite Ketteler's antipathy for certain liberal convictions, he initially found a seat among their numbers with the hope that on certain reforms they could find common cause. This turned out not to be the case, but it reveals at least willingness for compromise and dialogue, and thus the absence of strict party lines of voting. "It was a parliament of university-educated officials and lawyers. Not surprisingly, its members thought in constitutional and legal terms."⁵¹¹ The parliament was ultimately doomed by its lack of internal unity, its lack of connection to the original revolution, and by the unwillingness of Frederick William IV and the local princes to concede power to the central state or an elected parliament by accepting authority on its terms.⁵¹² It did, however, reveal many aspirations of the German people, and it had a significant impact on the subsequent political environment in Germany. Prussia, for example, eventually adopted a constitution very similar to the one put forward by the delegates, including many principles listed in the 1848 Basic Rights (*Grundrechte*).

⁵¹¹ Blackbourn, *Long Nineteenth Century*, 147. Siemann notes that "the legal education which the deputies had undertaken in the days of the restoration ... was historical and constitutionalist in colouring, rather than parliamentary and democratic." Siemann, *German Revolution of 1848-49*, 123.

⁵¹² Blackbourn, *Long Nineteenth Century*, 164. Eyck, *Frankfurt Parliament*, 213.

Kirche und Rechtsstaat, church and the modern constitutional state, were the two dominant issues for Ketteler when he was elected to the Frankfurt National Parliament (also referred to as an assembly) from Tecklenburg, where he was a parish priest in the small town of Hopsten. He went to Frankfurt with some misgivings, but reconciled himself with his political role after he was persuaded that without him, a liberal delegate might be elected who would jeopardize the political positions he shared with conservative Catholics. Even men like Johannes Geissel, the conservative archbishop who succeeded Droste-Vischering in Cologne, advocated engagement of his priests in the political process: “The Church may and must take part in the building of a new society, and her servants with her. They can and shall as citizens and priests. Belonging to the state as citizens, they share the same interests, the same rights and duties.”⁵¹³ And in Westphalia they followed that advice, as clergy were 20 percent of the delegation sent to Frankfurt compared to the 5.6 percent of clergy in the parliament overall.⁵¹⁴ The election process in Prussian areas was not direct, but involved an electoral college and took place in two stages. First, popular elections determined electors who, in the second stage, would choose delegates for both Frankfurt and a concurrent Prussian parliament in Berlin.⁵¹⁵ It seems that the most prominent conservative Catholic delegates from Westphalia went to Berlin. Because that parliament was judged more important, there was a shortage of

⁵¹³ Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 128. Bolton quotes Bachem here: Bachem, *Vorgeschichte, Geschichte, Und Politik Der Deutschen Zentrumspartei*, 2:25-26.

⁵¹⁴ Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 130.

⁵¹⁵ I was unable to determine the franchise requirements in the Tecklenburg where Ketteler was elected. Bolton notes: “There was a great deal of variation from state to state as to who was entitled to vote and how, if at all, the franchise was to be weighted. The confusion was compounded in the Prussian territories by the fact that electoral laws in the Rhineland and Westphalia had not been subject to the Stein reform.” *Ibid.*, 129.

suitable candidates for Frankfurt. They were looking for men who were acceptable to the electorate and skilled enough to counter the liberal opposition among both Catholics and Protestants. Bolton's 1982 political science dissertation on Ketteler, which goes into some detail on this topic, makes the point that the "actual selection of members of each body [Frankfurt and Berlin] was, in effect, determined by log-rolling among the electors."⁵¹⁶ Ketteler, who had been chosen by the dean of the priests in Tecklenberg to run in the first place, received a slim majority of votes from the electors after the concession was made to appoint the liberal candidate Thüssing as his alternate.⁵¹⁷ Thüssing's policies were sufficiently odious to Ketteler to keep him from resigning even after he desired to get away from political life and back to parish work.

6.2. The Frankfurt Assembly: Constitutionalism Was A Response To Political And Social Unrest Of 1848

Leading up to 1848 Germany shared the general European social unrest and the call for reform with constitutional measures, including "a democratic franchise, a strong parliament, a free press, and an unlimited right to political association."⁵¹⁸ The difficulty was that the heterogeneity of the German states forced the revolutionary parliament to address the problems of disunity while attempting to legislate universal codes for a single constitutional administration. Of the thirty-nine states participating, thirty-five had

⁵¹⁶ Ibid. Bolton states that Geissel himself went to Berlin, considering that legislative body more important for Catholic concerns.

⁵¹⁷ Ibid., 132. The position of alternate was not clearly spelled out. As a result, when Ketteler attempted to later resign, a controversy was sparked regarding the obligations of the alternate to carry on the policies of the delegate replaced. This will be treated later in the chapter.

⁵¹⁸ Dieter Langewiesche, ed., *Die Revolutionen Von 1848 in Der Europäischen Geschichte, Ergebnisse Und Nachwirkungen: Beiträge Des Symposions in Der Paulskirche Vom 21. Bis 23. Juni 1998, Historische Zeitschrift. Beiheft; 29* (München: R. Oldenbourg, 2000), 120.

dynastic rulers, and the remaining four civic regimes had their own legal systems and enjoyed a great deal of autonomy. Metternich's post-Napoleonic design had intentionally left the German states without a central power or national German identity. Instead of a central power, the confederation formed in 1815 had an assembly in Frankfurt that lacked sufficient authority to conduct matters of state except by way of consensus among the individual states. It even lacked the authority to unify the system of taxing and tolling within its borders until it was accomplished outside of the structure of the confederation in the *Zollverein* in 1836. The *Zollverein* persisted until the unification of Germany made it unnecessary in 1871.⁵¹⁹ Rights too, to the extent that they existed, were a matter largely for the local state to interpret and therefore were essentially dependent upon the will of the local sovereign. The very structure of employing such rights ran counter to a more universal concept or theory of rights.

The situation in 1848, as mentioned earlier, was in transition. The effects of France's vast secularization of church properties were still being felt a half century later. The decline of feudal structures, partially the result of legal emancipation acts and partially economic necessity, left peasants without their familiar social support, without enfranchisement, without economic security, and without a body to represent their interests in government. The concept of property, a central concern for Ketteler's *Sermons*, was of particular concern during this period of economic transition. Germany had not achieved the transition from a feudal to a capitalistic understanding of property as the parliament abolished feudal bonds. The transition produced further social disparity as

⁵¹⁹ H.W. Koch, *A Constitutional History of Germany in the Nineteenth and Twentieth Centuries* (New York: Longman, 1984), 22.

feudal obligations were translated into capitalistic terms. Not surprisingly, the peasants' 'emancipation' from feudal obligations was a mixed blessing. It left them the option to work for very poor wages on the land or for very poor wages in the growing urban industrial centers, while the noble landholders were granted the great estates as private possessions—a commodity that under the 'reform' laws could be bought and sold on the open market.⁵²⁰

This transition to a cash economy that benefited the elite in German society symbolized for Ketteler and others the transition to a crass materialistic individualism. Industrialization was beginning to create an urban proletariat of the working class. Guilds and other labor structures were becoming obsolete and with them the values that had informed and sustained artisans and their families for centuries.⁵²¹ This transition, however, did not move immediately to a radical ideology of democracy or socialism. In fact, the social unrest at the beginning of the nineteenth century was attributed as much to the liberal reforms as to the archaic feudal structures that crumbled with the transition of local estate economies to modern capital relations, with the former lords now in full possession of the estates as private property. The social fragmentation and unrest, however, were observed by most and labeled by Baader and others as the *Sozialfrage*, meaning it was a question that deserved political attention. Koch notes that while these workers were beginning to become aware of socialist models and ideas, they had no way to express it in legitimate avenues of government. Even in 1848 after the activists sparked the revolution, there was not a single working-class representative included in the

⁵²⁰ Siemann, *German Revolution of 1848-49*, 132.

⁵²¹ Koch, *A Constitutional History of Germany*, 39.

Frankfurt Assembly.⁵²² It is also important to note that the social difficulties from industrialism and urbanization in 1848 were still nascent in Germany.

The revolutions of March 1848 were not the result of socialist ideas, despite Karl Marx's great hopes and determined efforts. Rather, the revolutions were as varied and uncoordinated as the individual states and the confederation they were attempting to reform, though not upend entirely. "Belly-issues"⁵²³ were obviously important following the great famines and the inability of governments to deal with them. Moreover, there were associated moral issues that instigated popular anger: "the right to the fruits of one's labour and a fair wage, hostility to hoarding and usury."⁵²⁴ These issues did not, however, carry enough weight among the population to crush the old order. Rather, the revolutions were great theatrical movements made possible by the ready communication of uprisings from Paris and the new relatively easy transportation of dissenters to capital cities by train.⁵²⁵ Sometimes the uprisings were begun by liberal democrats, but as often they were begun by students "with their flowing locks, feathered hats and loosely-tied scarves,"⁵²⁶ very few of whom were from the lower classes. In Bavaria, the final provocation seems to have been the King's immoderateness with a cabaret dancer, Lola Montez.⁵²⁷ In Prussia, the revolution began with workers in Cologne and they spread after a few days to Berlin. If anything united the revolutions, it was the desire to turn back Metternich's

⁵²² Ibid., 40. Siemann, however, lists four craftsmen among the members. These four, however, would probably be members of guilds and therefore would not be numbered among the 'laboring' class of unskilled workers.

⁵²³ Blackbourn, *Long Nineteenth Century*, 145.

⁵²⁴ Ibid.

⁵²⁵ Ibid., 143.

⁵²⁶ Ibid.

⁵²⁷ Koch, *A Constitutional History of Germany*, 46.

repressive measures, which had been imposed to diffuse German national feelings and thus to maintain a balance of power in Europe. The “divided and vacillating ruling elite”⁵²⁸ was another common precondition that fueled the revolution.

The revolutions each had their own instigation and character, but once they were set in motion, they amalgamated and transcended the particular concerns that brought them into being. Without a unifying cause beyond the desire for reform, the amalgamated movements adopted the general program of liberal political reforms. The liberal reformers in Germany, though neither revolutionary prior to 1848 nor anti-monarchical, were happy to apply their agenda once the revolution presented them with that opportunity.⁵²⁹ They were seeking the reform of government, a move towards national unity⁵³⁰ and, “above all, liberals believed in the rule of law: the basic rights of free speech, assembly, and association, and an end to ‘arbitrariness’ (a key concept of the period).”⁵³¹ These goals could all be summed up in the desire for a *konstitutionelle Verfassung*, the concept-constitution of *Begriffsjurisprudenz*.

Through a series of missteps, the Prussian monarch, Frederick William IV, was initially forced to accept the principles of the revolution and the cause of national unity by appointing liberal ministers who prepared the way for a constitutional assembly. These concessions were repeated in most other German states, and led ultimately to elections in May for the Frankfurt Assembly. There were no structured political parties,

⁵²⁸ Blackbourn, *Long Nineteenth Century*, 142.

⁵²⁹ Strandmann, in R.J.W Evans and Hartmut Pogge von Strandmann, eds., *The Revolutions in Europe, 1848-1849: From Reform to Reaction* (Oxford: Oxford University Press, 2000), 102.

⁵³⁰ Koch, *A Constitutional History of Germany*, 50.

⁵³¹ Blackbourn, *Long Nineteenth Century*, 130.

but the candidates elected to the parliament generally were well-known personalities from the patrician class. Among the issues they considered most relevant was the forming of a constitution with a catalogue of basic civil rights. “This catalogue of basic rights was based upon the then prevalent conception of a conflict between state and society. The aim was to overcome this conflict by incorporating civil liberties into the state by way of the constitution.”⁵³²

Despite its revolutionary beginnings, the *Paulskirche* parliament successfully diffused and muted radical threats to the status quo without adopting the revolutionaries’ initiatives. The revolutions had demonstrated the power of the masses, the political risk of widespread poverty, and the danger of public discontent. This was known already by the activist (radical) democrats, but it was a lesson learned well by ministers across the political spectrum, including *laissez faire* liberals, Catholics, and even conservative Junkers. Bismarck and his adviser Radowitz, for example, successfully averted later revolutions with social programs to avoid extreme hardship in German living and working conditions. Ketteler’s own writings during his time as a member of the parliament and especially in his *Sermons* must be seen in the light of all these experiences, lessons, fears, hopes, and expectations.

6.3. The *Grundrechte* Of The Parliament: Catholics Advocated The Church’s Independence From The State As A ‘Right’

Though it is often referred to as a ‘Revolutionary Parliament,’ its elected members, *Abgeordnete*, represented fairly well established political interests. These men (there

⁵³² Koch, *A Constitutional History of Germany*, 65.

were no women elected) shared a common culture that transcended their class or *Stand* differences and separated them from the revolutionary elements. Koch calls the members the “Honoratioren, the patricians of the cities and rural communities, who put themselves or their candidates forward.”⁵³³ Their university education united them in a relatively small percentage of the population who would appreciate a *bürgerliche* existence of cultural taste, social values, and the desire for a certain commodious urban living.⁵³⁴ Aristocratic status was important, but cultured society had a measure of intellectual meritocracy where a university education granted one access and diminished resentment. Thus among the university educated men who were elected to parliament, there was little chance of Jacobin Terror or even moderate social ‘revolution.’ Rather, they followed a parliamentary course that took advantage of the social volatility to warrant some dramatic changes, but all in good order and not especially in the interests of the lower classes. Still, with the federal constitution and its Basic Rights (*Grundrechte*), they did essentially agree to cast off the last legally recognized vestiges of feudalism.⁵³⁵ In its place, they sought to firmly establish a *Rechtsstaat*—a state ruled by laws that was less vulnerable to the will of a local prince. The parliament successfully focused Romantic expectations of unity among the various German states, but it was unable to convince Prussia’s Frederick

⁵³³ *Ibid.*, 40.

⁵³⁴ “A society which was not defined by wealth or social status, profession or corporate identity, but largely by its own particular environment and neo-humanist education. Such a Bürger enjoyed an urban, small-town existence, with the cultural opportunities presented by the proximity of a princely court, still in the pre-industrial pattern and identifiable by its liberal values and aspirations.” Hahn, *1848 Revolutions in German*, 125-127.

⁵³⁵ *Die Grundrechte des deutschen Volkes*, Art II §137, “Vor dem Gesetz gilt kein Unterschied der Stände. Der Adel als Stand is aufgehoben. Alle Standesvorrechte sind abgeschafft. Die Deutschen sind vor dem Gesetze gleich...(usw)”

William to accept leadership of a nation envisioned as a constitutional monarchy.⁵³⁶ It was not an outright rejection of a nation ruled by laws and characterized by rights, but he was unwilling to accept that he, as monarch, could be bound by a constitution, a mere ‘piece of paper.’ The constitution pounded out in the *Paulskirche* was not adopted after the parliament itself was suspended. Its democratic and thus popular legitimacy was stripped away by Frederick William IV’s rejection of the parliament’s offer to lead a new united Germany. Nevertheless, the parliament’s constitution did have a lasting influence in Germany. Already in 1850, for example, Prussia adopted major sections of the constitution—including its section on Basic Rights (*Die Grundrechte des deutschen Volkes*, referred to here as the *Grundrechte*).⁵³⁷

Thus, historically, the document marks a definitive shift to a more modern liberal government, and theoretically it marks a shift from an understanding of rights as particular and relational (*eigene Rechte*)⁵³⁸ to a more universal theory of rights. The ‘particular’ rights being superseded were the rights of the estates—rights held by individuals according to their class (*Stand*), their family lineage, or their relationship to the monarch. Frederick William remained tied to this idea, it is true, but the vast majority

⁵³⁶ Blackbourn, *Long Nineteenth Century*, 172.

⁵³⁷ Bachem, *Vorgeschichte, Geschichte, Und Politik Der Deutschen Zentrumspartei*, 2:86.

Bachem states: “Die neue Verfassung hatte die kirchenpolitischen Bestimmungen der Verfassung vom 5. Dezember 1848 ohne wesentliche Aenderungen übernommen.” The *Grundrechte* were finally passed in Dec of 1848, thus they were directly contemporaneous with the *Advent Sermons* and with Ketteler’s tenure in the parliament. The *Grundrechte* were later incorporated into the constitution which took shape only in January of 1849, after Ketteler had left Frankfurt for good. While he was not a full member when the constitution was finally voted on and approved (though Frederick William refused it for Prussia), he was a full member when the *Grundrechte* were debated and approved. My references to articles and paragraphs of the *Grundrechte* will be to its later form as incorporated in the constitution.

⁵³⁸ Matthew Bernard Levinger, *Enlightened Nationalism: The Transformation of Prussian Political Culture, 1806-1848* (New York: Oxford University Press, 2000), 210.

of the delegates recognized the passing of that medieval or feudal system of political legitimation and they advocated more universally based freedoms articulated in the form of rights. This does not mean that they utterly rejected the *Stände* structures of their society in favor of the French Revolution's egalitarianism as exemplified in the slogans of liberty, equality, and fraternity. "In their program for social reform, many revolutionaries desired both to establish equality and to preserve certain traditional hierarchies. In their political program, many revolutionaries sought both a democratic constitution and the preservation of the monarchy."⁵³⁹

In function and form, the German Basic Rights (*Grundrechte*) are comparable to the American Bill of Rights and French Rights of Man, yet the German version differs by neglecting to justify its claims. All three documents state the fundamental rights of their respective governments and they are all clear and subjective formulations of rights as individual claims (*Ansprüche*) outlined generally and backed by the authority of the state. The German *Grundrechte* catalogue differs, however, in its stated justification, or rather in its lack of one. Further, it refrains from answering the question: "Who makes the law?" It makes no explicit claims for a universal theoretical basis of rights and instead claims rights based on citizenship—citizenship granted by one's German identity. "*Jeder Deutsche hat das deutsche Reichsbürgerrecht.*"⁵⁴⁰ Given that 'Deutschland' or a German 'Reich' did not yet exist, this illustrates the close connection between their national striving and the shaping of their German national citizenship identity. It also demonstrates that the rights did not make universal claims based purely upon human

⁵³⁹ Ibid., 214.

⁵⁴⁰ *Die Grundrechte des deutschen Volkes*, Art. I, §131.

nature, upon a social contract, or upon religious or existential beliefs. Instead, the *Grundrechte* list is a summary document hammered out in the sausage making process of parliamentary debate and voting. Its lack of an explicit theoretical foundation left some ambiguity, for example, and it refrains from any claim about who makes the law,⁵⁴¹ but that lack of theoretical commitment allowed for political consensus among immensely diverse groups including, for example, Junkers, natural law Catholics, liberals, and radical democrats. That consensus succeeded in laying out the groundwork for a *Rechtsstaat*, “a state based on the principle of law before which everybody was equal,”⁵⁴² by defining the ‘citizen’ who will be the subject and object of further constituted laws.⁵⁴³

The first article essentially established the foundation of a *Rechtsstaat* by declaring the equality of all citizens before the law. The second article was an explicit consequence of the first. It abolished the privileges of nobility (*Standesvorrechte*) and declared that all Germans were equal before the law (*Die Deutschen sind vor dem Gesetze gleich*). After having abolished noble privileges and disbanded serfdom and feudal ties to hereditary obligations, it declared in the third article that the freedom of the human being was inviolable (*Die Freiheit der Person ist unverletzlich*).⁵⁴⁴ The *Grundrechte* protect the person from unfair intrusion by state authorities using legal measures and from extra-legal seizures of property or person. Freedom of expression, including freedom of the

⁵⁴¹ Donald Dietrich’s comment on *Grundrechte*.

⁵⁴² Eyck, *Frankfurt Parliament*, 222.

⁵⁴³ Maurice Cranston is off base in the claim that these *Grundrechte* are essentially Hegelian in that they locate rights not in persons, but in the state. His critique of Hegel is simply transferred to the “nationalist German liberals.” Maurice Cranston, *What Are Human Rights, Preface: Reinhold Niebuhr* (NY: Basic Books, Inc., 1962), 5.

⁵⁴⁴ *Die Grundrechte des deutschen Volkes*, Art. III, §138.

press, is declared as a right, as is the freedom of association and education. The death penalty is abolished, except in rare cases, as are branding and beatings. Important for Ketteler is the protection of private property and specifically the household. These itemized examples demonstrate the specific nature of *Grundrechte* rights as claims. Though the word *Recht* is not repeated for each claim, it is used over forty times in different forms for the fourteen articles with their fifty-nine specific paragraphs. The following formulation of the right of expression is typical of the whole document: “§143. Every German has the right to freely express their opinion through speech, personal writing, print and illustrated representation (*Jeder Deutsche hat das Recht, durch Wort, Schrift, Druck und bildliche Darstellung seine Meinung frei zu äußern*).”

Crucial for the interests of the parliament’s Catholic *Verein* (*katholischer Klub*) was the *Grundrechte*’s formulation of religious freedom. This followed logically after the right to free expression in the fifth article. Religious freedom could have been formulated two ways, either in terms of separation or in terms of freedom, i.e., the exclusion of the governing domain from the religious domain, or by focusing upon the individual’s freedom from coercion regarding belief. Much hung upon this question, and Catholics lobbied hard and successfully to bring about this second possibility as it appeared in the final document. This is quoted at length here:

§144. Every German has full freedom of belief and conscience. No one is obligated to reveal their religious convictions.

§145. Every German is unrestricted in the household and public exercise of their religion. Crimes and offenses committed against this practice of this liberty are to be punished by law.

§146. The enjoyment of state and country citizen rights (*bürgerlichen und staatsbürgerlichen rechte*) is to be neither qualified nor restricted because of

religious confession. Religious confession may not cause injury to civil duties.

§147. Every religious community orders and administers/governs its affairs independently, but they remain subject to the general state laws.

No religious community enjoys preferential privileges through the state; there is henceforth no official national church.

New religious communities may form themselves; it does not require that the state recognize their confession.

§148. No one should be forced to attend religious events or celebrations.

§149. In the future, the 'Formula of the Oath' is to be read: 'So God's help protect me.'

§150. The validity of civil marriage depends only upon the completion of the civil requirements; the religious marriage ceremony may take place only after the civil act has been accomplished.

The difference of religion is not an impediment to civil marriage.

§151. The official registration [of marriages] is to be administered by the civil authorities.⁵⁴⁵

This religious 'independence' (*selbstständig*) scheme presented here represents a disappointment for the liberals in the parliament and the success of the Catholic position. An early scheme had been proposed regarding the separation between church and state that focused upon the 'separation' *per se* (*die Trennung von Kirche und Staat*), but that was challenged by the Catholics and especially by Johann Joseph Döllinger, who addressed the issue before the convention of *Piusvereine* in the first *Katholikentag* (October 1848). In that extra-parliamentary forum, Döllinger addressed the risk posed by this '*Trennung*' formulation for people with no cultural or political experience of a division between these two domains. He argued that a *Trennung* was not a neutral position. Thus, as stated, this separation of church and state entailed the subordination of

⁵⁴⁵ *Die Grundrechte des deutschen Volkes*, Art. III. Sections are indicated in the text.

one to the other, i.e., the state with jurisdiction over the churches. State law trumps church law and thus opens the door to state control of what had previously been the domain of the churches, such as church organization and religious education in the schools. He was a historian in Munich and one of the most influential and original theologians in the German Catholic Church. As a leading academic representing a prestigious German Catholic university, he was a widely respected theologian and was on good terms with the leading ministers in the parliament, both Protestant and Catholic, conservative and liberal. Ketteler respected the leadership of his former professor for church history and leading light of the *Görreskreis*. The parliament was a kind of reunion of Ketteler's theology days in Munich—certainly the conversation topics would not have been drastically different. This group formed much of the core of the Catholic *Verein*, which became a voting block that included Ketteler.⁵⁴⁶

With the Catholic delegates behind him, Döllinger successfully changed the phrasing of the constitution away from negative language of 'separation' to a positive statement reinforcing the "*Freiheit, Selbstständigkeit und Unabhängigkeit*"⁵⁴⁷ of religion and the churches. This was incorporated directly into the *Grundrechte*, with the first paragraph stating, "Every German has complete freedom in belief and conscience." The next paragraph demands that Germans be obliged to declare their convictions publicly or to be hindered in the public practice of their religion. Nor, paragraph §146 continues, should

⁵⁴⁶ This situation would change in the years after the parliament as Döllinger became more publically confrontational, and Ketteler refrained from public disagreements with the Catholic Church in Rome.

⁵⁴⁷ Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 2:704. Huber is the main source for the material here regarding the inner working of the parliament and the *Katholikentag*.

one's religious convictions either condition or limit civil rights (*staatsbürgerliche Rechte*). Paragraph §147 extends this to the structure of the church, which will remain independent, and the state will claim no one church as an official church with greater rights and privileges. Finally, a concession to secularization is granted with regard to marriage. The situation that led to the Cologne Conflict in 1837 and much inter-denominational conflict is resolved by making the state recognition of marriage prior to and independent from that of the churches. Mixed denominations, therefore, are not recognized impediments for the state and the churches have the liberty to dispense sacraments according to their own lights without civil consequences. Thus, the *Grundrechte* effectively affirmed religious freedom while producing some degree of church-state separation without subordinating the churches to undue state restrictions or control.

This construction, coming exactly two hundred years after the Treaty of Westphalia and over one hundred years before the Second Vatican Council's document on religious freedom, was adopted by the Catholics enthusiastically as a protection against the state's encroachment upon church affairs. For the Catholics, it cannot be simply or anachronistically viewed as their embracing the ideal of religious freedom, but it should be viewed as a progressive practical response to the growing danger of absolutist secular governments and liberal ideology. That said, this position was adopted in positive terms and supported rationally with arguments appealing to the dignity of the human person and the inviolability of conscience. Ketteler's own position on this topic was similar to that stated in the parliament by his old professor of canon law and the father of his friend,

the Munich professor Georg Phillips. Phillips stated, “the misfortunes of Germany were due not so much to the religious divisions themselves, as to their exploitation for political purposes.”⁵⁴⁸ The implication was that the independence of the churches from political manipulation would benefit the religious communities and diminish the political discord caused by previous religious divisions. Phillips was a ranking member of the *Görreskreis* who, as a professor of secular law with canon law credentials, would be conscious of the implications and dangers of legislative constructions. Centuries of close church-state union in the mixed denominational German states were not so easily defined away, however, and the next thirty years under Bismarck would demonstrate the complexity of paragraph §147, where both the independence of church order and the priority of state law are affirmed. This article, which will continue to be relevant for Ketteler for the rest of his public life,⁵⁴⁹ was addressed specifically in the *Sermons* where he hinged the well-being of the community upon belief in God, but did not advocate constitutional legislation to insure that belief. There is still plenty of middle ground where the battles would be fought.

The restatement of the *Grundrechte* was a breakthrough for the Catholic position, and they voted nearly unanimously in favor of the article with its positive affirmation of church independence. The debate itself is a remarkable demonstration of the uniqueness of church-state relations in the German states where Catholics unselfconsciously advocated the rights of religious freedom and the Enlightenment rationalists were wary of

⁵⁴⁸ Eyck, *Frankfurt Parliament*, 234.

⁵⁴⁹ The religious freedom rights article, as carried over and promulgated in the Prussian Constitution, was the key reference point for Ketteler in his subsequent arguments for religious freedom. It is another example of the critical importance of the Frankfurt Parliament for Ketteler.

the churches being released from government tutelage. The irony is punctuated with the examples of far right Catholic conservatives like the Munich philologist Ernst Lasaulx advocating religious independence⁵⁵⁰ while liberals and anti-clericals were skeptical of granting such independence to so potent an extra-governmental organization “owing to the blind obedience of many of the flock to the priests.”⁵⁵¹

It was not religious freedom and freedom of conscience that were controversial, so much as the integration of the previously privileged denominations into a society in which all religions were equal... Attempts to enforce the democratization of internal church organization and administration from the outside (the election of priests) remained unsuccessful. All in all, this section of the Basic Rights represented a milestone in the secularization of the modern state.⁵⁵²

Having won on the positive formulation of religious freedom, the Catholics believed that it was in their interest to support this modern constitutional and secularizing document. The *Grundrechte* defined the right to religious freedom, stated positively, and refrained from completely disengaging religion from social life as the liberals had advocated. The question *whether* these relations could be determined with rights language was completely absent from this debate. This is critical in supporting the thesis that rights were non-controversial. If they were controversial, Catholics would have resisted their use, but we have no evidence of this. This “no barking dog” argument is that rights were conventional and thus elicited no howl of protest.⁵⁵³ Catholics’ success in the parliamentary forum fortified their political confidence. It empowered them and gave

⁵⁵⁰ Koch, ed., *Frankfurter Nationalversammlung*, 261.

⁵⁵¹ Eyck, *Frankfurt Parliament*, 235.

⁵⁵² Siemann, *German Revolution of 1848-49*, 133.

⁵⁵³ Fritz Bauerschmidt provided me with the name of this form of argument called “Dog did not bark,” or “No barking dog.” It refers to the short story from Sir Arthur Conan Doyle, “Silver Blaze,” in *The Memoirs of Sherlock Holmes*, first published in 1894.

them license to accept the project of the parliament. “Döllinger’s presentation [of the positive formulation of religious freedom] was the most important result of Mainz’s *Katholikentag*.”⁵⁵⁴ Because of this restatement, the Catholics were able to approve the parliament’s *Grundrechte* with confidence, clearing the way for their confirmation of the constitution as a whole.

This atmosphere of political self-confidence made compromise possible on two other church-related issues. First, the lessening of Catholic distrustfulness softened the antagonism of the debate regarding the Jesuits returning to Germany. Still, Catholics were themselves mixed in their desire for the Jesuits’ return, as demonstrated when the leader of the Catholic *Verein*, Radowitz, suggested that Catholics could let the Jesuit issue drop as a good will concession to the parliament. It was thus not even a priority for the majority of Catholic delegates, though Ketteler himself was furious about Radowitz’s offer.⁵⁵⁵ The second issue regarding education, however, was more pertinent to the structure of the church-state relationship being formulated. The Catholic delegates succeeded in changing the legislation from requiring the state to provide basic education for all German students in favor of a state guarantee that a proper education be provided

⁵⁵⁴ Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 705.

⁵⁵⁵ Huber notes that even among the Catholics in the *Piusvereine* there was a majority who wanted the Jesuits to remain outside of Germany. The Catholic Prussian general (and close ally of Frederick William) von Radowitz gamely refused to ask for the admission of the Jesuits as a sign of Catholic good will for having won their position regarding religious freedom. Eyck, *Frankfurt Parliament*, 239. This infuriated Ketteler who was prevented by the speaker from taking the podium. It is remarkable to modern ears that the continued expulsion of the Jesuits was a matter for constitutional legislation at all, but this issue continued to engage Ketteler during his tenure as Mainz’ bishop, presenting him with further opportunities to articulate his position regarding religious freedom—a position articulated again in a language of rights which is addressed in later chapters.

for all students. Denominational schools could continue to function even with state regulations. The Catholic organization of delegates had successfully lobbied the parliament to achieve fundamental changes in the constitution regarding the nature of the churches and their official status in society. They thus successfully established that the church was not simply another voluntary organization, “like every other association (*Gesellschaft*) in the country,”⁵⁵⁶ but had a potentially integral, though not coercive, role in a society envisioned constitutionally. This is a point from which Ketteler’s *Sermons* will take off. While denouncing society’s movement towards secularization as nihilist, he still voted for the constitutional protection of people’s religious freedom.

6.4. Ketteler’s Articulation Of Rights In The ‘Paulskirche’:

Recognizing the central importance of 1848 for Ketteler’s intellectual and political development, his biographers adequately covered his role in the Catholic *Verein*, his *Leichenrede*, and his *Advent Sermons*.⁵⁵⁷ The biographers focused upon his stirring spoken words that were quickly published, making Ketteler a public figure. These three events will be treated below. What has not been treated until recently, however, was the industrious but mostly silent period of seven months that Ketteler spent as a member of the Frankfurt Parliament. Christoph Stoll’s article, “*Wilhelm von Ketteler im Frankfurter Parlament*,”⁵⁵⁸ provides some very rich information on this topic by examining the proceedings of the parliament in conjunction with Ketteler’s biographies and his recently

⁵⁵⁶ Huber, *Deutsche Verfassungsgeschichte Seit 1789*, 704.

⁵⁵⁷ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 66-86. Pfülf, *Ketteler: Eine Geschichtliche Darstellung*, 2:152-165.

⁵⁵⁸ Stoll, "Ketteler Im Frankfurter Parlament," 217-235.

published correspondence from the period. Stoll notes that many relevant papers were withheld from the most important, if somewhat liberal, biographer Fritz Vigener when he was researching his authoritative work. Since most subsequent biographical information refers to Vigener's biography, Stoll's article attempts to rectify this distortion with currently available material.⁵⁵⁹ What follows is greatly benefited by Stoll's research.

In a dramatic sense, Ketteler's very participation in the parliament is noteworthy. His work in that legislative body indicated a performative acceptance of the legitimacy of democratic and thus popular sovereignty over and against royal privilege, natural law hierarchies, and divine right legitimacies. This point is reinforced by Ketteler's voting in favor of the Habsburg Archduke Johann as the nominal head (regent) of a provisional executive. That vote located ultimate authority, practically speaking, in the popularly elected (ideally) Frankfurt Parliament—which is why Frederick William IV later refused the parliament's crown, since he clung to a divine right understanding of sovereignty.⁵⁶⁰ As a member of parliament Ketteler represented about 50,000 constituents, and he took his popularly elected (again, ideally) mandate seriously, missing only four votes in seven

⁵⁵⁹ Ibid. Stoll was particularly well qualified to write this article, having edited both Ketteler's collected works, *SWB* (especially *SWB I*, 5 (1985), which contains Ketteler's 1848 notes) and having recently re-published the documents and proceedings of the Frankfurt Parliament with a new introduction. Christoph Stoll and Franz Wigard, eds., *Stenographischer Bericht Über Die Verhandlungen Der Deutschen Constituierenden Nationalversammlung Zu Frankfurt Am Main, Hrsg. Auf Beschluß Der Nationalversammlung Durch Die Redactions Commission Und in Deren Auftrag Von Professor Franz Wigard. Neu Vorgelegt Und Mit Einer Einführung Versehen Von Christoph Stoll*, 9 vols. (München: Moos, 1979, 1988-89). Ketteler's earlier biographer, the conservative Jesuit Pfülf, played a role in denying these relevant papers to the liberal Vigener. This Pfülf/Vigener conservative/liberal struggle is more revelatory of the post-*Kulturkampf* debate and should not be anachronistically applied to Ketteler himself. Birke's work is the most authoritative work on the pre-1870 struggle. Birke also appreciated Ketteler's role in the *Paulskirche*, though he did not dwell on it. Birke, *Ketteler Und Der Deutsche Liberalismus*.

⁵⁶⁰ Blackbourn, *Long Nineteenth Century*, 161.

months without excuse. His jottings indicate that he was especially interested in the debates on the *Grundrechte* regarding the schools and the church.⁵⁶¹ He followed the example of Bishop Diepenbrock and refrained from associating with any specific political party in the parliament, taking a seat back in the second section away from the front.⁵⁶² He was right of center literally and figuratively, and surrounded by a small group of mostly Catholic members who shared his Romantic conservative worldview. His immediate neighbors, many of whom had also studied law in Göttingen, were mostly members of the middle to far right *Pariser Hof*,⁵⁶³ which advocated the *Großdeutsch* solution in opposition to Prussian hegemony in a future German state. These men were not especially remarkable for their activity at the parliament,⁵⁶⁴ but they would have been together not only in the *Paulskirche*, but also in the Catholic *Verein* where Ketteler held considerably more influence. It was from that established social and religious association that he fit into the larger political culture during that time of German national 'transition.' The *Verein*, mentioned above in connection with Döllinger's intervention on the *Grundrechte*, was an extra-parliamentary association chaired by General Joseph Maria

⁵⁶¹ Stoll, "Ketteler Im Frankfurter Parlament," 219.

⁵⁶² Hahn notes that almost a third of the delegates did not formally associate with political parties, most of whom might have been motivated by the "Romantic standpoint [which] demanded a direct link with the people," Hahn, *1848 Revolutions in German*, 118. Still, Ketteler's motivation was tied more to his belief that such political association was unsavory for priests.

⁵⁶³ Refers to the location in Frankfurt where they met, not any association to Paris.

⁵⁶⁴ Ketteler took seat number 530. In front of him were Adolf Lüntzel (Right, Casino party), Ferdinand von Staudenheim (Austrian, no party, presumably Catholic), and Zum Sande (Right, Pariser Hof), beside him were Matthias Deymann (Right, Pariser Hof), Eduard Schrakamp (no party, also from Westfalen) and Berien (?). From the seating chart in Koch, ed., *Frankfurter Nationalversammlung*, 34,35.

von Radowitz. Radowitz was the far right pro-Prussian friend and advisor of Frederick William IV, but the *Verein* included Catholics of all political stripes.

The Pre-parliament that planned the Frankfurt Parliament had directed the individual states to hold elections according to their own franchise laws. So, while there was an ideal of universal male suffrage, direct elections were not stipulated and there were great variations from state to state.⁵⁶⁵ Ketteler himself was a reluctant candidate who probably did not campaign for himself. "He was chosen as an elector in the general election and as such took part in the subsequent selections of delegates to Berlin and Frankfurt."⁵⁶⁶ In representing Hopsten, he was following the instructions Cologne's archbishop Johannes Geissel who instructed his priests to take part in the new proceedings:

The church and its servants may and indeed must work with the new social construction. The church can and should do this as citizens and priests. They are citizens of the state, and they share the same interests, the same rights and duties.⁵⁶⁷

The biographies tell a pious story about a shy Ketteler's reluctance to get politically involved, neglecting even to vote for himself in the close electors selection.⁵⁶⁸ Ultimately, what matters is that he did accept the appointment and while he did not have a leading role in the parliament, his political views were formed in the context of a Catholicism coming to terms with the modern state of laws, the *Rechtsstaat*. My argument here

⁵⁶⁵ Eyck, *Frankfurt Parliament*, 43.

⁵⁶⁶ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 132.

⁵⁶⁷ Bachem, *Vorgeschichte, Geschichte, Und Politik Der Deutschen Zentrumspartei*, 2:24., cited in Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 128. "Die Kirche darf und muß an dem neuen gesellschaftlichen Bau mitwirken und ihre Diener mit ihr. Diese können und sollen es als Bürger und Priester. Dem Staat als Bürger angehörend, teilen sie gleiche Interessen, gleiche Rechte und Pflichten"

⁵⁶⁸ Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 133.

regarding Ketteler relies partly upon his written and spoken word, but also upon his performative word, i.e., the significance of the thirty-seven-year-old Ketteler's actions during this time. For example, Ketteler supported the conservative Vinckes' intervention that attempted to remove the abolition of nobility from the *Grundrechte*. On the one hand, this could locate Ketteler as a reactionary. Ketteler's reasoning for the position, however, was that the article that claimed the 'equality of all Germans before the law' had already effectively ended aristocratic rights. Stated in this way, the democratic forum, the power of the constitution to articulate rights, and the concept of rights are performatively affirmed even as Ketteler remains in some ways tied to the more Romantic external trappings of the *Stände* society. The *Rechtsstaat* structure was not threatened, but for Ketteler, the equality of all Germans before the law did not imply the stripping of all cultural differences and traditional roles.

His conservative *and* republican position here was similar to that of Jacob Grimm, who himself held no noble title. Grimm proposed, with broad support from the parliament, that no more nobles should be created and that all legal differences between the *Stände* should be abolished. Families, however, should be allowed to continue to use their titles. Eyck notes that even the far right Catholic Prince Lichnowsky (Ketteler later delivered the *Leichenrede* at his grave after he was assassinated by the radicals outside the parliament) realized the need to concede privileges of tax and military exemptions.⁵⁶⁹ The point in this section is that Ketteler, together with conservative Catholics, performatively recognized the legitimacy of the democratic legislative process, together

⁵⁶⁹ Eyck, *Frankfurt Parliament*, 223.

with its discourse of subjective rights, even as they were pursuing a conservative social agenda.

6.4.1. Ketteler Opposed The Liberals And Democrats Within The Context Of The Legislature, Thus Providing A Performative Affirmation Of The Representative Process In His Subsidiary Defense Of The Organic Model

Hahn criticizes the political Catholicism in the parliament as being illiberal, anti-modernist and “opposed to the political legacy of the Enlightenment.”⁵⁷⁰ He marks the shift in strategy among Catholics due to the mixed marriage controversy among other things, and portrays their subsequent maneuvers as politically pragmatic, crassly self-interested, and destructive of the ‘revolutionary’ impetus of the parliament. Referring to their effect through the Pius associations, he asserts that Catholics were “successful in reinstating the Jesuit order and in gaining an input into educational policy and, in general, their impact was anti-democratic and illiberal.”⁵⁷¹ His argument that the Catholics of the parliament were not ‘liberal’ has validity, however, they were in many ways ‘pro-democratic.’ The legislatures of representative government are precisely the locations where constituents of a democracy pursue their interests. It is also the case that the liberal goals were not necessarily in the interest of a great number of German citizens either in the short or longer terms. In addition, Hahn’s criticism is blind to the point that the hostility of democratic and liberal parties in the parliament to any religious influence in society, let alone government, was itself an ideological endeavor contrary to many

⁵⁷⁰ Hahn, *1848 Revolutions in German*, 121.

⁵⁷¹ *Ibid.*

democratic principles. Eyck writes of the liberals' motivation for a 'unitary' government: "It so happened that the Left was at that time committed to the unitary principle, not only on general grounds of doctrine, but also because it still hoped to dominate the centre of the national state and to enforce its ideas that way."⁵⁷²

Ketteler recognized the stakes in the parliament and it is true that he opposed the principle of a 'unitary' government (as Eyck puts it) and many other liberal positions, especially the exclusion of religion from public life, yet he essentially accepted the terms and location of the debate in the public sphere—and in the Frankfurt Parliament specifically. Ketteler's opposition can be summed up in his rejection of the absolutizing and colonizing tendencies of a central government, especially one under Prussian control, capable of imposing universal rules over the individual states that were destructive of the specific social values of the communities in the states. Again, this opposition fits within his Romantic social theory and his advocacy for subsidiary legislation to protect the complexity and richness of organic local communities. This is demonstrated in his submitted amendments to the *Raveux'schen Antrag*, a liberal petition that attempted to establish the Frankfurt Parliament's jurisdiction over the legislatures of individual provinces or states (*Länder*). Hahn frames the debate as a struggle between the ideals of democratic popular sovereignty on the one hand and, on the other hand, the rejection of that sovereignty by conservatives and bourgeois liberals. Ketteler's position on the debate is fascinating for three reasons. First, he understood the profound long-term implications of such a centralized structure. Second, his counter-argument foreshadowed the principle

⁵⁷² Eyck, *Frankfurt Parliament*, 131.

of subsidiarity that would later be incorporated into Catholic Social Thought. Third, he framed his anti-liberal argument using a language of rights.

The liberals argued that because the parliament is the representative body elected by all, it most legitimately represents the German people. Because the parliament represents the people, it is the legitimate expression of their sovereignty. As such, according to the *Raveux'schen Antrag*, the parliament has the authority to make laws concerning all aspects of the people whom it represents. This exemplifies the democratic principle that contains the 'unitary' ideal.

Ketteler, however, recognized the colonizing tendency of this ideal contained in the phrase 'sovereignty of the parliament.' Therefore, his argument against the *Raveux'schen Antrag* sets the 'will' of the German people/nation (*Wille des deutschen Volkes*) over and against the 'sovereignty' of the parliament. The will of the people is not, he argued, that the parliament will make laws concerning all aspects of their lives. Rather, the members of parliament were elected with a restricted mandate to handle only nationally relevant matters—matters that cannot be addressed on the local or state level. He thus attempted to limit the jurisdiction of the parliament by denying it the power to represent and thus adjudicate for the entirety of German life. Rather, he argued that the jurisdiction of the parliament was limited to the sphere (*Kreis*) of issues that required national organization.

This argument was analogous to Savigny's and the historical school of jurisprudence in that it rejected the imposition of a 'concept' constitution (*konstitutionelle Verfassung*) 'from without' because it was destructive of the organic development of law 'from within' culture. *Extra-Land* or national legislation is judged by the extent to which it is

protective or destructive of culture that organically emerges from the lived experience of local communities. Ketteler's argument hinged upon an understanding of freedom and unity, both of which he claimed to embrace for the German people.⁵⁷³ He acknowledged that Germans share a desire for unity on a national level (*Kreis*) and that parliament has the responsibility to provide it legislatively “zur Herstellung dieser Einheit erkennt die ganze deutsche Nation die Souveränität dieser Versammlung an.”⁵⁷⁴ Yet the German people also want to be free from external restrictions upon their self-determination (read: free from Prussian hegemony). In a deft rhetorical maneuver, he outlined that freedom in terms of the particular social levels (*Kreise*) where humans experience freedom. People want to be self-determinative in their families, in their local communities, and in their provinces. If the ‘sovereignty’ of the people is located entirely in a national assembly, the multi-layered and complex social body is crushed flat, leveled, homogenized. The effect is to destroy the freedom/self-determination and thus the culture of the different *Kreise*. Therefore, on the national level, the responsibility of parliament is to protect the freedom existing on each subsidiary level: the freedom of every ‘person’ in their family, of every ‘community’ (or parish) within their boundaries, and of every ‘people’ (*Volk*) according to the laws and customs of their regional governments, as long as these protections do not destroy the integrity of the unity of the whole German nation.⁵⁷⁵ In essence, this is a long

⁵⁷³ Krieger's identification of positive progress according to the success of the liberal understanding of freedom does not address this understanding of freedom with deep roots in German intellectual history.

⁵⁷⁴ *SWB I*, 1:70.

⁵⁷⁵ Paraphrase from *SWB I*, 1:71.

established principle of German customary law that was imperiled by the overreaching central legislature.

The argument is also important for what it does not do. It does not call into question the authority of the legislature to debate this issue for the nation. Rather, it uses the internal terms of the revolution, *Einheit* and *Freiheit*, to arrive at a conclusion that in fact affirms this public forum. The argument, while respectful of the place of religion in society, does not attempt to trump the debate with religious references like divine threats or scriptural directives. Finally, by framing his ‘illiberal’ conclusions in rights language, he performatively demonstrates that rights language, even in a democratically elected legislature, need not imply the adoption of liberal philosophical presuppositions.

Only when the local community recognizes the rights of the family, when the state recognizes the rights of the community, and when the national assembly recognizes the rights of the state, will the German people have reached freedom.⁵⁷⁶

Ketteler’s submitted amendments to the *Raveux’schen Antrag* ultimately did not reach the floor of the parliament. It is also true that the argument itself was not universally supported by the Catholic members of parliament. Yet the document is critical for the argument here because, first, it outlines the structure of Ketteler’s position at this time. Second, the argument is entirely consistent with Romantic Catholic social theory. Thirdly, despite Ketteler’s failure to bring this to the floor, the point stands that his practical aim in the submitted amendments, i.e. the protection of individual states from a ‘colonizing’ anti-religious central power, did represent the majority Catholic view

⁵⁷⁶ *SWB I*, 1:70. “Nur wenn die Gemeinde die Rechte der Familie, wenn der Sonderstaat die Rechte der Gemeinde, wenn die Nationalversammlung die Rechte der Sonderstaaten anerkennt, wird das deutsche Volk zu der Freiheit gelangen.”

that had considerable if not unanimous support among the Catholic delegates. It also had wide resonance among the overwhelming majority of Catholics who made up the numbers of the *Piusvereine*—the backbone of the emerging political Catholicism. Ketteler took this central position representing a non-controversial Catholic social theology, articulated it with a rights language, also in a non-controversial fashion, and was prepared to submit it to a democratically elected legislature.

In the end, a legislative solution was engineered by Raveaux, the liberal who had introduced the petition, which followed a compromise strategy suggested by Johann Peter Werner, the Catholic representative from the Rhine, and it was almost universally accepted by the parliament. It offered legal precedence to the parliament, but did not grant it the role of ultimate ‘sovereignty.’ Rather, it incorporated a subsidiary principle that reserved certain powers to the local states. The compromise conclusion was analogous to the American ‘federalist’ position that offered important concessions to state government, but it was also different in important ways that reflect the German context. In the United States, the states’ rights were granted by the Constitution itself, i.e., the central power that had restrained itself in certain areas. The German subsidiary solution located the continuing legitimacy of local rights in the states themselves, and not in the authority of a document representing “We the people.”

The context of the 1848 Frankfurt Parliament was the experience of the utter failure of the previous weak central German Confederation to provide the necessary unity for trade, defense, or social development. In response, the parliament accepted that the state needed to abolish the remnants of feudal princely rule in the provinces (*Länder*), but the

majority of delegates feared the disproportionate power of Prussia in any centralized government. Ketteler, together with a consensus developed in the Catholic caucus (*katholischer Klub*), advocated a pragmatic middle way that recognized the legitimacy and role of the central government, but which denied it the claim of ultimate sovereignty. Sovereignty remained a mysterious power for the Romantics, the *Wille des deutschen Volkes*, which could be represented only imperfectly by any legislative body, which was thus always answerable to it. Legislation was to be judged by whether it fostered the growth of the whole human community on each of its levels, including the national level. Therefore, the compromise that was acceptable to the Catholics agreed that the national parliament's laws took 'precedence' over the individual province laws. It gave the national legislature sufficient authority to be an effective central power, but it did not give it the claim to complete popular sovereignty, i.e., the central government was limited in its claim to represent, and therefore legislate for, all levels of society.

This principle that limited the national government was essentially a principle of subsidiarity: that the national government had the authority to legislate only on matters that must be managed on the national level. Though this term, subsidiarity, may not have attained general usage or the status of an official principle, it was the term that Ketteler used: "The state has only a subsidiary right (*Der Staat hat nur ein subsidiares Recht*)."⁵⁷⁷ The national legislature did not have legitimacy in matters that the local communities could competently administer. The principle of subsidiarity reined in the Enlightenment position that took form in the universal laws of the Napoleonic Civil Code. Subsidiarists

⁵⁷⁷ *SWB I*, 5:122. Ketteler's "Entwürfe für die Rede vom 18. September 1848 über die Schulfrage." Here, Ketteler is differentiating the state's rights from that of the family.

rejected the position that universally valid laws could be promulgated to rationalize every aspect of human life. This position is distinct from the federalist principle of the American constitution. In the American model, the rights of individual states are granted by the Constitution representing the central power, but such claims as ‘inalienable rights’ in the *Declaration of Independence* and the qualification in the *Bill of Rights* in the Ninth Amendment recognize that rights need not be ‘enumerated’ in the Constitution to be ‘retained by the people.’ Thus, there is at least the recognition of an extra-constitutional realm of legitimacy. Yet, American jurisprudence is very reluctant to recognize any rights not at least implicit in the Constitution. This is different in the German context of the 1848 parliament’s constitution, where legitimacy was determined by an extra-legislative principle: the principle of subsidiarity.⁵⁷⁸ Here, the subsidiary rights of the *Kreise*, including rights of the *Länder*, are not derived from the state as embodied in a document of the state. Rather the constitution is legitimate to the extent that it protects the rights of the people (*Volk*), thus representing its will (*Wille*). This conclusion was accepted, if reluctantly, by the liberals, and it was very favorable to the Catholics. Both voted overwhelmingly in favor of its passage.⁵⁷⁹

⁵⁷⁸ Savigny’s historical account of the legal fiction ‘juristic persons’ interestingly models the ideals of subsidiarity without ever using the term. Friedrich Karl von Savigny, *System Des Heutigen Römischen Rechts: Zweytes Band, Die Rechtsverhältnisse*, 8 vols., vol. 2 (Berlin: Veit und comp., 1840), 2:225.

⁵⁷⁹ Hahn, *1848 Revolutions in German*, 139. The intervention of Johann Peter Werner is found in Stoll, "Ketteler Im Frankfurter Parlament," 220.

6.4.2. The School Question: Education is the Right of Parents Or The State

The question of religious liberty in the Basic Rights (*Grundrechte*) and the question of sovereignty in the national legislature had been resolved satisfactorily for the Catholics, but the resolution of the school question was not. The debate on the issue occasioned Ketteler's first address to the parliament. His position on the issue starts with five principles he first composed on religious freedom, though these were not articulated before the parliament. In them, he attempted to demonstrate "not that the state is Godless, but that it should be without a single denomination."⁵⁸⁰ Here Ketteler was detailing the matters to be considered *jura in sacra*, i.e., within the inner realm of church activity, immune from state interference:

- (1) The freedom to promulgate ecclesial prescriptions, the cessation of the Placet [giving the state authority to veto internal church actions].
- (2) The freedom to make all ecclesial appointments without any interference from the state.
- (3) The unrestricted authority to call synods and to govern all statutes regarding one's own religious community.
- (4) The freedom to enjoy the right of religious association.
- (5) The freedom to administrate and use church property.⁵⁸¹

The rights that Ketteler outlined here represent subjective rights on a collective level, and in defending the structure of these freedoms for churches in the state, he made a very

⁵⁸⁰ Stoll, "Ketteler Im Frankfurter Parlament," 225.

⁵⁸¹ (1) Freier Erlaß kirchlicher Verordnungen, das Wegfallen des Placet. (2) Freie Besetzung aller kirchlichen Stellen ohne irgend eine Einwirkung des Staates. (3) Unbeschränkte Befugnis, Synoden zu berufen und sich selbst nach den Satzungen in Jeder Religionsgesellschaft zu regieren. (4) Freies Assoziationsrecht religiöser Genossenschaften. (5.) Freie Verwaltung und Verwendung des Kirchen vermögens.

modern connection. He linked the problems of society with the “police state” (*Polizeistaat*), meaning that society was too burdened with regulations and there was no room for freedom. Using ideas often associated with Enlightenment theologians, Ketteler suggested that first, a person is to be granted freedom, and then is to be called to a noble struggle for love and mercy. The ecclesial denominations should be measured by the strength of their love, indicating that this should not be dictated by statutes or princes.⁵⁸² Thus, the rights of the corporate body are identified with the subjective rights and moral life of its members. It is key that the argument is being made on behalf of individuals, not on behalf of the church itself or its leaders. Ketteler further demonstrated this by backing a proposed amendment to the *Grundrechte*: “The freedom of every worshiper of God, and their public worship is guaranteed.”⁵⁸³ This freedom does not create a rigid separation between church and state, but it does go a long way to insure a sphere of freedom for worship that echoes Görres’ principles in *Athanasius* (1838). There, as in 1848, rights are put forward to protect the freedom of individuals, and it is universalized such that this religious freedom is not restricted to the established denominations. Though ‘error’ is granted no explicit rights, individuals do seem to be given a freedom that does not exclude it. His position regarding the school question presupposes this religious independence as already established.

⁵⁸² This is the theme of Lessing’s “Nathan the Wise,” which Kaplan identifies as a proto-typical religious work from the Enlightenment. Kaplan, “Answering the Enlightenment”, 21.

⁵⁸³ Quotation from Stoll, “Ketteler Im Frankfurter Parlament,” 226. From Nagel’s amendment to the *Grundrechte* which Ketteler signed. “*Die Freiheit jeder Gottesverehrung und ihrer öffentlichen Ausübung ist verbürgt.*”

Yet, Ketteler's position did not advocate such independence of the church and schools from one another. On this position, he did have the ear of the parliament. Speaking on September 18, 1848, he argued that the formation of children is the right of the parent, not the state. Again, in the following quotation he refers to the subsidiary structure of social rights in his remarks on fundamental rights:

No right is holier and more worthy of protection as the right of parents (Recht der Eltern) to educate and form the character of their children. It is an inalienable right (unveräußerliches Recht). The state has only a subsidiary right (subsidiäres Recht) of carrying this out. The parents recognize this right and this responsibility. If you violate this right of the parents, you are destroying them themselves, as it is felt do deeply in their conscience. How can this right become secured? ...

Once again, the state has only the right to demand that the school is available, that it is providing the required educational materials, etc...⁵⁸⁴

The responsibility for the education of children belongs within the *Kreis* or sphere of the family and thus with the parents rightly. Ketteler's position on the schools is directly and explicitly contrary to that of the liberals, as is his social theory, and yet he articulates his position in unmistakably subjective rights language. Finally, that rights language itself is explicitly tied to his Catholic natural law social theory, a social theory that he would outline most clearly in his *Sermons* shortly after he learns that he had lost this battle in the parliament.

⁵⁸⁴ *SWB I*, 5:121. From "Entwürfe Für Die Rede Vom 18. September 1848 Über Die Schulfrage:" "Kein Recht ist heiliger und unverletzlicher als das Recht der Eltern an der Erziehung und Ausbildung. Es ist ein unveräußerliches Recht. Der Staat hat nur ein subsidiäres Recht Ausführung. Die Eltern kennen dieses Recht und diese Verantwortung. Verletzen sie dieses Recht der Eltern, so vernichten sie sich selbst, sie berühren das Volk da in seinem Gewissen. Wie kann dieses Recht gesichert werden?... Der Staat hat hier wieder nur das Recht zu fordern, daß die Schule vorhanden sei, daß die formale Bildungstufe darin bestehe etc."

Ketteler's parliamentary address continued to outline a school system according to his subsidiary theory of the state, the church, families, and the schools. The separation of the church from the state, he argued, does not necessarily imply that religion must be removed from the schools. 'Secular' education cannot be truly neutral, despite liberal claims. It is contrary to the nature of education because it is destructive of children's full formation. There already exists, he continued, a German right to freely learn and freely teach. It was a recognized and essential condition for Germans such that its violation was contrary to the freedom of conscience, the right of parents, and overall freedom, because the schools were the proper concern for the local community. We should note that Ketteler was not making a religious argument about the necessary role for religion, nor did he resort to power politics by referring to the many Catholics he represented. Rather he argued from principles derived from his social theory in terms that he hoped were convincing to members of the parliament. Religion had a central role in his social theory, but people's belief systems could never be coerced or jeopardized. He resolved the potential for coercion by reserving to the local community the decision regarding their children's education. With the right to make their own decision established, a process could be structured to reflect their will either for religious education or against it. Having proposed his own positive social legislation, he then launched into a critique of the liberal program, arguing that it was untenable because it belies a mistaken philosophical presupposition of neutrality. He claimed that the 'secular' teacher merely teaches a secular and potentially anti-religious worldview. "*Ein Unterricht vom religiösen Indifferentismus sei unmöglich. Jeder Lehrer trage seinen Glauben, seine Confession mit*

in die Lehre hinein."⁵⁸⁵ His argument continues in this vein with various suggestions for incorporating the parents' right into the *Grundrechte*, but to no avail.

The final form of the *Grundrechte* granted all Germans (in good standing) the right to an education and it recognized the important right of the parents to provide a spiritual education for their children. This right, however, may be trumped by the requirements of the state as determined by the provinces. The political community retains the responsibility for the schools, including their physical structures, the hiring of teachers, and the content of the instruction. The one concession is granted to schools already existing—the rights they enjoyed would not be disturbed. Thus, Ketteler's position was completely trumped, but his argument stands as a well-developed contribution to the parliamentary debate. Bolton is correct in locating the source of this contribution in the Munich school over against a simple obedience to his bishops or the leaders of the Catholics in the parliament.

What consistency Ketteler showed at Frankfurt was organized around his personal and intellectual sympathy with members of the Munich group, rather than any conformity to a line laid down by the hierarchy. Ketteler was, in fact, thoroughly caught up in the spirit of parliamentary politics.⁵⁸⁶

6.5. Debate With Thüssing: Relationship Of Rights To The State, August 1848

Though caught up in the spirit of parliamentary politics, a series of four published letters written in the late summer and fall of 1848 (August 19 to November 2) reveal much about Ketteler's strategy for negotiating the dual roles of priest and parliamentary delegate. More importantly, these letters gave Ketteler the opportunity to publicly

⁵⁸⁵ *SWB I*, 5:124.

⁵⁸⁶ Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 147.

contrast his organic conception of rights and the state against the liberal position as represented by his correspondent and alternate delegate, Bernhard Thüssing, the liberal commissioner of justice for the Warendorf region.

Rights for Ketteler were related to and founded in a particular living community, the *Gemeinde*, apart from which they have no meaning or force. For Ketteler, rights stem from personal relations, with the rights stemming from family relations serving as his archetype. Here the ‘subject’ as possessor of rights is the individual embedded in a matrix of social relations. These social relations are manifested in increasingly wider ranging spheres (*Kreise*) of communities, ranging from the family and local community to the nation-state. In the discussion with Thüssing, he developed this theme by focusing particularly upon the fundamental rights of parents to raise and educate their children.

According to Thüssing’s liberal position, by contrast, rights are granted by the state (*Staat*) and as such, the state is the lone ‘subject’ possessing inherent and necessary rights. For Thüssing, the *Gemeinde* itself is an institution to be seen as a ‘municipality’ or ‘organization’ rather than a ‘community.’ Church groups too should be understood as institutions. As such, their existence is dependent upon the state and thus the rights they enjoy are derivative and dependent rights—rights that may be granted or denied by the state. The two positions seem irreconcilable on the practical level because they are so variant in their philosophical standpoints. Even their use of the word *Gemeinde* demands different translations into English, ‘community’ and ‘municipality,’ respectively. Yet they both freely used the word *Recht* to describe subjective rights, having focused not upon the possibility of rights, but upon their foundation, their legitimation, and their use.

The correspondence began with Ketteler's private letter to his parliamentary alternate, the liberal Thüssing, who had been originally designated to assuage those opposing Ketteler's appointment as a conservative delegate to the parliament. Ketteler wanted to resign, but also wanted the assurance that his alternate would carry on his policies. Thüssing replied by publishing both Ketteler's letter and his own reply in his local weekly paper, the "*Warendorfer Wochenblatt*." This generated a further public response from Ketteler and a final letter from Thüssing. The value of this correspondence was immediately grasped and all four letters were assembled and published. The letters provide us with a succinct outline of the debate between the Romantic-Catholic 'organic' position and the German liberals at the time of the Frankfurt Parliament. Written just weeks before the Advent Sermons, Ketteler's letters are a first draft of the ideas he would further develop in Mainz.

In the first letter, Ketteler proposed that since his main interest in the parliament had been essentially addressed with the discussions pertaining to the church and the schools, he intended to resign his mandate. The dispute arose because the parliament had been so hastily assembled and there was a great deal of confusion regarding its rules of order. Ketteler assumed that he could bind his alternate with the promise to conform to the voting agenda of the conservative Catholics. Thüssing had other ideas. What especially triggered his indignation, however, was the request that he preserve the Catholic Assembly's three principles:

- 1) the independence of the religious communities from the state;
- 2) the freedom of teachers and students [presumably to teach and be taught free from state interference]; and

3) the right of the local communities to administer their own institutions, including their local schools.⁵⁸⁷

These basic principles were first articulated in May 1848 in Cologne at the gathering of Catholic delegates organized by Bishop Geissel before he departed for the Prussian parliament in Berlin.⁵⁸⁸ The principles, like the gathering, were intended to provide the Catholic delegates with a unified position amidst the confusion of legislative debate. Thus, they were not original to Ketteler, but represented a position around which most Catholic delegates maintained a unified voice in both the Frankfurt and Berlin legislatures. It did not explicitly mention the ‘organic’ social theory in connection with the Romantic philosophical position, a position not exclusive to Catholics, but it was certainly compatible with it. Most importantly, the three carefully chosen principles were directly contrary to the liberal position with its centralizing and rationalizing tendencies towards abstract and universal codes legitimized by the central legislative body, as will be demonstrated below. It is difficult to be certain of Ketteler’s intention in writing the letter to Thüssing in the first place, since it could hardly have come as a surprise when Thüssing rejected the conditions for assuming Ketteler’s mandate. What follows is the essence of the debate broken down into the major divisions of the two positions.

⁵⁸⁷ *SWB I*, 5:324. Ketteler’s *Vier Briefe über das Verhältniß von Kirche, Schule und Staat* (Warendorf: published by J. Schnell, 1848). These are the three principles in the original German: “Unabhängigkeit der Glaubensgesellschaften vom Staate, Lehr- und Lernfreiheit, Recht der Selbstregierung der Gemeinde auch in Bezug auf die Volksschulen.”

⁵⁸⁸ Bolton, “Watch, Pray, Fight: Ketteler as Priest-Politician”, 137. Bolton describes it as “Geissel’s program.”

6.5.1. Liberal Conception Of *Gemeinde*, State, Church, Family, And Individual

When addressing the relation of the state and the church to each other, Thüssing emphasized the word separation (*getrennt*) rather than independence of belief communities from the state (*Unabhängigkeit der Glaubensgesellschaften vom Staate*).⁵⁸⁹ Ketteler, following his three fundamental principles, asked Thüssing to maintain the ‘independence’ of the church communities from the interference of the state. Thüssing’s response, however, was to turn this around, saying that he would support not only the ‘separation’ of the state from the church, but also the separation of church from the state.⁵⁹⁰ Next, he launched into a historical narrative of religious wars, an analysis of the harm caused by past church conflict, and the obstacles posed for a future unified German nation by the vying of different confessions. Then he outlined his understanding of the church as a *Gemeinde* and an institute whose legal existence was dependent upon the state government, and not the other way around. The state must remain aloof from such religious communities, treating none as more entitled than another and all as having their existence through the state itself. “The state alone, not the community (*Gemeinde*), is the single legal subject (*Rechtssubjekt*) whose legal existence depends only upon itself, upon the combined will of the entire people.”⁵⁹¹ Only the state represented the collective will

⁵⁸⁹ *SWB II*, 1:324. Ketteler’s first letter to Thüssing.

⁵⁹⁰ *SWB II*, 1:325. Thüssing’s response to Ketteler: “Zuvörderst bin ich völlig damit einverstanden, daß Kirche und Staat getrennt und nicht allein die Kirche vom Staat, sondern auch der Staat von der Kirche unabhängig sein muß.”

⁵⁹¹ *SWB II*, 1:325. Thüssing’s response to Ketteler: “Der Staat allein ist das einzige Rechtssubjekt, welches seine rechtliche Existenz aus sich selbst, aus dem Gesamtwillen des ganzen Volkes hat, nicht aber die Gemeinde.”

of the people; it is the instantiation of the collective will—the substantial embodiment of that will.

Thüssing's political understanding stood Ketteler's on its head. Whereas Ketteler found all basic rights in the most local human spheres of sociability, the family, and the *Gemeinde* as separate from the state, Thüssing located legitimacy and foundations in the largest sphere of organization, the state. The state, for Thüssing, represented the ideal and long-term interests of all Germans. It should be free from the day-by-day interference and petty concerns of local governments. Predictably, control of the schools represented the ideological battleground where these irreconcilable political views struggled. Thüssing's position is summed up in the following points:

- 1) The state is the embodiment of the people's collective will.
- 2) The state is not a receptacle of surrendered rights, but is the holder and giver of rights.
- 3) The individual is separate and free when free from compulsion from non-state obligations.
- 4) The *Gemeinde* is an institution within the state. Whether religious or secular, *Gemeinden* are voluntary associations that have rights as granted by the state.
- 5) The church, as a *Gemeinde*, is likewise an institution granted legal existence by the state.
- 6) Schools form future citizens and are therefore primarily the responsibility of the state.

6.5.2. Ketteler's Response: The Rights Of Parents And The Community Are Inviolable

Ketteler's response was addressed to the electors responsible for putting Ketteler into office as well as naming Thüssing his alternate. That is window dressing, however, as this second letter was purposely written to be read by the wide public, or at least the wide

public who read the “*Warendorfer Wochenblatt*.” It begins with a remarkable concession to Thüssing regarding the complete separation of church and state. While this strategic move overstates Ketteler’s position, since he would not accept the complete marginalization of the church from political life, it still marks the basic acceptance of the principle of separation of church and state as independent entities. Ketteler’s simple acceptance is all the more remarkable for its casualness and lack of qualification. It states, simply, “*Ueber die Kirchenfrage ist Herr Thüssing mit mir einverstanden*”⁵⁹² and then moves to the school question. His rhetorical style from this point forward matches the organic philosophy he is defending. In opposition to Thüssing’s rationalistic and universalizing ‘imposition’ of a social theory, Ketteler made his case for the organic social theory with reference to the most basic of human experiences, the experience of family relations. The tension here is completely consistent with the opposition of the liberal legal drive towards universal codes (Thibaut) and the Romantic legal opposition to that ‘external imposition’ and destruction of the law that emerges from the organically developing communities (Savigny) as outlined in the first chapter’s treatment on German law. Ketteler, likewise, opposed the impersonal and inorganic state to the matrix of relationships existing in the family. Further, his rhetoric addressed the electors not according to the public office or even according to their citizenship, but as fathers. Whereas Thüssing had devalued the role of the *Gemeinde* by locating the state as the locus of all rights, Ketteler started from the most fundamental *Gemeinde*, the family, and built his system from there.

⁵⁹² *SWB II*, 1:327. Third letter, Ketteler’s response to Thüssing.

It is my leading principle, gentlemen and fathers of families, that you yourselves by divine and natural law are the responsible persons for your children and that you, parents, have the holy and inviolable right to decide how your children are to be educated. I insist upon this principle to its last consequence, and I demand for Protestants, as well as for Catholics, the right to educate their children as Protestants and as Catholics, just as I defend the awful right of the unbeliever to educate his children in ignorance of religion.

The state which acknowledges complete freedom of conscience and belief has no other right in regard to parents beyond demanding a certain minimum of formal education from its subjects and it can force parents to afford this minimum.

Gentlemen, you have here that absolute difference of views existing between your representative and his alternate. I maintain you are the absolute authority over your own children, that you have the holy right and the holy duty to direct not only the development of the bodies of our children, but likewise their soul's growth; Herr Thüssing turns over to you the bodies of your children and he delegates the state as the guide of the soul of your children, so that the state can direct their souls as it chooses. For him the purpose of school lectures is merely a service in the interest of the state.⁵⁹³

In a few sentences, Ketteler demonstrated the chasm between himself and Thüssing.

First, he addressed the electors as fathers and then located their responsibility as fathers

⁵⁹³ *SWB II*, 1:327-328. Third letter, Ketteler's response to Thüssing. "Mein oberster Grundsatz ist es hier, daß Sie selbst, meine Herren Familienväter, nach göttlichem und natürlichem Rechte auch die Herren ihrer Kinder sind und daß Sie, die Eltern, das heilige und unverletzliche Recht haben zu entscheiden, wie Ihre Kinder erzogen und gebildet werden sollen. Diesen Grundsatz verfolge [p. 327:] ich bis zu seiner äußersten Consequenz, und ich fordere daher ebenso für den Katholiken und gläubigen Protestanten das Recht, seine Kinder im katholischen und protestantischen Glauben zu erziehen, wie ich demf Ungläubigen das furchtbare Recht vindizire, seine armen Kinder im Unglauben auszubilden. [2nd paragraph:] Der Staat, der volle Gewissens- und Glaubensfreiheit anerkennt, hat den Eltern gegenüber durchaus kein anderes Recht, als daß er von jedem seiner Angehörigen eine bestimmte Stufe formaler Geistesbildung fordern und daß er die säumigen Eltern anhalten kann, ihren Kindern diese Bildungsstufe zu verschaffen. [3rd paragraph:] Sie sehen hier, meine Herren, den vollendeten Gegensatz zwischen Ihrem Deputirten und dessen Stellvertreter. Ich behaupte, daß Sie die Herren Ihrer Kinder sind, daß Sie das heilige Recht und die heilige Pflicht haben, nicht bloß die Ausbildung des Leibes, sondern auch die Ausbildung der Seele zu leiten; der Herr thüssing überläßt Ihnen den Leib und gibt dem Staate die Seele Ihrer Kinder, um diese nach seinem Wohlgefallen auszubilden.8 Ihm sind "die Zwecke des Unterrichtes lediglich allgemeine Staatszwecke!" Hogan, "Ketteler's Interpretation of the Social Problem", 258.

in divine and natural law. Corresponding to that responsibility is the right, holy and inviolable, to educate one's children, using the words *erziehen* (to bring up) as well as *gebildet* (from *Bildung*, meaning education more properly) to further indicate the organic process of education. This is contrasted with Thüssing, who is primarily interested in the state's right to operate the schools (*Schule*). This matter of style is not superficial, but demonstrates the wide divergence between the two men's understandings of the nature and function of government and society. For example, Ketteler's claim for rights here as holy and inviolable, *heilige und unverletzliche*, is based upon both natural and divine law and extends to the care of the children's souls. This concern would be completely out of bounds for Thüssing, whose conception of the state and political discourse did not allow for any mention of religion or faith, except to carve out space for individuals to practice it privately. As a liberal politician, he viewed religion only skeptically and through the lens of the history of religious conflict. Ketteler acknowledged the fact of religious diversity and extended the parents' rights to Protestants and even atheists, laying boundaries only for protection from state interference. In terms of education, the state has the right to require basic educational content and standards, but otherwise he viewed the state skeptically and through the lens of the experience of Napoleon's secularizing agenda and the prospect of Prussia's growing absolutism and militarism.

Ketteler's letter points out the implications of the liberal agenda for the poor. If the schools are left in the hands of the state, the rich retain the option to educate their children privately. But the poor do not. They are at the mercy of the state-supported and state-dictated curriculum.

The state must make it possible for the less affluent and poor parents to exercise their rights regarding their children's upbringing and education. The state can only do this by giving the community responsibility for the most important educational establishment, the community school, to the local community.⁵⁹⁴

The argument here is that rights are not merely a menu of potential options where one lists a number of social goods, like the right to vote or possess property. Nor are they simply carved out spheres of freedoms like the right to free speech and worship. For Ketteler, rights describe elements necessary for human flourishing which direct the state's obligatory actions. They define obligations and freedoms inherent in just social relations. They emerge over the course of history and find increasing legitimacy in judicial precedent. They make positive demands upon the state such that it is responsible for insuring that the rights are exercised so that the community may actualize its potential. Thus, contrary to the German liberal priority of the state as the source of rights, Ketteler's rights discourse prioritizes the community and sees the state as its servant.

The community, *Gemeinde*, may make demands upon the state because, as the organic theory holds, the community precedes the state chronologically, morally, and in importance. "The state is merely an institution, and its existence is dependent upon the community. It is impossible to even conceive of a state without the community."⁵⁹⁵ The state exists for the community and not the other way around, as Thüssing held, and at the heart of the organic community is the rights-bearing individual as the most fundamental rights bearer (*Rechtssubjekt*). "The people (*Das Volk*), the individual members of the community (*die Individuen im Volke*), are the bearers of rights (*sind das Rechtssubjekt*).

⁵⁹⁴ *SWB I*, 1:328.

⁵⁹⁵ *SWB I*, 1:329.

Their legal existence (*rechtliche Existenz*) is self-generated. The state, however, including its legislative and executive power, is granted authority to protect the rights of the people (*ist nur sein Bevollmächtigter*).⁵⁹⁶ The protection of inviolable personal rights is necessary for the development and flourishing of the human community. The state fulfills its role and purpose when it protects the rights of its people within the communities that foster full human living.

My view is based on the simple premise, that every individual (*Individuum*) ought to have those rights, which can be exercised, and which may be exercised (*die es selbst ausüben kann, auch selbst ausüben darf*). For me, the state is not a machine, but is instead a living organism designed with living members (limbs, *Gliedern*)—in which every member has his own right, his own function, his own free life. Such members are, for me, the individual, the family, the community, and so on. Every lower member moves freely within his own sphere, and enjoys the right to the most free self-determination and autonomy (*Selbstbestimmung und Selbstregierung*).⁵⁹⁷

Ketteler set these principles of self-determination and self-government (*Selbstbestimmung und Selbstregierung*) into the overarching hierarchical social framework with the principle of subsidiarity sorting out the relations between the embedded community and state interests. People live freely when they are able to enjoy the rights and functions proper to each subsidiary level (*Kreis*) of human society: in their families, their local religious and neighborhood communities, and the successively more universal governing structures. The ultimate *telos* is the free self-government of the population, with Ketteler's principle of subsidiarity indicating that each successively larger community, from the family to the nation, should be granted as much freedom as it can properly exercise for its own flourishing. True to the organic model, the practice of

⁵⁹⁶ *SWB I*, 1:328-329.

⁵⁹⁷ *SWB I*, 1:331.

freedoms on the lower levels fosters the competence for freedom in more universal forums of governance. Thus by protecting the rights of individuals, families, local communities, etc, society (within which the state plays an important role) fosters the capacity for freedom on the national level.⁵⁹⁸ The liberal imposition of rights ‘from above,’ Ketteler held, is destructive of social flourishing because it does not foster the capacity of individuals in society to enjoy the rights prescribed. Practically speaking, for rights to be maintained, the people must be capable of exercising (*genießen*, i.e., enjoying) them.

Finally, this principle is applied to the school question. For Ketteler, the schools were essential to the life of the *Gemeinde*. He begins with the organic model and its critique of the liberal proposition that education should be neutral with respect to religious influence. Positively, he argues that the family is in fact the most basic location of children’s education. Regarding the schools, their duty is much greater than simply instilling the knowledge, skills, and habits necessary for a progressive economy. The local school (*Volksschule*) is the place where children build character and are imbued with the values that have been handed down through generations. According to the principle of subsidiarity, since the local school can be adequately governed by the local community, it is destructive of that community for the government to remove that responsibility, and it is destructive of families to remove their role in shaping their

⁵⁹⁸ Here, again, an analogy can be made to Savigny’s *juristische Person* such that social bodies (families, associations, local and state governments) function as legal actors and as such may exercise ‘rights’ appropriate to their intrinsic purposes. These rights must be recognized by the state, but do not ‘come from’ the state.

children's formation. These injuries to the social fabric are destructive of society as a whole.

The nub of the issue was of course the control of the schools by churches as opposed to secular administrators. Thüssing was understandably wary of the difficulties that religious diversity brings, especially in populations with long histories of antagonism because of their religious differences. More pernicious, according to Ketteler, was the liberal worldview that accompanied the secular administration of the schools. For him, the exclusion of religious input in the schools was not a neutral solution, but the imposition of an aggressive anti-religious ideology. Again working with a subsidiarity argument, he proposed a solution for the national constitution to direct local communities to work out compromises consistent with their own values, reserving the possibility that the local community might decide for a non-religious secular option. In areas of religious uniformity, these problems are less apparent and the one-size-fits-all solution is not appropriate. In any case, regardless of the level of diversity the local community should be left to resolve the difficulties with its own ingenuity and general state requirements. Going back to his original idea in the first letter, Ketteler assured his readers that though he obviously valued the role of the church in society, his advocacy in the parliament was not for the material interests of the church as an institution. Rather, he was advocating for the citizens he represented by his mandate—citizens whose lives were enriched by their religious faith and faith communities, whether Catholic, Protestant, or something else.

6.5.3. Thüssing's Liberal Theory: Rights Originate In The State, The Most Vital Element Of Human Organization

Having already rejected Ketteler's request to maintain the Catholic position should he resign his mandate in the parliament, Thüssing outlined a rival position in his first letter. In his second response addressed to Ketteler, which was likewise an open letter published in the *Wochenblatt* (Nov 2, 1848),⁵⁹⁹ he went into more detail regarding his position. His most pressing concern was the danger of any alliance of the state with the church, which, he argued, would lead to dangers for both the church and the state. His argument referenced the great danger for Catholics posed by a Prussian alliance with Protestantism, and he made the economic connection between state support for churches and the subsequent compromise of church integrity. The simple point was that a state church supports the state, and he made a rare reference to the American constitution as a political document that got this point correct. This argument for an independent church appealed to Ketteler's audience as well as to Ketteler himself, but the point of division is the practical question about administering schools under the auspices of the state, or at least with state support. They could not reconcile their positions for three reasons. First, they maintained fundamentally divergent anthropologies that pitted the organic and religious formation or *Bildung* against the liberal habitus of good citizenship. The second point is related to the first, as their theories on social development were based upon their anthropologies. Ketteler included education within the parents' sphere of moral and social responsibility. Good families form the rock of good societies. Thüssing considered

⁵⁹⁹ *SWB I*, 1:333-343.

education to be the training ground of citizenship—with religious education limited to a private sphere. Third, they differed in their understanding of local governments, in their proper role and their dependability. For Thüssing, the national political unit was the most fundamental element of human organization, and, for Ketteler, it was the family within an organically related community.

Thüssing argued that his most basic disagreement with Ketteler concerned the local municipality's (*Gemeinde*) 'right of self-determination.' "The school belongs to the 'community,' that is, the political organization (*Gemeinde, d.h. der politischen Vereinigung*), which is simply the political institution (*politisches Institut*)."⁶⁰⁰ With a political foundation, Thüssing naturally held that the political representatives have the 'right' to educate future generations. Given the liberal faith in reason, the liberal ideology of progress through education, and the related liberal conviction that religion has been a source of superstition and backwardness, Thüssing's prioritizing of this question is understandable. He countered Ketteler's position with a teleology of his own. The point or goal of the political system cannot be achieved with reference to the desires of the *Gemeinde*, because it is too myopic and immature. His argument included an analysis of the abuses of power and the lack of consistency and protections in the feudal system, which he with good reason associated with Ketteler's subsidiarity argument.

Noticing the rhetoric of Ketteler's family imagery, Thüssing located the more appropriate paternal figure in the state, which is singularly capable of making the decisions leading to a prosperous future. "Only with the help of the state is the

⁶⁰⁰ *SWB I*, 1:336.

community able to achieve the schools' essential objectives."⁶⁰¹ Thüssing essentially locates the beliefs, interests, and practices of the church within that infantile condition. In response to Ketteler's point that the community has priority over the state chronologically and morally, Thüssing retorts that in history, it was the state of Rome that was victorious, not the weak communities. It was Rome that established law, peace, and prosperity. Following the position of historical jurisprudence, he makes the case that 'rights' are legal claims and historical products that had their beginning in the law of the Roman state. Without Rome, there would have been no *Familienrecht*, no *Gemeinde-Bürgerrecht*. The places where the community formed its own laws were in Asia and even among the early German peoples. That primitive existence, however, benefited greatly by Rome's introduction of law, even if it was by force.

Thüssing's sweeping historical analysis, remarkable for its scope within the context of a heated political fracas, literally lays out the liberal narrative that opposes 'raw power' against the law, feudalism against capitalism, local interests against state interests, and the church against parliamentary legislation. The narrative began with Rome, marked the major historical events in German history, and ended with the triumph of liberalism over irrational and self-interested feudal society. The schools, under feudalism, had only maintained the situation of servitude within the highly structured class system. In order for the people to experience real equality, the local interests of the classes need to be suppressed in favor of more universal standards. Only the state is capable of such action, and the schools are precisely where the change needs to take place.

⁶⁰¹ *SWB I*, 1:337.

Ketteler's parliamentary speech on the school question was delivered on September 18 amidst the fray with Thüssing. The speech will have to be used to anticipate a response to Thüssing's November 2 letter since there was no subsequent public correspondence. In addressing the school question before the parliament, Ketteler argued that parents had a sacred right to raise their children. "It is an inalienable right (*ein unveräußerliches Recht*). The state has only a subsidiary right (*ein subsidiares Recht*). . . . The parents know (*kennen*) this right and this responsibility (*Verantwortung*). Violate this right of the parents, and you are destroying the parents themselves—it concerns the very conscience of the people (*sie berühren das Volk da in seinem Gewissen*)."⁶⁰² He then reiterated his hermeneutical principle that neutrality in education is impossible: "Education from a position of religious neutrality (*Indifferentismus*) is impossible"⁶⁰³ because teachers must bear their belief systems in their teaching. For Thüssing, church control of schools leads necessarily to demagoguery. For Ketteler, state control of schools leads to absolutism. For Thüssing, who looked to the state for leadership, the churches as voluntary associations should be satisfied with fostering religious beliefs in their private spheres. For Ketteler, who viewed the state as the protector of the community, the parliament must avoid setting curriculum agendas, but rather should insure the right of parents and communities to obtain the education they deem most appropriate, without skewing parliamentary favor towards any single denomination to the detriment of any

⁶⁰² *SWB I*, 5:122. Ketteler's "Entwürfe für die Rede vom 18. September 1848 über die Schulfrage."

⁶⁰³ *SWB I*, 5:124.

other. "Every father can choose the teacher, the school, and the institutions according to his own desires."⁶⁰⁴

During the period between the first and the last letter, Ketteler had become a national figure. Because of the great practical differences with Thüssing, Ketteler would not resign until after December, when the Frankfurt Assembly had become ineffective. As an answer to Thüssing's charges, the Advent Sermons best demonstrate Ketteler's ideas.

The autumn was waning and after almost a year of revolution, the proceedings in the *Paulskirche* were losing momentum. There was also little optimism that Frederick William IV would accept the government envisioned by the constitution.

⁶⁰⁴ *SWB I*, 5:130.

7. Advent 1848: Ketteler's Sermons On The Social Question

7.1. **Prelude to Sermons: The Need For Christ In The Context Of Conflict: Ketteler's Graveside Oration (*Leichenrede*) And *Katholikentag* Address**

By the fall of 1848 the radicals who had begun the revolution were not content with the progress of the parliament, and they were especially not happy with the prospect that the Prussian King Frederick William IV and his government would refuse to take the parliament seriously. The mobs had gathered with increasing menace outside the parliament doors in September. Though, again, they lacked a clear focus in terms of an actual unified political agenda, they were generally pro-unification nationalists, and they found encouragement from the liberals who saw in the mobs a potent weapon to keep the parliament on a track of reform. The mob finally boiled over after the defeat of a bill to improve labor conditions. They tracked down and killed two conservative delegates, one of whom had been a pivotal voice against the labor bill,⁶⁰⁵ and they thus set off a counter reaction against the rioters responsible for the violence and the socialist ideology some of them were pushing for. A few days later, at the graveside of the two victims with the graves still open, Ketteler was among those who delivered a graveside speech, a *Leichenrede*. His address that day articulated a response to both the social problems that had given cause to the rioters' anger, as well as to the violence that he argued could not resolve the social injustice that spawned their anger. The address was so well received that it was published nationally and earned him respect among Catholics and Protestants as a forthright defender of conservative values. Bolton refers to the resemblance of the

⁶⁰⁵ Hogan, "Ketteler's Interpretation of the Social Problem", 38.

Leichenrede to Marc Antony's funeral oration as a political speech.⁶⁰⁶ As such, the content of the address dwelt very little upon the actual victims of the assassination, but upon the political causes and implications of the killings.

Ketteler's personal relationship with the assassinated delegates, Prince Felix Lichnowsky and General von Auerswald, is not entirely clear, but the *Leichenrede* gave him a forum to proclaim the ideas he was developing in a highly charged popular forum, distinguished from the later *Advent Sermons* by its inter-denominational audience. The message was consistent with that of the *Sermons*, but the emphases and rhetorical flashpoints did differ—with the most notable difference being his constant references to “*das deutsche Volk*,” the German people or nation. He traced the ‘progress’ of the German *Volk* from the dark ages, “*die Zeit der Finsterniß, der Barbarei*,”⁶⁰⁷ to his contemporary ‘enlightened’ times, “*die Zeit der Humanität, des Lichtes, der Aufklärung*.”⁶⁰⁸ After clearly mocking the liberals’ claim to intellectual and social superiority, he wondered aloud regarding the party responsible for the social disparity and unrest that led to the murders of the two delegates. The responsibility did not lie with the German *Volk* who, referencing scripture, knew not what they had done. Those responsible, he asserted, were the forces lined up to tear down the pillars of society, the pillars founded upon Christian belief and strengthened with Christian virtues.

The occasion of the murders was a perfect opportunity for Ketteler to demonstrate the relative strengths of the Enlightenment against his own social theory inspired by the

⁶⁰⁶ Bolten, “Watch, Pray, Fight: Ketteler as Priest-Politician”, 154.

⁶⁰⁷ *SWB I*, 1:13. Ketteler’s “Leichenrede,” Delivered at the gravesite of two parliamentarians killed by rioters in Frankfurt, September 18, 1848.

⁶⁰⁸ *SWB I*, 1:13. Ketteler’s “Leichenrede.”

Romantic organic system and Christianity. Ketteler's strategy was to grab the nationalist plank away from the liberals who had used the themes of German unity and prominence to co-opt the radicals looking for tangible reform. The violence, Ketteler claimed, did not represent the true German civilization. Rather, Christian values and virtues did. The highest ideals were not those of the French Revolution, but of Christianity.

In stirring words, he recognized the very real ideals of the Enlightenment, but then contrasted those ideals against the actions of the radicals and the liberals, using the murder of the delegates as his case in point. Yes, people desired freedom, equality, unity, fraternity, and wished to raise the condition of the poor, but the fruit of the liberal exclusion of religion from society was the opposite of these ideals: moral slavery, great disparity of wealth, social contention, and violence. The poor are not helped but are reduced to conditions of servitude and idleness by liberal social policies. The only way to reach the true ideals of the day is provided by the wisdom of the Christian Gospel.⁶⁰⁹ Without Christ, the utopian ideals of the Enlightenment are unrealizable in the political and social realms.

Fourteen days after the *Leichenrede*, Ketteler addressed the assembled Catholic associations, and there, before an entirely Catholic audience, ironically, he put forward a balance to the *Leichenrede*'s sometimes ominous fusion of religious, social, and political matters. He did this in three ways that will be spelled out below in more detail. First, he defined his understanding of freedom that removes the church from any official state

⁶⁰⁹ *SWB I*, 1:15. From Ketteler's "Leichenrede:" "Es gibt nur ein Mittel, um diese erhabenen Ideen zu verwirklichen, und das ist, daß wir uns wieder hinwenden zu dem, der sie der Welt zugetragen hat, zu dem Sohne Gottes Jesus Christus."

function. Second, he expressed respect for Protestants and offered a path for reconciliation that implicitly excluded the use of any state office or function for accomplishing that aim. Thirdly, he designated the *Sozialfrage* as the most important issue for the church. That means that the church is to be involved by concerning itself with issues affecting the poor; i.e., neither marginalized regarding secular issues, nor primarily concerned with the accumulation and use of political power for its own ends. In his organic model he envisioned a strong and independent church, a strong and independent state, and the constitutionally preserved freedoms for both protected by rights. Following Baader and Möhler, as described above, he stressed the human need for a full social life that required the values, beliefs, and most importantly the sense of meaning provided by religion. Therefore, he rejected the liberal understanding of freedom that radically fenced off political and religious aspects of social life.

First, regarding freedom, Ketteler boldly claimed that religion has nothing to fear from it. In fact, the true power of the church could be best demonstrated in a situation of complete freedom.

When one has seriously examined the present situation, one must confess, that when the people do not return to religion, then it can bear no freedom. Only the church, Christianity, makes possible humanity's fullest freedom. We need not shrink from any free institution in the state when we are firmly established in religion.⁶¹⁰

⁶¹⁰ *SWB I*, 1:18. From Ketteler's "Leichenrede:" "Wer die Lage der Gegenwart ernst geprüft hat, der muß sich gestehen: wenn das Volk zur Religion nicht zurückkehrt, dann kann es keine Freiheit ertragen; nur die Kirche, das Christenthum befähigt den Menschen zur vollsten Freiheit. Wir brauchen vor keinem freien Institut im Staate zurückzuschrecken, wenn wir auf Religion bauen."

He did not in any case call for an institutionalization of the church in any state office. The separation of church and state was preserved insofar as, simply, one rules and the other worships, but he did reject the strict marginalization of church from political discourse.

Secondly, his possibly triumphalist Roman Catholic language is balanced by his explicit respect for the positions of some Protestant ministers who were members of the Frankfurt Parliament. More importantly, it is balanced by the arena he chooses for the churches to demonstrate the truth and strength of their beliefs. He never advocates the use of state power for denominational advantage such as an official 'state church' or a continuation of political power for religious officials such as the 'prince-bishops' exercised before the secularization in 1803. Rather, quoting scripture, he claimed 'by their works will you know them.' He explicitly advises against doctrinal disputes in favor of tangible demonstrations of love. Only the practical and concrete actions of love will dissolve the causes of Christian divisions.

Thirdly, in a point related to the second, he balances the *Leichenrede*'s potential heavy-handedness of church involvement by specifying just how the church should be involved in politics. It should be involved on the level of analysis and critique, of course, but also on the moral level by advocating policies that help the poor. As the most important question of the day is the *Sozialfrage*, that is where the churches should demonstrate their worth and their possession of truth. Following Aquinas, therefore, false answers to possession, such as the abolition of rights to property, could be recognized and solutions that are more appropriate advocated.

7.2. Ketteler's Political Sermons Use A Rights Discourse Within A Natural Law Social Philosophy

“The Great Social Questions of the Present” is the literal translation of the title of Ketteler’s six sermons, which he delivered in Mainz in 1848. They have the elements that make a good sermon and thus were appropriate to the diocese’s annual preparation for Christmas. They each begin with a careful reflection on scripture. They locate the message of the scripture in contemporary life and relate that message to the life of the worshipping community and to the church as a whole. They are Advent sermons—meaning that they were preached to a community preparing for the celebration of the Christian mystery of God’s incarnation in the birth of Jesus Christ. The sermons are true to the spirit of Advent, as Ketteler insisted upon the importance of God’s incarnation and warned his congregation about the consequences of rejecting its truth. He exhorted the congregation to recognize God in their lives and to act in accordance with their religious convictions.

Yet the sermons were also unmistakably political in their focus, intent, and structure. Ketteler marshaled systematic arguments. He gave history lessons and he incited the congregation to respond to his call to defend the church in the political forum. The structure and content of the sermons, individually and as a group, reflected the Catholic Church’s long tradition of natural law theory and moral catechesis. Ordained only four years previously, he was still a young man, with the *Sermons* completing the trajectory of his early priestly and political life—two aspects of a single vocation for Ketteler. His legal training and ensuing career in the Prussian bureaucratic system had given him a sense of professional competency, and the Cologne Conflict triggered a series of events

that steered that competency and interest into the Catholic Church. His very vocation was politically inspired and it matured in the context of ardent opposition between the interests of the church and the state. Ketteler seemed to thrive in the atmosphere of conflict, and the *Sermons* are charged with a sense of urgency inspired by the threat of opposition. Even as a young priest, he seemed to be on a trajectory for higher ecclesiastical office. His career was helped by his noble status (*Stand*) and the leadership he demonstrated as a pastor. His election and tenure in the Frankfurt Parliament had also proved him capable of public office. It was the delivery of the *Sermons*, however, that finally established him as a national figure and a leader of the Catholic standpoint in the German political world. His consecration as bishop of Mainz less than two years later in 1850 was the institutionalization and confirmation of this fact.

There is a consensus among biographers that the *Sermons* are not themselves very original theologically, sociologically, philosophically, or politically. “Regarding a technical or practical solution to the social question, it is true that Ketteler’s *Sermons* in Mainz’s cathedral broke no new intellectual grounds, and they offered no new approach for legislation.”⁶¹¹ There is also consensus, however, that when they were delivered, there was no single Catholic approach to the growing social crisis, described by the term *Sozialfrage*, that had spawned the revolutions in 1848. By so successfully and convincingly summing up what was already theoretically available, the *Sermons* substantiated and legitimated a single position for the church, with Ketteler as the

⁶¹¹ “Es ist richtig, daß die Predigten Kettelers im dome zu Mainz keine neuen bahnbrechenden Gedanken, kein neues System für die gesetzgeberische, fast möchte man sagen: für die technische, Lösung der sozialalen Frage boten.” Bachem, *Vorgeschichte, Geschichte, Und Politik Der Deutschen Zentrumspartei*, 2:58.

spokesperson for that position. The academic theories and perhaps unarticulated popular desires found definitive shape in these historically pivotal sermons and later in the popularly received publication of the sermons.⁶¹²

Located in the context of his social theory, Ketteler's quite confident rights language reveals a political discourse standing apart from liberal anthropology, sociology, and many (but not all) of their solutions to the social problems of his day. Three points, therefore, are demonstrated in this analysis of the *Sermons*.

First, Ketteler used a strong, explicit, and intellectually self-conscious discourse of subjective rights. This rights discourse is most evident in the first sermon on private property.

Second, his discourse of rights flows from and is consistent with his explicitly Christian natural law social theory. Ketteler's social theory, drawing influence from the Catholic Romantics mentioned above, is explained in some depth in order to demonstrate that his concurrent use of rights discourse is not anomalous or the result of sloppy thinking, but is the result of intellectually rigorous systematization and rooted in theological precepts. Rights, for Ketteler, were determined by practical reason and legitimated by their foundation in the natural law and their contribution to the common good of the social order.

⁶¹² The *Sermons*, "Die Grossen Socialen [sic] Fragen Der Gegenwart Sechs Predigten Gehalten Im Hohen Dom Zu Mainz," had many publications in the nineteenth century. My references are to the edition in the *SWB I*, 1:22-87. I also make reference to the *Sermons* in Ederer's translation of Ketteler's major works: Wilhelm Emmanuel Ketteler, *The Social Teachings of Wilhelm Emmanuel Von Ketteler: Bishop of Mainz (1811-1877)*, trans. Rupert J. Ederer (Washington, DC: University Press of America, 1981), 7-99.

Third, Ketteler's use of rights is explicitly non-liberal. His use of a rights discourse does not imply that he had adopted at least some elements of liberal thought, whether it be anthropology, sociology, or political philosophy. Rather, I demonstrate that one of Ketteler's stated goals in the *Sermons* was to understand the underlying causes of the social problems of his day. This set him on a course of analysis that led him to reject the principles of liberalism at play in the Frankfurt Parliament and the radicals at its doors. Like natural law, liberalism is a system with broad associations and meanings, and it is a term that Ketteler did not often use in the *Sermons*. Rather, he focused on what he judged to be its most pernicious ambition, i.e., the definition of religion as an entirely private activity and thus the exclusion of any religious influence from the public sphere. Therefore, in the analysis of the *Sermons*, I carefully outline the specific object of Ketteler's critique within the broad ambit of liberalism.

7.2.1. Ketteler's Argument Against Liberalism Is Explicitly Religious And Specifically Catholic

The foundation of Ketteler's system was unabashedly Christian and Catholic. Specifically, his sociology was informed by Romantic theories of the organic society, though he made few specific attributions to any intellectual influences more recent than St. Thomas Aquinas in the thirteenth century. He approached the 'Social Question' (*Sozialfrage*) by diagnosing concrete social problems and by understanding the root causes of those issues and their effects upon the social structure.⁶¹³ His ecclesiology

⁶¹³ Ketteler's specific call for understanding the social problems and the causes and effects of those problems are a foreshadowing of what would later be called the 'signs of the times.'

placed the church and its ministers in the center of the political debate regarding these issues, though he recognized that for ordained priests public office was only a temporary necessity. Finally, he advocated solutions for the problems using a discourse of necessary rights while recognizing that subjective rights alone were not sufficient to deal with the issues of the day. Society could not be adequately formed by ‘alien’ laws imposed by politicians, but required the transformation of a people’s spirit to establish a society of peace and justice—thus avoiding the social distrust, the gross inequalities between rich and poor, and the poverty and decadence Ketteler saw around him. He framed the issue as a conflict between a liberal freedom understood primarily as specific liberties and the Christian freedom that comes with the moral life of virtue.

Using an organic analogy, following the anthropology and sociology of Adam Möhler’s *Symbolik*,⁶¹⁴ he compared society to a young tree that was being starved at its roots by the inadequacy of moral training, buffeted by the rough weather of materialistic and *laissez faire* economic theories, and malformed by the diseased grafts of anti-religious secular policies. Ketteler’s *Sermons* addressed each of these issues, proposed a social model based upon Christian natural law with the strong influence of Romantic organic sociology, and insisted that society not marginalize Christian teaching. The tree, once rooted in faith and cultivated according to the organic policies of the laws of nature, required the good soil of Christian families for nourishment. The church braces the tree with its moral authority against the volatile winds of absolutism and libertinism. In

⁶¹⁴ See section on Möhler’s ecclesiology in Himes, *Ongoing Incarnation: Johann Adam Möhler*, 170. Himes notes: “But in section 37 of *Symbolik*, human communities are fundamentally ambiguous, neither good nor evil in themselves. Society can serve to lead one to truth or to keep one imprisoned in error... Mohler asserts the need of a visible community of belief” (ibid., 292).

addition, the Christian tradition provides principles of dignified human living by which the tree might be pruned. These principles guide the caretaker to prune the dangerous fruit of social inequality and class animosity, of materialism, and of the alienation of people from their basic physical, intellectual, and spiritual necessities.

The analysis of Ketteler's social theory with all its ideals must be understood in light of the performative analysis of his actions in the parliament above. Apart from his actions, either the theory could sound disjointed and unrealistic, or worse, it could sound like a proposal for a high-minded but essentially intolerant and repressive system like the utopias he criticized. Thus, while Ketteler criticized the direction and content of much political discourse and action, he accepted the basic rules of the game. By his actions, he demonstrated that he was willing to participate in the democratic and representative process. His position on the Basic Rights (*Grundrechte*) in the Paulskirche is crucial for understanding his willingness to, on the one hand, embrace the rights legislated there, and on the other hand to offer a scathing critique of the liberal philosophy of the *Ungläubige* (unbelievers). Ketteler's critique was obviously political, but it was framed in religious terms. With the term *Ungläubige*, he conveyed more than a lack of religious faith, such as atheism. Rather, the 'disbelievers' had a secular faith complete with 'inspired texts,' rituals, dogma, and an aggressive policy of proselytization.

Liberals were the *Ungläubige* because their policies advocated the complete removal of all religious influence from public life, thus rejecting the first principle of Ketteler's social theory. Ederer translates the term, with good reason, with the word 'secularists,' and the policy as 'secularism,' but this is somewhat confusing given the contemporary

associations with the word secularism. The *Ungläubige* include those politicians who may have had some affiliation with a religious denomination, but advocated political positions stemming from an understanding of freedom as the removal of external restraints. The basic positions of the *Ungläubige* include a *laissez faire* economic policy, the transition from a more communal to a capitalist economy, the removal of political and economic restraints on the property rights of the rising bourgeoisie and the upper classes, and the promulgation of a constitution reflecting the ideology of the German Enlightenment. I preserve the German word *Ungläubige* where Ketteler uses it to emphasize his distinctly religious critique of their foundations and the specific policies generally referred to as ‘liberal.’

Most liberal delegates in the Frankfurt Parliament were moderates willing to work with the monarchy to achieve moderate reforms. It was the radicals, however, who especially raised Ketteler’s ire, representing a distilled liberal ideology and a willingness to use violence to achieve their goals. The radicals’ distilled liberal position formed a kind of ‘ideal type’ of German liberalism that became a central target in Ketteler’s *Sermons*. He was horrified by the incendiary rhetoric of social transformation based upon liberal theories, and was justified in associating that rhetoric with the assassination of two conservative parliamentary delegates in September by the rioters in Frankfurt. His position *vis-à-vis* the radical liberal faction is illustrated above in the account of his *Leichenrede*—the address delivered at the gravesite of two conservative delegates murdered. The radical liberals sought the complete reorganization of society based upon idealist principles derived by ‘Reason.’ They advocated a concept of freedom as a

‘freedom from,’ which Ketteler rejects in his sermons. Krieger describes this concept of freedom for the radical liberals in 1848:

... an absolute moral freedom to the equal civil and political liberty of all... Liberty was rooted in a cosmic principle of freedom—Hegel’s dialectical reason, Kant’s moral reason, or the reasonable natural law of the French tradition—and the radical’s emphasis was not so much upon concrete liberty, with absolute freedom as its ground and justification, but upon the absolute principle of freedom, with concrete liberty the locus for its rigorous and integral application.⁶¹⁵

This understanding of freedom was contrary to Ketteler’s Romantic and organic understanding. For him, liberal freedoms were associated with the marginalization of customs, traditions, and other social formulas that were potentially productive of freedom. He devoted the entire third sermon to this specific topic.

7.2.2. The Sermons Found No Issue With The Use Of A Rights Discourse *Per Se*

Before Ketteler’s sympathetic Catholic audience in the Mainz Cathedral, the *Sermons* found no issue with the use of a rights discourse *per se*, even as he critiqued the liberal positions at length, with great gusto, and with explicitly religious arguments. On the contrary, within his social theory, he articulated an explicitly theological basis for many political rights, and he even attributed the arguments supporting those rights to St. Thomas Aquinas. Thus, it was not just in the parliament where Germans on all sides of the political spectrum backed the concept and use of rights in general and at least some of the Basic Rights (*Grundrechte*) in particular. There was some disagreement regarding the

⁶¹⁵ Krieger, *German Idea of Freedom*, 323. Krieger’s seventh chapter, “The Rise of Liberal Intellectuals” (ibid., 278-340) deals most immediately with the topic of liberalism at the time of the *Sermons*.

specific rights articulated there, for various reasons. The legitimacy of rights *per se*, however, was conferred by the backing of any rights. The debate itself conferred legitimacy of a 'basic rights project' in theory. Stated differently, the debate about the articulation of specific rights 'performatively' demonstrated that those engaged in the debate accepted the principle that rights were legitimate legal and political concepts. Conservative Catholic Pius associations, for example, were strong advocates for protections for the church in the form of rights. Moreover, in his *Sermons*, Ketteler used a rights discourse from the pulpit, i.e., in the inner forum.

His theory of private property rights defended in the first sermon could easily co-exist with the rights articulated in the Basic Rights (*Grundrechte*) articles. Moreover, this conservative endorsement of and use of subjective rights in Germany should come as no surprise, given the post-Napoleonic history of social reform implemented by Stein and Hardenberg in order to preserve and foster the anti-populist monarchical state.⁶¹⁶ They simply saw no fundamental contradiction between the articulation and legislation of systems of rights and the persistence of social structures typically associated with more conservative (read non-liberal) philosophical schools. There is a great deal to separate the position of the Prussian conservatives and the Roman Catholic conservatives, but they too, like the liberals, shared this rights discourse. At issue in the *Sermons*, therefore, was the perception that liberal theories and policies were destructive of the very fabric of

⁶¹⁶ Levinger, *Enlightened Nationalism*, 193. "Up to the Revolution of 1848, nearly all German intellectuals and political activists, except for a small group of radicals, including the Left Hegelians, continued to accept the principle of monarchical sovereignty" (ibid., 197). This, too, should be no surprise given the persistence of the monarchy even in England, that home of capitalistic individualism and rationalism.

social life and not that there was danger in the use of rights language by the liberals or any other German political group.

7.2.3. The Question of Freedom And The State

Ketteler's opposition to the liberals comes into sharpest focus in the conflict regarding the nature of the 'state.' The liberals, generally following Kant and to some degree Hegel, assigned to the state both a separation and an independence from society, but also a moral role not previously played in German society. In fact, the very articulation of such strict differences between state and society was an innovation dependent upon a post-Enlightenment worldview. Kant profoundly influenced the understanding of rights and law in Germany by de-legitimizing the use of power by the *Stände*—the aristocrats who had previously functioned as the land's defenders, rulers, and judges, and who legitimated their power with claims of divine intention—God's order. In the place of divine intention as well as the natural law *Vernunftrecht* theory that succeeded it, Kant located political legitimacy in the legal structure of the state as expressed in the term *Rechtsstaat*. The term itself was essentially embraced by the delegates in the *Paulskirche* on all sides of the political spectrum: performatively in the very writing of a constitution as a basis of law in the state—where even the power and role of the king would be outlined, and definitively when they voted to abolish the vestiges of feudal administration. Not everyone, however, embraced a Kantian interpretation of the *Rechtsstaat*, and there was no consensus about the successor to the social hierarchy for representing and articulating society's values. Kant, and the liberals influenced by him, granted this function to the state. Conversely, Ketteler relegated that

moral role to the churches. Both sides wanted a constitution to preserve order and both sides wanted rights to define and protect realms of free action, but Kant's legacy for the liberals was the understanding of the constitutional state as the source of liberty.

The state became an instrument for the realization of moral freedom through the external compulsion which, in the name of the inner moral law, it exerted against men's immoral and unfree natural acts. Moreover, this state partook of a moral character not only because its functions were defined or limited by a moral purpose... but because the introduction of legislative rights as the external form of individual freedom translated moral freedom into political as well as civil liberty within the state.⁶¹⁷

Krieger thus locates the beginning of German liberalism in the Kantian conflation of the realms of spirit and flesh, of values and politics, such that the care of the values of the nation was given over to the political realm. Krieger suggests a kind of political 'Reformation,' with Kant as its Martin Luther, where the church and other social institutions were marginalized as moral mediators in favor of a direct relationship between the individual citizens and the state.⁶¹⁸ Institutions of family, church, and society were secondary and optional associations, as Thüssing held above, for the citizen to choose or reject freely. Broadening the analogy, Hegel is a later reformer whose philosophy illuminates the topic of freedom in 1848 less through its own influence than by its example. He granted the state a central role in the formation of human values.

The nation was 'the moral individual' which crystallized what was universal in individual men... Individuals, the relations among individuals, and the rights and liberties resulting therefrom were all assigned to 'civil society,' an inferior realm within the nation which Hegel called 'the world of ethical

⁶¹⁷ Krieger, *German Idea of Freedom*, 124.

⁶¹⁸ Ibid.. The 'Reformation' analogy is mine.

appearance.’⁶¹⁹

For Hegel, freedom was attained in and through the state. For Ketteler, this was a monstrous conclusion, but inevitable once religion was marginalized within society by the exclusion of its principles and its influence from political discourse. There was much at stake for religion and society, the *Sermons* hammered home, in the acceptance or rejection of the liberal theories of state as foundational for the emerging government in 1848. This goes some way towards explaining Ketteler’s almost apocalyptic tones as he draws distinctions between his organic society and that of the *Ungläubige*. For Hegel and men like Thüssing, the state as embodied in a constitution had an existence or reality separate from and above the individuals in society. Krieger quotes from Hegel’s *Philosophy of Right* to demonstrate that “the Hegelian state was frankly ‘an organism,’ and ‘this organism is the constitution of the state.’”⁶²⁰ Rights within such a theory were expressions of the national state over and against the particular edicts of local princes. For Ketteler, society was a social ‘organism’ distinct from the state and protected by the state.⁶²¹ Moreover, rights were recognized by the constitution in a *Rechtsstaat* to protect the individual from the state, especially as it could be manifested in absolutist form under a Prussian king. Here, Ketteler was utilizing and reapplying a theory of rights deep in the

⁶¹⁹ Ibid., 130.. The interesting contrast here is to Savigny’s *Fiktion, der juristischen Person*, representing the existence of many social levels of ‘personality.’ The modern state consumes all these embedded ‘personalities’ until each human person, as a citizen of the modern state, stands before the state in an unmediated way. Habermas calls this the ‘colonization’ of the lifeworlds.

⁶²⁰ Ibid., 133-134.

⁶²¹ A modern analogy to Ketteler’s vision is Habermas’ idea of a ‘lifeworld’ separate from and protected by the state. It has an independence from the state and contains forces of culture and creativity which enrich the state. Habermas suggests that the lifeworlds should be protected from colonization by not being subject to the same degree of reasonable scrutiny as discourse in the public sphere. Ketteler’s proposal suggests no such scruples regarding the application of reason to religious beliefs and principles.

German tradition where freedom was understood as the freedom of the individual states from external authority.

7.2.4. Outline of Sermons: Ketteler's Social Theory And His Use Of Rights Language Rest On A Christological Foundation

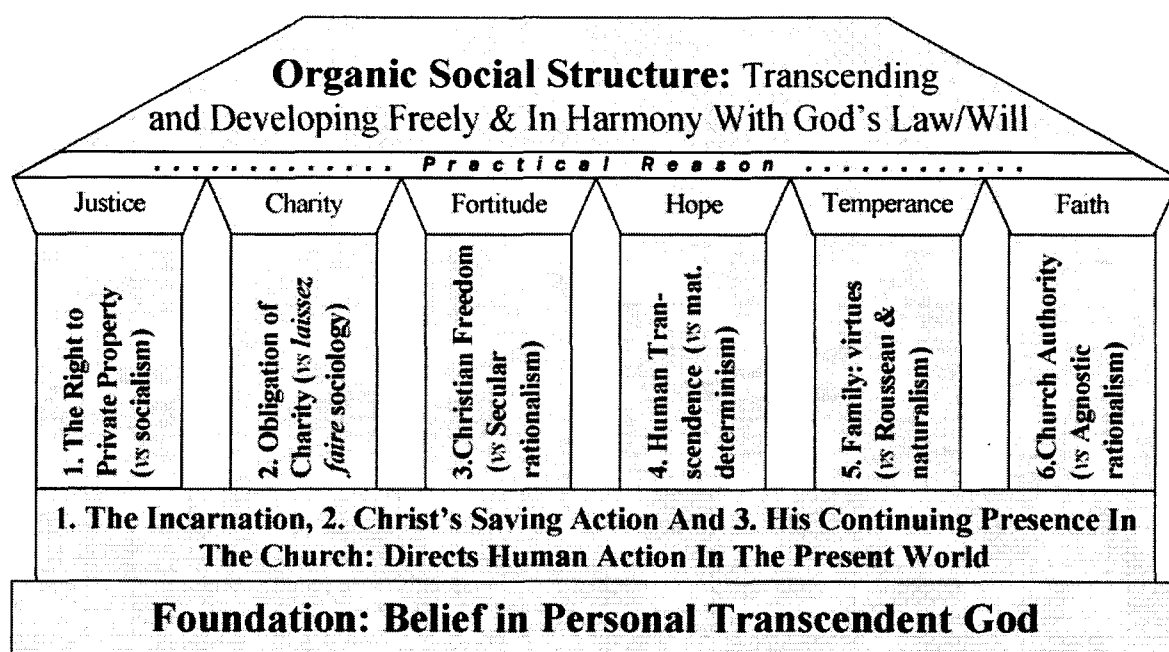
Having outlined the general structure of his opponents' position, Ketteler's own natural law system is outlined below. The structure of his system, which he likens to an edifice, requires underpinning, but his is distinct from the Cartesian reasoning of *Vernunftsrecht* and the social contract 'consent' basis of modern liberal theories. "Like an edifice upon its foundation, so too rests the entire social life upon a foundation of fundamental truths, without which it cannot exist."⁶²² Ketteler's *Sermons* constantly describe society as an edifice built upon a foundation of belief in a loving transcendent God. Recalling Charles Taylor's term, 'social imaginary,' this belief was Ketteler's key to understanding all reality: "it provides the hermeneutic clue to understanding the real."⁶²³ More than a recurring theme, the allusion functions as the organizing principle for the six sermons.

Concerning rights language, rights are identified within the system as applications of practical reason. Since rights are essentially practical reason in the social sphere for Ketteler, they depend upon the virtues of society built upon religious truths. They are not external to theological concerns, but in an essential way express theologically inspired values. For this reason, Ketteler's theology is relevant to a discussion of his rights

⁶²² *SWB I*, 4:49. Ketteler writes, "Wie ein Gebäude auf den Fundamenten, so ruht das gesammte gesellschaftliche Leben auf gewissen Grundwahrheiten, ohne welche es gar nicht gedacht werden kann."

⁶²³ Taylor, *Modern Social Imaginaries*, 7.

language. The discussion of the *Sermons* themselves will develop this theme, so the goal here is simply to introduce the main points. As the chart below illustrates, the foundation of the entire system is a religious belief, a belief in, as Ketteler puts it, a personal transcendent God (*persönlichen überweltlichen Gott*)⁶²⁴—God the creator, and God the Father as revealed in Christian scripture, as distinct from a deistic impersonal God.



Built upon this foundation is the further structural layer of belief in Christ, the incarnation of God, who realized in his human form the concrete expression of God's love. In Christ, there is no divide between the ideal and the real, between mind and body, between the idea and the practice. The social theory builds upon this because the incarnation divinizes human actions and makes the human situation the location of transcendent action for believers. The prospect of isolating this religious truth from more mundane or secular

⁶²⁴ *SWB I*, 1:51. Ketteler's third sermon. "God, described as *Persönlichen*, occurs seven times in the sermons, and God's attributes are defined as personal *persönlich* four times.

concerns such as politics would be incongruous with the very foundation of the Christian organic theory.

When God does not build the house, then the builders build in vain. [Ps 127 (126)] When Christ the Lord does not construct the foundations, then the whole is a futile. Only in Christ can we find help, only when we return to the living faith in Christ and his Church can we still prevent the collapse of the social structure.⁶²⁵

Ketteler's theology is far more Christological than it is Trinitarian. He makes few references to the Holy Spirit at all. His Christology is urgent and exemplary, with Christ's spirit and example the impetus and model for practical action. This theology is at once abstractly existential and plainly practical. Existentially, Christ is the one who brought salvation to the world—who renewed all Creation, on the one hand. On the other hand, he is the one born of poor parents, a refugee from his youth who cared for the poor and lived among them. And he died “poor and naked on a cross.”⁶²⁶ Interestingly, while Jesus Christ's human nature is so emphasized in these six sermons, which were meant to prepare the people of Mainz for the mystery of God taking on human form, that there is no reference at all to the baby Jesus. Jesus' mother Mary is referenced mostly as an example of virtue for contemporary women and especially for mothers. Her role in the incarnation, as the *Christotokus* or bearer of Christ, is not stressed at all.

Thus, the Sermons do not fall into the category of Romantic religious sentimentalism popular among Catholics. They are much more focused on the social questions of the

⁶²⁵ *SWB I*, 4:77. “Wenn Gott das Haus nicht bauet, dann bauen die Bauleute umsonst [Ps 127(126),!]. Wenn Christus der Herr die Fundamente nicht zimmert, dann ist Alles vergeblich. Nur in Christus ist noch Hilfe zu finden, nur wenn wir zum lebendigen Glauben an Christus und seine Kirche zurückkehren, können wir dem Einstürze des gesellschaftlichen Gebäudes noch wehren.”

⁶²⁶ Ketteler, *Ketteler's Social Teachings (Ederer Trans)*, 35. From the second sermon.

day. In fact, explicit references to the given name 'Jesus' are not very common, occurring eighteen times in the six sermons—and only seven times apart from the title 'Christ.' In addition, though Christ as example is critical in the theology presented here, there is no mistaking it for the exemplary Christologies of Protestant and Catholic (to a lesser degree) rationalist theologians of the early and middle part of the century. They were theories that downplayed the divine nature of Jesus and looked instead to the scriptures for patterns of moral living. These few references in the Advent sermons to Jesus as simply Jesus do not in themselves reveal Ketteler's theology, but this approach is consistent with a fairly high, though neither distant nor sentimental, Christology. Apart from direct references to Jesus' life from scripture, the name only appears in the genitive form: the love 'of Jesus' (twice), the teaching 'of Jesus,' the poverty 'of Jesus,' the life 'of Jesus.' This is compared to the eighty-five references to 'Christ' in various forms and the single mention of the Holy Spirit. Again, this theology links him with Möhler's *Symbolik*, with its dearth of references to Jesus' life and its focus upon "the Christ of the Chalcedonian formula ... as the center of Christian faith."⁶²⁷

Another connection with Möhler is Ketteler's detailed opposition of Catholicism to Protestantism. *Symbolik* was revolutionary in its time for its courage to address the specifics of Protestant and Catholic doctrines on an academic level—as opposed to the parochial manuals and catechisms that preceded it.⁶²⁸ It treats, in a dialectical approach,

⁶²⁷ Himes, "Strauss and Barth on Möhler's Ecclesiology," 105.

⁶²⁸ Anton Van Harskamp presents a less positive account of Möhler's *Symbolik* than the one offered here, arguing that Möhler's was motivated by social concerns rather than the true differences between Protestantism and Catholicism. While granting the social pressures and the political relevance of *Symbolik*, I am not convinced by his internal critique of Möhler's work.

specific theological topics and demonstrates, in apologetic fashion, the relative strength of the Catholic position with an emphasis upon the sacraments and tradition. Ketteler adopted both the theology and spirit of *Symbolik* in the *Sermons*. Protestant faiths were recognized as sharing in the truth to the extent that they shared Catholic belief. They were, he claimed, like the branches that had fallen off a tree. The branches are able to survive for a while because of the reserved sap that they still hold,⁶²⁹ i.e., the truth they have is not self-generated, but continues to give life as long as it does not dry up.

Ketteler was obviously aware of the diversity of religious belief among Germans and the painful history of the discord spawned by Christians attempting to impose their belief systems with political coercion. Never did he suggest legislation that either would directly or indirectly exercise force to compel belief or in any way violate the freedom of conscience as a fundamental principle. "Religion can only rejoice about freedom, because only with freedom can it develop its complete strength and truth. And error will collapse as soon as it is separated from the support (apron strings) of the world's power."⁶³⁰ He had demonstrated before and after 1848 that he was quite able to cooperate publicly with non-Catholics and even atheists when their interests coincided. He was without illusion regarding the possibility of the Frankfurt Parliament allowing such an injustice to favor one church or another, and in any case was himself more suspicious of secular power

Anton Van Harskamp, "The Authority of the Church and the Problematic Nature of Modern Subjectivity in Johann Adam Möhler's *Symbolik*," in *The Legacy of the Tübingen School*, ed. Donald J. Dietrich and Michael J. Himes (New York: The Crossroad Publishing Company, 1997).
⁶²⁹ *SWB I*, 1:71. Ketteler's fifth sermon.

⁶³⁰ *SWB I*, 1:18. Ketteler's "Rede vor der ersten Versammlung des katholischen Vereines Deutschlands." "Die Religion kann sich nur freuen über die Freiheit, denn dann wird wie sich in ihrer ganzen Kraft und Wahrheit entfalten und der Irrthum wird zusammenfallen, sobald man ihm das Gängelband der weltlichen Gewalt entzieht."

than hopeful for its protection.⁶³¹ Yet his sermons are by no means ecumenical and strike the modern ear with the clang of triumphalist confidence or even arrogance. They do not reach out a hand of compromise or sensitivity to differences of faith, and his system is without compromise regarding the deposit of the fullness of Christian truth in the Roman Catholic Church. “Were there—until the end of the world—a truth that rose higher than that of the Catholic Church, if then..., than its belief would be a lie, its trust foolishness. The [church] would not be the work of God; it would be the work of men.”⁶³² He believed that the truth was God-given and therefore its implementation in this world carried the force of God’s power. To the extent that this truth is believed and put into practice, it could only bolster the well-being of society.

Ketteler’s Christology, as applied to his social theory, employs a ‘participation understanding’ composed of three parts. First, the incarnation, following Möhler, “serves as the initial sacramental grounding for the authoritative objectivity of the church.”⁶³³ Second, Christ’s saving action that forms the historical point from which all human action is potentially directed towards God’s will. Third, again with a historical framework, the work of redemption effected by Christ is continued in the church under his leadership. Belief, therefore, is not merely a personal experience of relationship to Christ, but is a participation in his continuing saving action in the world through and with the community of believers. The sixth and final sermon addresses his ecclesiology

⁶³¹ Ketteler was roundly shouted down when he suggested to the *Paulskirche* that something would not sit well with the “Willen des katholischen Volks” *SWB I*, 1:5. Bolten, “Watch, Pray, Fight: Ketteler as Priest-Politician”, 151. Ketteler was not shielded from the public distrust of religion, and Catholicism specifically, in the public sphere.

⁶³² *SWB I*, 1:24. Ketteler’s first sermon, “Die großen socialen Fragen der Gegenwart.”

⁶³³ Dietrich and Himes, eds., *Legacy of the Tübingen School*, 14(from preface).

specifically, so it is enough to mention here the focus upon the divine nature of the church, which is the same body as that created by Christ.

Thus, the chart reveals a social theory, which in some ways harkens back to a pre-Reformation and pre-secularization model, but which also incorporates the insights of Möhler's *Symbolik*. The *Sermons* attempt to make the case that this model as outlined by Aquinas still holds despite the political developments leading up to 1848. Belief in a personal transcendent God situates society as it situates the person (*der Mensch*) in a relationship of 'created' to the 'creator,' not only as individuals (*einzelne Menschen*), but in relationship with the rest of Creation. It acknowledges a reality of dependency and obligation, dependency upon a divine being who imparts not only existence but also purpose and meaning. God, as the source of Creation, also creates an order and end or purpose for Creation—a natural order with a divine telos. Belief implies obligation to God in the following sense: Because humans reflect God's nature, we share God's creative and loving relationship to all being. An autonomous individualism is profoundly incompatible with belief in God according to this model—in the political, social, or private sphere. This is a critical point for Ketteler, whose reflections upon the natural law continually refer to its divine source. Even taking into account the context of the discourse as sermons, and thus directed to people sharing a basic faith, this point is central to his whole political scheme.

7.2.5. Society's Pillars Outlined In The *Sermons*

Each of the six sermons Ketteler delivered concentrated upon a pillar that supports society. Each of these pillars is built upon a divine foundation. If he had delivered five

sermons, or seven, there might have been a different approach or maybe some overlap. But as it happens, the six sermons with their six pillars correspond quite distinctly to Aquinas' classic formulation of the seven virtues—three cardinal and three theological, with the seventh virtue prudence (practical reason) playing a central role in all six sermons. The virtues support a single roof representing the end or purpose of the social structure, namely the actualization of the potential of the human community as determined by God's will. Ketteler's reliance upon such a central and identifiably Catholic moral theology and pedagogy establishes his commitment to the traditional anthropology and separates him from any suspicion that his rights language involved him in a liberal individualistic anthropology.

As a building rests on a foundation, so too does the entire social life rest upon particular fundamental truths without which its existence would be inconceivable. Numbered among these fundamental truths, aside from the right of private property, are especially the teachings on human liberty, on the order and destiny of humanity, and on marriage and the family.⁶³⁴

With the caution that the chart above is my exegetical construct, the structure fits Ketteler's argument and rhetorical style as well as the classical models of moral catechesis in that it follows a pattern of teaching and argumentation based upon the classic virtues, with a seventh virtue, prudence, binding the whole structure together. Ketteler uses the actual word 'virtue,' *Tugend*, mostly in reference to the structure of moral law, though he makes reference to actual virtues *qua Tugenden* only in reference to

⁶³⁴ *SWB I*, 1:48. Ketteler's third sermon. "Wie ein Gebäude auf den Fundamenten, so ruht das gesamte gesellschaftliche Leben auf gewissen Grundwahrheiten, ohne welche es gar nicht gedacht werden kann. Zu diesen Fundamenten des gesellschaftlichen Lebens rechnen wir, außer dem EigentumsRechte, noch insbesondere die Lehre von der Freiheit des Menschen, von der Bestimmung des Menschen, von der Ehe und Familie."

those virtues dealing with motherhood. Nevertheless, it is no stretch to analyze the *Sermons* in terms of the classical virtue schema, since Ketteler was himself so explicitly relying upon the sections in the *Summa Theologica* that deal with the virtues—especially the virtue ‘justice.’ There is much overlap in the sermons. Moreover, the order in which they were delivered does not progress in the classical fashion from the cardinal to the theological virtues (temperance, fortitude, and justice to faith, hope, and charity). Nonetheless, the themes of the sermons can be appropriately categorized according to the virtues in a way that gives us significant insight into the structure of his very explicitly natural law social theory.⁶³⁵ The teaching of moral theology according to the pattern of the virtues was so much a part of the life of the church during Ketteler’s lifetime, moreover, that the variance from the classical ideal is itself quite telling.

Ketteler began with the virtue of justice, regarding private property, and thus demonstrated both the pressing concern of the day and also the relative priority that practical issues held in his theological understanding. The *Sermons*’ focus upon private property as the central issue of his time makes most sense when it is seen within the context of his reliance upon Aquinas, and especially upon the specific questions in the

⁶³⁵ Ketteler’s variation from the classical pattern is itself revealing. The classical pattern moves from the cardinal (C) virtues: temperance (C1), fortitude (C2) and justice (C3), to theological (T) virtues: faith (T1), hope (T2) and charity (T3), with the lower numbers referring to the personal virtues and the higher numbers representing more universal objects in the scholastic schema. Thus the classical pattern moves from C1, C2, C3 to T1, T2, T3. Ketteler’s *Sermons*, however, move from the universal to the particular, alternating from cardinal to theological: Beginning with Justice (C3), then Charity (T3), fortitude (C2), hope (T2), temperance (C1), and finally, faith (T1). The pattern is therefore: C3, T3, C2, T2, C1, T1. This pattern represents, I propose, the pattern of Ketteler’s thought. He was greatly concerned with the existential and fundamental truths about the world and being a religious man, he interpreted these in religious terms. Bearing these fundamental truths, he encountered the world and applied his fundamental axioms to the complex reality using practical reason.

Summa Theologica's "Treatise on Prudence and Justice." Question 58, "Of Justice," begins with an article that deals with the question, "*Whether Right (jus) is the Object of Justice.*" Aquinas states:

It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it denotes a kind of equality, as its very name implies; indeed we are wont to say that things are adjusted when they are made equal for equality is in reference of one thing to some other.⁶³⁶

The other virtues have their object within the person, such that they perfect the agent internally and only secondarily affect the external world. Thus, the temperate person is in control of wanton internal desires, and, secondarily, is not murderous, adulterous, etc. With justice, in contrast, the object is external to the person such that an action is just in relation not only to the agent, but also in relation with others. "Because a man's work is said to be just when it is related to some other by way of some kind of equality."⁶³⁷ Thus justice is by definition the most appropriate object of the *Sozialfrage*, or social question, and property is an archetypal question of justice since it deals with the allocation of society's most basic goods and thereby reveals society's most basic values. Aquinas defined justice as rendering to each person their due, and the question of private property deals precisely with this question on a political level. This first sermon also hits upon themes that will be repeated over the six sermons, namely, the decadence of society but the survival of the church, the persisting nature of truth, and the relationship of humans to the creator. In this very theological social understanding, Ketteler goes so far as to define

⁶³⁶ Aquinas, *Summa Theologica*. II-II "Treatise on Prudence and Justice," Question 57, "Of Right," art. 1, "Whether right is the object of justice?"

⁶³⁷ Ibid. II-II "Treatise on Prudence and Justice," Question 57, "Of Right," art. 1, "Whether right is the object of justice?"

the right to private property as a doctrine⁶³⁸—a doctrine that is necessary for healing the evils of the day.

Ederer appropriately titled the second sermon “The Obligation of Christian Charity,” though Ketteler himself did not offer titles to his sermons. The confusion in the English language between the ‘virtue’ charity and the related ‘action of charitable giving’ as charity is avoided in the German. The virtue ‘charity’ in German is *Liebe*, which preserves the Latin sense of love in *caritas* and is rendered as *christliche Liebe* (Christian charity), *Nächstenliebe* (love of neighbor), *göttliches Lieben* (divine or holy charity), and *Lehre der Liebe* (the doctrine of charity). The action of charitable giving is therefore easily differentiated by such terms as *Barmherzigkeit* (mercy or compassion), *Wohltätigkeitsorganisation* (charitable organization), or *Almosen* (charitable donation). The German word *Liebe* for the virtue charity thus retains an obvious connotation of the person’s interior relationship with God. Charity as *Liebe*, as differentiated from charity as some external action, is critical for Ketteler’s system because of his stress of the need for society’s internal re-orientation as opposed to external or political reforms.

The third sermon, with a focus on the idea of freedom, falls under the category of fortitude in my exegesis. Here Ketteler contrasted the secular understanding of freedom as ‘freedom from restraints’ or freedom from a law external to ourselves, with the Christian understanding of freedom as the enduring orientation of the individual will to God’s will. The following of one’s own narrowly experienced desires leads to personal and social rebellion. Christian freedom, to the contrary, is associated with the recognition

⁶³⁸ *SWB I*,1:36. Ketteler’s second sermon. “Die Lehre vom Rechte des Eigenthums an, die ich die christliche genannt habe.”

of God as the lawgiver. By following and defending the true laws of God and Creation, humans achieve their full dignity. The fourth sermon, titled ‘The Christian Concept of Human Destiny,’ easily fits the Christian virtue of hope, which orients human persons to their ultimate purpose in the divine plan. In refuting the theories and consequences of atheism, Ketteler here outlines how the expectations of the believers (i.e., hope) reflect also in the strength of society in the present. The fifth sermon deals with the topic of marriage and the family and follows the message of the third sermon on freedom. Whereas the third sermon dealt with the secularists’, i.e., the unbelievers’, tendency towards rejection of the laws external to themselves, the fifth sermon reflects upon nature and benefits of the temperate lives nurtured in loving Christian families. Finally, the sixth sermon deals with faith and the participation of the person through that faith in the sacramental life of the church. This further develops the Christian concept of freedom within a faith community by making an argument for the authority of the church. Whereas the fifth sermon made the argument that the human person requires the tutelage of a good mother and a virtuous family to develop her or his human potential, the sixth sermon directly addresses the role of the church in society as an authority that reveals God’s will for humanity. The virtue faith, like the other six virtues (justice, charity, fortitude, hope, temperance and prudence), is located within the matrix of the organic social theory such that the lack of its development has damaging consequences for the whole of society.

Human dignity (*Würde des Menschen*) is so much more a fact of reality, that it cannot be made dependent upon the laws and truths generated merely by human hands. The reasonable person (*Vernünftiger Mensch*) stands before the reasonable person with the same rights (*gleichberechtigt*)[?] It would be

unreasonable (*unvernünftig*) and degrading to establish their rights from this position. If only human authority exists on this earth, then the teaching of the unbelievers (*Ungläubige*) is completely justified—even if it demands the impossible. If that is the case, then truly is the destiny of humanity cruel.⁶³⁹

The virtue here is faith, and Ketteler specifically refers to the process whereby faith is nurtured in the human person. The sermons are dealing, however, with the *Sozialfrage*, or social question. Therefore, the sixth sermon addresses the implications for society if the framework and limits of rational and political discourse were to be determined by the unbelievers (*Ungläubige*). Ketteler's language, his use of *Vernunft* and *Ungläubige*, makes it clear that he was referring to the liberals—to their 'merely human' foundation of rights. Thus, while the final sermon contains less explicit reference to rights as subjective claims, the implication for rights is clear: The exclusion of religious insights from political discourse is destructive of not only specific rights, but of the whole social structure. This conclusion is held concurrently with an understanding of rights as dependent upon: 1) the practical reason in the lawgivers; 2) a full understanding of the potential of human development; and 3) the proper needs and limits needed to develop the human community.

⁶³⁹ *SWB* I,1:83. Ketteler's sixth sermon.

7.3. First Sermon: Justice Is ‘To Each His Own,’ But According To The Divine Will

7.3.1. Christological Ecclesiology In Context: A Suffering Church Dies And Rises As/With Christ In History

The location of the sermons in Mainz is essential to understanding Ketteler’s rhetorical argument and style.⁶⁴⁰ Mainz was not a large city even in terms of nineteenth-century Europe before the rise of the great industrial urban centers. It did, however, have a symbolic importance in the German Catholic mind. Before Boniface, the apostle to Germany, was bishop there in the eighth century, it was already an old Roman city. After Boniface, the city continued to hold a place of honor among the German churches and it built a cathedral to match its importance in the twelfth century. Ketteler preached his six Advent sermons in the cathedral, but the first sermon was delivered on the feast of the dedication of Mainz’s church of St. Peter. St. Peter’s parish was almost a thousand years old when Ketteler stepped to the pulpit to address a Catholic congregation hungry for some meaning in their Christmas season after the year’s economic, political, and social tumult.

Ketteler’s rhetorically juxtaposed the physical and the spiritual, the ephemeral and the eternal, and the false and the true. It was combative and often defensive rhetoric

⁶⁴⁰ Bolton, probably following Lenhart, writes that the first Sermon was actually preached in St. Peter’s Church on the feast of its ‘installation,’ which would strengthen Ketteler’s analogies between the physical and spiritual church. Ludwig Lenhart, *Bischof Ketteler: Staatspolitiker, Sozialpolitiker, Kirchenpolitiker*, 3 vols. (Mainz,: v. Hase u. Koehler, 1966), 1:38n32. I have found no other reference to the separate location of the first sermon and most references to the sermons in German and English refer to them simply as the Advent Sermons in the Mainz Cathedral. The point of the analogy stands in either case. The 1977 collected works (*SWB*) footnote the dedication of the Cathedral on November 10 and make no mention of St. Peter’s Church. This is not a major point.

coming from a priest who was only thirty-seven-years-old. He continually confronted the listeners with variations on the following existential questions: ‘Are you a Christian?’ ‘Do you accept the reality of Christian truths?’ ‘Are you willing to live the life demanded by those truths?’ This ‘existential decision’ approach reflected that of the *Spiritual Exercises of St. Ignatius*, which played a central role in Ketteler’s own spiritual life. Whether he made a conscious decision to reference the *Exercises* here or not, his rhetoric projected the spirit of their “*First Principle and Foundation*”:

Man is created to praise, reverence, and serve God our Lord, and by this means to save his soul. The other things on the face of the earth are created for man to help him in attaining the end for which he is created. Hence, man is to make use of them in as far as they help him in the attainment of his end, and he must rid himself of them in as far as they prove a hindrance to him... Our one desire and choice should be what is more conducive to the end for which we are created.⁶⁴¹

The *Exercises* combine three dependent points regarding God, the human person, and ‘created things’ that are absolutely central to Ketteler’s theological approach. As mentioned, they begin with a central point of faith placing God as the source of all Creation. Second, the human person is ‘intended’ to live in an intentionally related way with the creator. Thirdly, the human person makes use of created things to the extent that they contribute to the teleological purpose of human Creation by God. Ketteler’s letters have many references to the important role that the *Exercises* played in own life.⁶⁴²

⁶⁴¹ “First Principle And Foundation,” from *Spiritual Exercises of St. Ignatius* §23.

⁶⁴² “Am meisten haben wir aber natürlich mit den Jesuiten verkehrt, wo ich mich ganz besonders freute, den Mann wieder zum Führer während der Exercitien zu erhalten, der mich schon vor ... Jahren geleitet hatte. [Christian Thuiner (1809-1858), 1831 Entered Jesuits, Austrian Provincial Jesuits in Innsbruck] Mir hat Gott unter den großen Gnaden, die er im ganzen Leben mir erwiesen, nach meiner Einsicht nie eine größere zugetheilt als diese geistliche Uebungen. Man muß sie öfter machen, um ihren ganzen Geist zu durchdringen, und so glaube ich mich auch jetzt

They overlap considerably with Aquinas' theology and philosophy, which influenced Ignatius' own writing. They thus provided Ketteler with a spirituality of action that moved from the principles of theology to their application in political and social spheres.

The historical context of these questions heightened the force of the rhetoric, as Ketteler's references to profound social distress were associated with the recent history of famines, revolutions, and failed political structures. The references to the physical structure of the churches, however, were immediately associated with the church as an institution capable of moral and political authority. Its continuing history was a source of permanence and safety in a calamitous world. The physical structure of the church provided him with the prime example of the opposition of the changeable world and the unchanging truth upon which the church was based. He pointed to the doors of the church that had welcomed so many of the congregation's ancestors, but then pointed to the single faith that unites those ancestors with the present church. This is one of Ketteler's central themes for these sermons and will continue to be important in his later writings, as is a second and related theme of the church under attack.

The sermons address the very specific dangers to the church posed by the 1848 revolutions and the range of ideologies associated with them, but Ketteler identifies these dangers with the whole history of opposition from the time of early church persecutions

noch tiefer in sie hineingedacht zu haben. Auch Richard [Ketteler's brother] ist von ihrer Bedeutung ebenso wie ich durchdrungen. Ich bin überzeugt, daß er von nun an mit noch viel größerer Klarheit auf die Bedeutung des geistlichen Standes für sein ganzes Leben hinblicken wird. Wir werden nun gemeinschaftlich unser Leben noch besser verstehen, noch besser es einsehen, von welchem einen Grunde unser ganzes Thun ausgehen, nach welchem einen Ziele unser ganzes Leben hinstreben muß. Denn diese Einheit in dem Grunde und dem Ziele des ganzen Lebens zu bewirken, ist die allgemeine Absicht der Exercitien." *SWB II*, 1:217-218. Ketteler's Letter to Sophie v. Merveldt, April 16, 1843.

through to his present. In the midst of these dangers he tapped into Möhler's insights in *Symbolik* to brace his congregation with a vision of the church's unchanging nature surviving the havoc of history. "[The church] possesses a heritage of unchangeable truth more lofty than any imaginable cultural accomplishment of the human spirit. It enjoys a vitality more dynamic than any conceivable ebb and flow of human life."⁶⁴³ He quotes the Passion narratives of Matthew's Gospel as well as Tertullian to compare the persecutions of Jesus and the early church with his nineteenth-century German church, beset by the forces of revolution on the one hand and by the ideology of liberalism on the other. Tertullian, the second-century lawyer turned Christian apologist and defender of the faith against persecution, was someone with whom Ketteler could readily identify, yet unlike Tertullian, who feared the influence of 'Athens' (philosophy or reason) upon 'Jerusalem' (faith), Ketteler was fully confident that reasonable persons of good will could be brought together upon the common plains of natural law. If there are any 'cities' to be feared, it should be the rationalist and revolutionary Paris or the absolutist and anti-Catholic Berlin.

7.3.2. The Context Of The First Sermon: Feast of Dedication of St. Peter's Church

The first sermon was delivered on November 19 on the Feast of the Dedication of St. Peter's Church in Mainz, and its message flowed from the historical circumstances of that parish church located near the cathedral. Ketteler's sermon used the physical structure of St. Peter's as a case study for his ecclesiological argument. The parish church, named

⁶⁴³ *SWB I*, 1:24.

after the saint peculiarly identified with papal authority vested in Rome, was first established in the tenth century and was rebuilt in the eighteenth century in Rococo splendor. It was secularized by the French in the early nineteenth century, when it served as a stable for the revolutionary forces—the symbolism of French horses of war desecrating a house of prayer would not have been lost on Ketteler or his audience. They would see the trampling of that holy site by Napoleon’s forces as a physical manifestation of the liberal secularizing agenda that attempted to demystify and ‘rationalize’ German culture by removing its explicit Christian symbols. It does not even require explicit reference in the sermon. Rather, the unstated intimation adds to the urgency of his preaching and spurs his hearers to recognize that they are still living at a time of struggle requiring acute historical understanding and brave resistance.

Ketteler begins:

On this day, my Christian brothers and sisters, we reflect back over the centuries that have passed since the consecration of the ancient churches in this city as houses of the living God; and we look back over the ranks of your ancestors who with one faith, one hope, and one common love walked through these doors...

While church buildings depend upon human caprice which can be fickle, the Church which we belong to owes its strength and durability not to man, but to God... Men can bestow upon it earthly treasures and a seat alongside the thrones of kings as our ancestors did; or they can rob it of its earthly possessions, mock and humiliate it as is the case today. Still as the power of the Almighty which resides in the crucified Christ cannot be taken from the crucified church. The Church will survive by this power until the end of time.⁶⁴⁴

This ecclesiology has some elements of separation from the world—that the ‘church under siege’ needs to recognize the enemy in this dangerous ‘world.’ Ketteler balances

⁶⁴⁴ *SWB I*, 1:23, translation: *Ederer*, 7.

this tendency, however, with, first, the call to recognize the inner constancy of God's love and truth that sustains the church and, second, the 'mandate' from Mark's Gospel to spread the Word universally (Mk 16:15). Note here the Christological and specifically incarnational nature of his ecclesiological analysis of persecution.

People can grant [the Christian Church] earthly treasures and a seat alongside the thrones of kings as our ancestors did; or they can rob it of its earthly possessions, mock and humiliate it as is the case today. Still the power of the Almighty which resides in the crucified Christ cannot be taken from the crucified church. The Church will survive this power until the end of time⁶⁴⁵

The ecclesiology is unmistakably that of Baader and Möhler, 'identifying' the church historically as the very 'Body of Christ.'⁶⁴⁶ Persecution was a part of Christ's life and it is a part the church's life. Also like Christ, however, the church rises from the dead to defeat evil in God's own way. To that end, Ketteler lets loose a series of rhetorical questions asking the congregation to respond to the present crisis together with Catholics everywhere and risk every last drop of blood in their veins.⁶⁴⁷ This mandate to defend the church and spread the word is specifically and unmistakably Christological and involves the acceptance of suffering, but it is not passive. Piety requires action. "This pious belief is not enough in these times; actions must prove the church's truth."⁶⁴⁸ The consequence of belief is external and secular in the sense that the dynamism is to engage the world and address its social ills.

⁶⁴⁵ *SWB I*, 1:24, translation: *Ederer*, 8.

⁶⁴⁶ This notion of 'identity' raises many appropriate theological questions, including whether this identity allows for sin in the church, and whether this identity is exclusively with the Catholic Church, or whether other Christian communities share in this identity as well. Ketteler does not acknowledge these problems here or elsewhere. Himes offers an analysis of how Möhler might have resolved the question in: Himes, "Strauss and Barth on Möhler's Ecclesiology."

⁶⁴⁷ *SWB I*, 1:25.

⁶⁴⁸ *SWB I*, 1:25.

Given the apocalyptic tone of Ketteler's sermon, it may seem odd that he identified the most vital social problem of his time as the *Kirchenlehre*—the teaching or 'doctrine' of private property.

All that I am privileged to do at present is to recall the Church's teaching which is relevant to the most vital social problem of our time, namely the Church's teaching regarding the private property right. I would like to point out how superior this teaching is to contemporary opinions... and how the Church, fortified with this doctrine, can heal the evil of our time.⁶⁴⁹

This is an extraordinary claim that makes sense only in light of his tutelage under Baader's sociology, with its attention to Aquinas, the rise of a political ideology antagonistic to the church and to established social norms, and the disappointments experienced by the lack of social stability following months of work in the Frankfurt Parliament constructing a constitution. Thus, in an approach foreshadowing the Second Vatican Council's emphasis upon 'signs of the times,' Ketteler focuses upon the right to private property (*Recht des Eigentums*) as the key to understanding both the problems and the solutions for his era. The problems are social. They demand an understanding of society. And they are to be addressed not by technical policy 'solutions,' an approach more appropriate to liberalism, but with a 'healing' to be directed by the teaching of the church. The organic analogy is again predominant, and it co-exists with the concept of rights.

⁶⁴⁹ *SWB I*, 1:25, translation, *Ederer*, 7.

7.3.3. The Church Can Heal The Evil Of The Times With The Right to Private Property

Having proclaimed that the church's twofold task was to spread truth and restore life to a decadent society, Ketteler then launched into a defense of private property as a right, (*Recht des Eigenthums*) based upon the teaching of the church and specifically the work of St. Thomas Aquinas. When taken out of context, it can seem strange to put so much emphasis on this single property right. The context, however, was the period following the 1848 revolutions when the communist movement was still potentially volatile and gaining strength. The larger context includes the history of social unrest stretching back to the revolutions of 1830 and the havoc created by the Napoleonic Wars before then. By the end of 1848, with winter approaching and the hopes for the success of the Frankfurt Parliament fading, the problems of society were concrete and pressing. Famine, hunger, and disease fed the cycles of economic and social chaos. People's desire for social order was thus not an irrational conservative impulse, but based upon direct experience.

Ketteler's prescription for social health was to emphasize the source of all order, namely God. He mocked the attempts of liberal constitutionalists, socialists, communists, and others in the parliament to tinker with social constructions without addressing the ultimate foundation and purpose of the social order. Ketteler's fiery sermons were meant to give solace to the people with solutions to their pressing material and religious concerns. He reassured the congregation in the midst of instability and disorder that the church's doctrine was capable of healing the divisions of the time. Further, he was conscious that the salve could not be a simple deadening of the pain (an opiate), but required structural change that would change the material conditions of people in society.

In framing his argument for the right to private property the way he did, and placing the issue at the center of the contemporary crisis, he was essentially following Baader's prescient essay *Evolutionism and Revolutionism* (VI 73-108).⁶⁵⁰ Regarding private property, Baader claimed that: "Christianity has also fundamentally reformed all doctrines and notions of acquisitions, possession, and consumption of property by doing away with the pagan concept of absolute property without, however, barring individual acquisition and possession."⁶⁵¹ Despite the obvious glaring difference between 'Bishop Ketteler' and Karl Marx, they were united in understanding that the battles of the day regarding governmental policy were secondary to the more fundamental and 'internal' questions about human meaning and purpose. And they both offered close readings of history to demonstrate recurring patterns of development, with Marx locating the engine of social change in the material means of production and Ketteler in the faith (or rejection) of Christian truths. Consistent with his fundamental axiom that God is the center of all life, we are to understand possessions and thus private property as aspects of God's Creation and thus subject to God's order of love.

The definition of property takes on theological relevance when it is understood to represent the relationship of the human person to God's created order. Further, since property claims are inherently exclusivist—if I claim something as my property I am implicitly excluding it from others—it is an essentially social conception. The conception of property, therefore, profoundly affects the nature of social human relations. Therefore, for Ketteler, rights are never independent or absolute, but must be seen as gifts of God to

⁶⁵⁰ Reference from Alexander, Betanzos, *Baader's Philosophy of Love*, 402.

⁶⁵¹ Quote from Alexander in *Ibid.*, 403.

be used in service of God's will in the context of God's created social and material order. Conversely, absolute rights, such as property rights, imply a claim upon the created order independent from the creator's will—an independence from God. Further, absolute claims to property as a right can only be asserted when one recognizes no more essential relationship with other people in society.

This is where Baader and consequently Ketteler were justified in understanding social relations, and thus politics, theologically. If religion and all religious reasoning and beliefs are excluded from political discourse, then the reasoning that will hold sway in politics is the reasoning that not only prescind from the question, but also denies all theological relevance to the discourse about human relations with material things (i.e., things that may be called property). If the process within the state for defining and specifying rights, including private property rights, preemptively shuts out 'religious' viewpoints and arguments, it has already excluded such concerns as the relationship of humans with a material order divinely given, and the rights defined by the state will exclude such relevance from its definition of rights. Moreover, the viewpoints and arguments that would be considered appropriate, i.e., secular viewpoints and arguments, are themselves hardly neutral concerning religion and carry metaphysical baggage.

Ultimately, Ketteler was arguing that the state's exclusion of religious concerns from public discourse was leading to an essentially atheistic social order, whether that was intentional, as was the case with the social democrats, or performative, as was the case with the broad range of liberal-leaning representatives in the *Paulskirche*. To make his

argument in the first sermon, Ketteler used St. Thomas Aquinas' questions on law in the *Summa Theologica*.

7.3.4. Thomas Aquinas On Justice And Private Property

Ketteler's first sermon focused upon two articles from Aquinas' *Summa Theologica*, "Second Part of the Second Part, Treatise on Prudence and Justice," which dealt with justice regarding robbery and theft (two species of sin regarding private property), Question 66.1 ("Is It Natural For A Man To Possess External Things?") and 66.2 ("Is It Lawful For A Man To Possess Something As His Own?") where Aquinas outlined his theory of property in terms of the natural law.⁶⁵² In the questions, he first differentiated between natural "as regards [its] nature" and "as regards [its] use" (66.1). Concerning the very nature of goods, they are subject only to God, and are not inherently suited or inclined towards a system of property. It is only in terms of their use that the argument can be established for private property, "because, by his reason and will, ['man'] is able to use [external things] for his own profit, as they were made on his account: for the imperfect is always for the sake of the perfect, as stated above (64,1)" (66.1). If the argument is taken further, the end of the community that includes many people is more perfect than a single person. Therefore, the external thing, though appropriately held as possessions by individuals, is justly considered property only as far as that contributes to the common good. This would make private property not a right absolutely, but only conditionally in terms of its reasonable establishment within a community where it

⁶⁵² Aquinas, *Summa Theologica*. II-II "Treatise on Prudence and Justice," Question 66.

contributes to the good of that community. One other reason for human 'dominion' over things includes providing sustenance for living (66.1, ad 1), yet this is countered by two more warnings that dominion regarding the nature of things belongs to God alone, and that the rich person has external things only as received from God. The theologically driven understanding of property therefore suffuses Aquinas' understanding of property, and is used as a counter to the tendency of humans to hoard possessions as apart from, and to the detriment of, the community.

Aquinas located two natural capacities in the person as reasons for possessing things: the power to 'procure' things and 'dispense' them. More solid, though, are the three reasons why possessions are conducive to human flourishing. First, people take better practical care of personal things as opposed to things held in common. Second, the division of property makes society more orderly by giving each person or family stewardship over one or a few specific things. Third, a more peaceful state is generated if the citizens are contented, and property prevents many of the quarrels that arise from holding things in common. He did not take for granted that property claims (including, therefore, modern conceptions of private property rights) are 'self-evident.' Rather, such claims have legitimacy to the extent that they are conducive to the ordering of society and thereby to the common good.

Aquinas' position on the 'use' of property may appear somewhat socialist: "[quoting Ambrose] He who spends too much is a robber" (66.2 ad3). The key, however, to understanding his conception of property is always the teleological purpose or end of God's Creation. "Why are you rich while another is poor, unless it be that you may have

the merit of a good stewardship, and he the reward of patience” (66.2 ad2). “Man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need” (66.2). Thus, his understanding of property is much more conditional than the understanding of many modern theorists. The ‘right’ of possessing external things, i.e., private property, is a right/law (*jus*) in terms of it being the fruit of political *phronesis*, i.e. practical reason. Thus, a community could determine to arrange for its needs in alternative ways if it could proved more conducive to the social *telos*. “The division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law, as stated above (57.2,3). Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason.” (66.2 ad1) The reliance of human reason is Aquinas’ foundation stone.

Though not explicitly treated by Ketteler in the *Sermons*, another article from Question 66, “Is It Lawful To Steal In A Case Of Necessity?” (66.7), sheds further insight into the *Summa Theologica*’s restricted understanding of property rights. Aquinas laid great weight upon the individual’s need to maintain his own integrity and did not resort to utilitarian strategies which might contemplate the sacrifice of ‘some’ human beings for the benefit of the ‘many.’ The integrity of individual persons contributes to the common good. Thus, he has a proportionally radical answer regarding the taking of another’s property in cases of extreme need.

Wherefore the division and appropriation of things which are based on human law do not preclude the fact that man’s needs have to be remedied by means of

these very things. Hence, whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor.⁶⁵³

Aquinas couched this in qualifying terms to soften the revolutionary language.

Moreover, he maintained the stable and legally ordered society as a basis of furthering the common good. But a society that contains both people in destitution and people with great affluence is a society where the common good is not being sought. Thus, in cases of extreme need, the taking of another's property as a way of maintaining one's integrity is not considered, properly, theft, "because that which he takes for the support of his life becomes his own property by reason of that need" (66.7 ad2). The final arbiter is the prudential judgment that recognizes the sufficient need and acts to secure the means of meeting that need.

Aquinas' conclusions may at times be difficult to reconcile with contemporary American economic principles and conceptions of private property, but the argument here is that his method of argumentation involves reason as the final arbiter and that the common good is the teleological end of social reasoning. Aquinas located the object of rights in the good of the community. The rights are thus reasonably and deliberately determined within a matrix of interdependent relations. He placed the practical result of deliberation squarely within the reality of contemporary exigencies.

Ketteler's first sermon goes into great detail in outlining the argument of Question 66 in the *Summa Theologica*. Following Aquinas, he referenced the Aristotelian maxim to seek the mean between the extremes, and then Ketteler applied it to the extremes

⁶⁵³ Ibid. II-II "Treatise on Prudence and Justice," Question 66, Art. 7

regarding property—between an absolute right and the abolishment of property. The argument has essentially three steps and follows Aquinas very closely:

[1] God is [as creator of all things, including humans] the true and sole possessor of all Creation (*Eigenthümer aller Geschöpfe*), ...

[2] and this is God's right (*Recht Gottes*) because it is linked with the existence of Creation itself. [God's right] is inalienable (*unveräußerlich*) and no allotment (*Vertheilung*), no possession (*Besitz*), no common law (*Gewohnheit*), and no legislation (*Gesetz*) can encroach upon this fundamental right of God (*Recht Gottes*). Consequently, here God is in possession of all right [sic] (*alles Recht*), while humans have none...

[3] Excepting from this fundamentally absolute property right (*wesentlichen vollen Eigentumsrechte*), to which only God is entitled, however, St. Thomas also distinguishes a right of use (*Nutzungsrecht*), and only in relation to this use is it possible to speak of a right possessed by humans to earthly goods.⁶⁵⁴

Ketteler's choice of words in the sermon was intentionally shocking, as he applied legal categories and terminology to God, following Savigny's formulations, as essentially a "juristic person (*juristische Person*)."⁶⁵⁵ It was meant rhetorically and analogically, since Ketteler obviously did not mean that God could either benefit from, or be subject to, the state's legal structure, but it is not meant ironically. His language of essentially subjective rights was the language of the courts, parliaments, and political philosophy. Applied primarily to God, the force of Ketteler's rhetoric is intensified as he turned the liberal understanding of rights on its head.' In a liberal system based upon consent, rights emerge from the conflict of individual wills, such that a state has legitimacy to the extent

⁶⁵⁴ *SWB I*, 1:26-27.

⁶⁵⁵ Savigny, *System Des Heutigen Römischen Rechts (Vol 2: Rechtsverhältnisse)*, 2:235. Paragraph 85 in Savigny's classic volume deals with the notion of a juristic person. "Die Rechtsfähigkeit wurde oben dargestellt als zusammenfallend mit dem Begriff des einzelnen Menschen (par.60). Wir betrachten sie jetzt als ausgedehnt aus künstliche, durch bloße Fiction angenommene Subjecte. Ein solches Subject nennen wir eine **juristische Person**, d.h. eine Person welche blos zu juristischen Zwecken angenommen wird. In ihr finden wir einen Träger von Rechtsverhältnissen noch neben dem einzelnen Menschen. (2:236:)" (Bold mine)

that it protects those rights. There, rights emerge from an anthropology of conflict and a teleology limited to human desires. Charles Taylor summarizes it well: “The original idealization of this order of mutual benefit comes in a theory of rights and of legitimate rule. It starts with individuals and conceives society as established for their sake.”⁶⁵⁶ Ketteler, to the contrary, begins with a Thomistic anthropology and teleology. That means that humans are essentially creatures of God, and as such have their purpose in relationship with God. This shift in social imagination locates the related use of created things within a transcendent teleology, thus undermining the notion that humans can make absolute claims to ‘created things,’ i.e., make rights claims, in a way that ignores the structure of God’s Creation, i.e., inherently integrated human social life, or in a way that takes no account of the creator.

This very theological claim would make little sense to even the most pious liberal because of their close association of rights with the state. Even German legal conservatives like Savigny would reject the applicability of such a construct because of the independence of the law (especially from religion) according to their lights. While the position that Ketteler took may be compatible with Aquinas, as Brian Tierney has argued, this specific sense and use of ‘right’ is lacking in the *Summa Theologica*.⁶⁵⁷ Given the dramatic difference between the existing understanding of rights and Ketteler’s, two questions arise regarding his argument and terminology here. Why, if he followed Aquinas so closely, did he interject a rights discourse foreign to the language of Aquinas?

⁶⁵⁶ Taylor, *Modern Social Imaginaries*, 18.

⁶⁵⁷ Tierney, *The Idea of Natural Rights*.

And secondly, does such terminology carry liberal associations or suggest the influence of liberal thought?

The answer is twofold and not especially daring. First, he used this terminology and legal framework because, in addition to his own legal training, he was influenced by Baader and the recent tradition of Catholic Social Thought, which was influenced by Baader.⁶⁵⁸ The proof for this is not beyond question, but it seems to be the most likely account given the previously demonstrated theoretical correlation between Ketteler and Baader as well as the historical overlap of Baader's influence in Munich and Ketteler's time there.⁶⁵⁹ Baader had made similar arguments regarding property, he did it with rights terminology, and he did it without compromising his Catholic anthropology or sociology.

The Christian cannot say: this property, this right, this office is mine, and I can do what I want with what I mine; the reason is that those things are, in fact, gifts of God and tasks too (*Gottes Gaben und Aufgaben*), so that he can do with those things only what God wills. Thus, for every truly Christian folk, all possession is administrative possession (*Amtsbesitz*) and all enjoyment is delegated (*Amtsgenuss*). (6,95)⁶⁶⁰

The second part of the answer, however, is much more important. Ketteler used such rights language non-controversially because that was simply the standard political discourse of his day, a basic linguistic framework shared by people on all sides of the question. Following the experience of the *Paulskirche* and the forming of the *Grundrechte* for the constitution there, the milieu was one that was open to such

⁶⁵⁸ Iserloh lists Joh. Bapt. Heinrich as the one who may have prepared the Thomist texts for Ketteler. Heinrich was the dean of the Mainz Cathedral who published a posthumous collection of Ketteler's retreat notes. (*SWB I*, 4:26)

⁶⁵⁹ The newspapers *Der Katholik* and *Historisch-politisch Blätter* were influenced by Baader and published his articles.

⁶⁶⁰ Baader quotation from Betanzos, *Baader's Philosophy of Love*, 104.

language. This language had also been used in the canon and civil law that Ketteler had studied, including the anti-liberal Romantic jurisprudence of Savigny with its notion of ‘juristic personality.’ The implication is, of course, that one could use such rights language, as anti-liberal politicians like Ketteler so blatantly did, without raising the hackles of anti-liberal Catholic censors. That is essentially my argument. Ketteler used such language confidently and without qualifiers, and thus was not worried about thereby being considered liberal or rationalist, or overly influenced by the Enlightenment. He used rights drawn from his Christian-organic social agenda and critiqued the rights, such as the too-strong property rights, which he judged to be illegitimate and destructive of society.

7.3.5. Ketteler Ascribes Property ‘Rights’ To Aquinas In An Analysis Of The Virtue Justice Because Ketteler Identifies Rights With Political ‘Prudence’

Ketteler’s projection of modern rights language into Aquinas can be explained, in part, by Ketteler’s identification of ‘rights’ with political practical reason. His use of St. Thomas Aquinas was idiosyncratic, but his careful study of the *Summa Theologica* in the original came at a time when interpretations of Aquinas were in some flux. Ketteler’s method, therefore, did not begin from a conventional or standard Catholic social theory, but was cobbled together from the mixture of jurisprudence, philosophy, and theology to which he had been exposed. He had learned and interiorized the Romantic penchant for historical research and for exploring semantic and philosophical foundations. Further, he was probably aided in his reading of Aquinas by the Mainz cathedral canon, Heinrich, whose legal and Romantic credentials reinforced Ketteler’s own. Heinrich was an

Aquinas scholar and later a professor in Mainz who trained in the law (doctorate, 1837 and habilitation, 1840) before studying theology in Freiburg and Tübingen as preparation for his priestly ordination.⁶⁶¹

Ketteler's interest in Aquinas dates to well before the sermons. He had obtained a personal copy of the *Summa Theologica* while he was still a seminarian, and continued to make references to individual passages from the book throughout his life.⁶⁶² Thus, while relying upon a general trend to read Aquinas in the original without the many centuries of sediment in the form of accumulated gloss, his reading of the thirteenth-century documents seems to have been relatively unmediated and creative.⁶⁶³ Since the *Summa Theologica* plays so central a role in the structure of Ketteler's argument, it is necessary to outline Aquinas' basic argument in question 66 as well as his broader framework of political philosophy in order to set off the peculiarities Ketteler brought to the interpretation and application of that argument.

Question 66 of the *Summa Theologica*, "Second Part of the Second Part," falls in the section on prudence and justice and deals with specific issues of private property. Entitled "Of Theft and Robbery," it is the practical application of the political principles that Aquinas laid out in the previous questions regarding law. Questions 47 to 56 address the

⁶⁶¹ *SWB II*, 1:446n10. Iserloh's biographical information in the footnote of Heinrich's letter (#211) to Ketteler, 1850.

⁶⁶² *SWB II*, 1:194. Ketteler mentions this acquisition in a letter to his sister Paula von Ketteler, from Munich, April 17, 1842.

⁶⁶³ Kaplan notes that Kuhn in Tübingen was occupied with Aquinas' *Summa Theologica* itself. Though his thought developed over the course of the 1860s, especially as it was necessary for him to defend his interpretation of Aquinas from neoscholastic challenges. Kaplan deals with Kuhn's use of Aquinas in a section on "Nature and Grace," Kaplan, "Answering the Enlightenment", 260.

principle and practice of prudence, i.e., practical reason in the political state. Questions 57 and 58 deal with the principle of ‘right’ (*jus*) and the virtue justice. *Jus* bears a similar ambiguity in the English translation as the German word *Recht*, in that it can be translated as either ‘law’ or ‘right’ depending upon its context. After Aquinas had outlined these political concepts in principle, he used the subsequent questions to draw out and further elaborate the principles in practical applications. Question 66 regarding property, therefore, is the elaboration of the virtue justice using prudence.

Aquinas was not a legislator. He did not create a system of laws, like a constitution, but rather outlined the common principles of law to be applied prudentially by rulers with a view to the common good: “The common principles of natural law cannot be applied to all men in the same way on account of the great variety of human affairs, and from this arises the diversity of positive laws among various people.”⁶⁶⁴ Also, as “whatever is for an end should be proportionate to that end, [and] the end of law is the common good,”⁶⁶⁵ so all laws should be practically capable of taking into account the variety of notions of the common good and adjudicating at least some workable system of just governance according to the diverse community.

Aquinas’ insistence on the common good seems at times to neglect or even endanger individual rights as understood in a modern sense. For him, law (*jus*) was

nothing else than a dictate of reason in the ruler, by whom his subjects are governed... it is evident that the proper effect of law is to lead its subjects to their proper virtue; ... For if the intention of the lawgiver is fixed on true good,

⁶⁶⁴ Aquinas, *Summa Theologica*. I-II “Treatise on Law,” Question 95: “Of Human Law,” art 2: “its origin,” ad. 4.

⁶⁶⁵ *Ibid.* I-II “Treatise on Law,” Question 96: “Of the Power of Human Law,” art. 1: “Whether human law should be framed for the community.”

which is the common good regulated according to Divine justice, it follows that the effect of the law is to make men good absolutely.⁶⁶⁶

This tension is addressed in questions such as whether, like Abraham with his son Isaac, an innocent person may be killed in order to further the common good. Aquinas acknowledges the exception of the scriptural account, but holds firm that individual lives or privileges may not be sacrificed for a greater good. Injustice, even in small matters, may not be a mode of attaining justice. Such moral calculus is contrary to the natural law. “The life of righteous men preserves and forwards the common good, since they are the chief part of the community. Therefore it is in no way lawful to slay the innocent.”⁶⁶⁷ The advantage of such a system is that it relies on general principles of justice balanced by the prudential application of right reason. Because the system is rooted so firmly upon reason as the most central characteristic of human nature, moreover, Ketteler was able to apply the *Summa Theologica* to his own diverse world and still claim to be well within the tradition of the natural law.

The *Summa Theologica*'s questions 66.1 and 66.2 on property are really the practical application of the principles established in questions 47 to 56 regarding prudence, or practical reason. The quality of prudence in a person is described with an analogy to sight.⁶⁶⁸ One who has prudence is like one who sees many things from a great distance, and so is able to anticipate the many consequences of all possible paths. But further,

⁶⁶⁶ Ibid. I-II “Treatise on Law,” Question 92: “Of the Effects of Law,” art. 1: “Whether an effect of law is to make men good?”

⁶⁶⁷ Ibid. II-II “Treatise on Prudence and Justice,” Question 64, “Of Murder,” art. 6, “Whether it is lawful to kill the innocent?”

⁶⁶⁸ Although prudence does not pre-exist in us. James F. Keenan, *Goodness and Rightness in St. Thomas Aquinas* (Georgetown: Georgetown University Press, 1992), 102-105.

prudence includes “more than a merely rational habit,... it includes application to action”⁶⁶⁹ and intends “the common end of all human life”.⁶⁷⁰ Moreover, as all the moral virtues (i.e., temperance, fortitude) are virtues according to a person’s natural reason, “since natural reason dictates to each one that he should act according to reason,”⁶⁷¹ so too does prudence apply that reason practically to obtain the proper mean for the virtues. So prudence is “right reason applied to action”⁶⁷² and is a crucial element of Aquinas’ theory of law, as law is the practical reason of the sovereign applied to the proper ordering of the state according to justice, and thus according to the common good. The methodology outlined here is one that leads to just laws in the state, i.e. *jus* as positive law. Ketteler’s *Sermons* are distinctive because while he explicitly applies this methodology, his use of prudence leads him to conclusions of *jus*, or *Recht*, stated in a modern subjective right fashion, as if that subjective understanding were present in Aquinas, which it is not. In Ketteler’s favor is that Aquinas’ system, with its reliance upon prudence, is open-ended and consistent with Ketteler’s exercise of practical reason in the nineteenth century. The notion of subjective rights not found in Aquinas is, moreover, quite at home in Savigny’s system.

⁶⁶⁹ Aquinas, *Summa Theologica*. II-II “Treatise on Prudence and Justice,” Question 47, “Of Prudence Considered in Itself,” art 1, “Whether prudence is in the will or in the reason?” ad. 3.

⁶⁷⁰ Ibid. II-II Q. 47, art 2, “If in the reason, whether [prudence] is only in the practical, or also in the speculative reason?”

⁶⁷¹ Ibid. II-II Q. 47, art 7, “Whether [prudence] fixes the mean in the moral virtues?”

⁶⁷² Ibid. II-II Q. 47, art 8, “Whether [prudence’s] proper act is command?”

7.3.6. *Jus or Recht Is The Sovereign’s Prudence Applied To The Proper Ordering Of The State According To Justice, And Thus According To The Common Good*

The *Summa Theologica* outlines the role of prudence in a political state and in doing so differentiates prudence in the state from that of the person. Aquinas asks, “Is a Species of Prudence Regnative?”⁶⁷³ The answer is that though prudence, as practical reason, exists in the ruler as it exists in the person, the different ends of the person, the family, and the state indicate different ‘species’ of prudence for each.⁶⁷⁴ Aquinas’ political philosophy includes the anthropology developed earlier in the *Summa Theologica* and extends it to the interpersonal sphere: The human person is a social creature existing within an interrelated and interdependent community. The good of the person is dependent upon the good of the community as the good of the community is dependent upon the good of the person. “Since it belongs to prudence rightly to counsel, judge, and command concerning the means of obtaining a due end, it is evident that prudence regards not only the private good of the individual, but also the common good of the multitude.”⁶⁷⁵

As the community is more perfect by being more universal, it includes more matters and “attains a higher end. Hence prudence in its special and most perfect sense, belongs to a king who is charged with the government of a city or kingdom for which reason a species of prudence is reckoned to be regnative.”⁶⁷⁶ Prudence is required for action in

⁶⁷³ Ibid. II-II Q. 50, art 1

⁶⁷⁴ Here we see the kernel for a principle of subsidiarity.

⁶⁷⁵ Aquinas, *Summa Theologica*. II-II Q. 47, art 10, “Whether prudence extends to the governing of many?”

⁶⁷⁶ Ibid. II-II Q. 50, art 1, ad. 1.

terms of one's purview; as the ruler's action affects all in the state, the ruler's purview ought to be proportional to the task. While Aquinas names a king as the one who governs, what gives legitimacy to the ruler is not the station or title, but the adequacy of the ruler's purview or prudence to the needs of the region to be governed. The ruling virtue is, using Aristotle's terminology in question 51.1, '*Euboulia*,' or deliberating well regarding intelligence and political justice.

The ruling science, political science, is limited by the complex nature of the subject matter, but despite that, Aquinas, following Aristotle's *Ethics*, placed it above all other sciences because its ends are more choiceworthy and because, in a sense, all other sciences could be subordinated to it in reference to their ends. The *Summa Theologica*, therefore, supplied Ketteler with the conceptual tools to understand and deal with a political structure in flux with the introduction of representative forms of governance. Aquinas' system of natural law offered goals, methods, and standards within a cohesive structure that was open to development. The goals were included in the concept of the common good. The methods were outlined in the principle of prudence and the fostering of the political virtues, especially justice. In addition, the standards were identified as goods necessary for political flourishing and outlined as 'laws' or in terms of justice. These included the most fundamental standard, the integrity of the human person.

Regarding the conception of justice, Aquinas relied heavily upon Aristotle's *Nicomachean Ethics* and *Politics*. There, Aristotle addressed the problem posed by a great diversity of political forms and conceptions of justice. Because of the diversity, one

may posit that all is changeable, that justice is merely the legal.⁶⁷⁷ But that is refuted by separating the acts of justice from justice itself. Acts of justice are just to the degree that they reflect a mean between the extremes; the unjust acts disdain the mean. This is not tied to any one political system because the mean must be adapted to the situation. What is required by the ruler or rulers is to discern the universal, i.e., justice, in the particular situation. This is outlined in the principle of *euboulia*, or deliberation, which is exercised by the ruler/s when using reason to promote “living well in general.”⁶⁷⁸ Political prudence, in the form of deliberation, involves “grasping the truth, involving reason, and [being] concerned with action about human goods.”⁶⁷⁹ The method outlined by Aristotle is appropriated by Aquinas down to the very structure of his own inquiry as demonstrated in his writing, i.e., including all the relevant questions to his own theory and thus subjecting his own arguments to the most rigorous objections. In the *Summa Theologica*, Ketteler had the resources of a dynamic system that relied on a careful scientific epistemology and on a confidence of reason to appropriately apply the principles of science, in this case of the practical political science, to the particular political situation. “Hence it is evident that *euboulia* (deliberating well) is a human virtue.”⁶⁸⁰

⁶⁷⁷ Aristotle, *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis, IN: Hackett Publishing Co., 1985), 133. Book V Chapter 7.

⁶⁷⁸ *Ibid.*, 153. Book VI Chapter 5.

⁶⁷⁹ *Ibid.*, 155. Book VI Chapter 5.

⁶⁸⁰ Aquinas, *Summa Theologica*. II-II, Q. 50, art 1.

7.3.7. **Social *Phronesis*: Rights, As The ‘Golden Mean,’ Are Judgments Of Practical Reason That Lead To Social Flourishing**

Ketteler used rights language with confidence and without qualifiers, and his political arguments were focused upon contending foundations and claims, not upon the possibility of a rights discourse *per se*. Regarding contending rights claims, the *Sermons* focused upon the problematic theories about the nature of property. They were the extremes of the mean mentioned earlier, namely the absolute right to property on the one side and the abolition of property on the other. Ketteler’s understanding of the ‘Golden Mean,’ in terms of *usufructus*, the right to use, is dependent upon faith in God: “this doctrine regarding the right of private property is only possible in that place where a vital belief in God can be found—because it is rooted and founded in God, in his will, in his order.”⁶⁸¹ The lack of faith in a personal transcendent God, the foundation of Ketteler’s social theory, has repercussions in society because people no longer understand their relations with other members in society in the context of a divine order with a transcendent purpose. With a lack of religious belief, ‘secular’ principles fill the vacuum of divine meaning. Moral values, formerly understood as God-given and incorporated into social customs and legal codes without difficulty, come under scrutiny and must be either defended by reason shorn of divine reference or consigned to a newly emerging category of voluntary human interaction, the private sphere. On the subject of material goods, therefore, this loss of faith thus leads to the imbalance of the social order as some

⁶⁸¹ *SWB I*, 1:27.

few begin to accumulate disproportionate amounts of property without a view to its creator or purpose.

The natural order or natural law is violated in such cases when the purpose of natural things is perverted. In terms of social theory, again following Baader's nuanced understanding of natural law, the intention of God's creative love is perverted by the boundless accumulation of property without the obligations which were formerly associated with the 'title' to estates and other property. This disconnected understanding of property that is further abstracted in developing capitalistic economies was a development of the modern period and, as Marx and others have argued, it had far-reaching effects into the structure of society. Ketteler argued from natural law that the new concept of property was the result of 'secularization' and that the deleterious effects upon the poor were significant. This understanding of natural law is dynamic and teleological—based ultimately upon the love of God. This understanding is opposed to the 'watch-maker' God of the Enlightenment natural law or the reified categories of classicist natural law, which emerged in late nineteenth-century Catholic scholasticism. The ultimate engine of social order in his system is the love of God. Baader held that "laws which govern anything flow from the inner constitution of that thing, including immediate reference to the ground of its being, God himself. Thus, law rests on ontology; right order is a function of proper relationship between center and periphery."⁶⁸²

The hierarchically ordered society is itself justified and compatible with the proper use of the right to private property if Creation is being used to serve its proper end. "In

⁶⁸² Betanzos, *Baader's Philosophy of Love*, 104..

the social organism, it is love that associates unequals with equals in humility and nobility. Inequality of place and function in society also justifies the need for authority.”⁶⁸³ This could on the one hand be seen as an apology for inequality and the persistence of injustice because it allows for the persistence of inequality between people, the creatures of God. Inequality is a threat to justice, which is itself defined by equality. Baader the doctor, however, relied upon the Pauline *imago Dei* (image of God) as the organic body to understand people’s place in society. For Baader there is a great variety of human vocations. This hierarchical model was not static, however, and it was not content with the persistence of injustice. Rather it had to be kept closely together with the anthropological understanding of the human person as *imago Dei* imbued with the task to “complete and transfigure... nature and, thereby, bring... blessing on it.”⁶⁸⁴ This anthropology is not consistent with indifference to social injustice or human misery. Ketteler himself was a vehement critic of the liberal identity of justice with radical equality if that equality was simply an abstraction. It does little good to have equality if all are equally deprived. Likewise, the equal sharing in the right to private property does little good to the person who is already poor and unable to exercise his right. The liberals could, Ketteler concluded, hide behind the slogans of equality the claims of property rights while remaining essentially indifferent to the misery of their neighbors. Equality, as a right according to the liberals, is not in itself a measure of happiness or well-being, and as defined by the liberals does not necessarily contribute to a good social system, i.e. one that sustains the relationships of care in its citizens.

⁶⁸³ Ibid., 102..

⁶⁸⁴ Ibid., 145..

The problem with the liberals' understanding of 'equality' was that in abstracting it from a teleology, they could at the same time make claims of justice without having to address the great disparities of wealth and conditions of the poor. Ketteler's understanding of equality, following Aquinas, placed it in the framework of the divinely established order. The *Summa Theologica* states that "the 'right' or 'just' is a work that is adjusted to another person according to some kind of equality."⁶⁸⁵ For liberals this might have been an equality of opportunity. For communists it is a radical equality of material means by holding all things in common. Aquinas recognized (in 57.1), however, that because human beings are changeable and subject to capriciousness, the equality of justice was not a simple mathematical equality of goods. It would not be just, for example, to restore to an 'evil man' something that he will use to create havoc for the community. Further, in the complexity of the social sphere, it might be judged best for all if some had access to more material goods as property. Conversely, however, if there is a great disparity between rich and poor and there is no discernable advantage for the commonweal, the prudent judge would recognize the situation as unjust. The systems of the liberals and communists are confined to simple human dimensions and thus lack the 'perspective' necessary for political prudence. In terms of prudence, therefore, the belief in God provides the ruler with the full perspective of human existence. As quoted above, the 'doctrine' of private property depends upon faith in God because the social order

⁶⁸⁵ Aquinas, *Summa Theologica*. II-II "Treatise on Prudence and Justice," Question 57, "Of Right," art. 2, "Of its parts, Whether right is fittingly divided into natural right and positive right?"

reflects God's will.⁶⁸⁶ This means that rights are measured not in relative terms, but in terms of objective truths. This understanding of rights, however, requires that a person exercise practical reason to judge what will effectively come near to the order. The recognition of disorder in society, such as the great disparity between rich and poor, indicates a lack of love and a misuse of God's endowment.

7.3.8. Faith Essentially Informs Ketteler's Social Imagination

Ketteler's understanding of the social order, his 'social imaginary,' was informed by a theology and philosophy that rejected the privatization of religious beliefs and practices. Ketteler treated the distinction between the natural and supernatural laws or 'orders' (*die natürliche und übernatürliche göttliche Ordnung*) explicitly only in the second sermon, but his organic metaphysical system actually hinges upon the adequate philosophical explanation of the relationship of the two 'orders' classically differentiated by their ends by Aquinas. Ketteler's solution followed that of Möhler's *Symbolik*, and fit the scholastic pattern insofar as its explication of grace included the 'divinizing' of the person by actualizing the person's natural potentialities in accordance with divine or God-centered ends. There is in no way an explicit break with the tradition of Catholic theology—quite the opposite. Möhler made constant reference to the councils, the patristic sources, and especially to Aquinas. But the *Sermons*, like *Symbolik*, have a rhetoric and focus that are decidedly un-scholastic. The following quotations regarding Möhler's account of the doctrine of justification demonstrate this point.

⁶⁸⁶ *SWB I*, 1:27. "The right of private property is only possible in that place where a vital belief in God can be found—because it is rooted and founded in God, in his will, in his order."

The Council of Trent describes justification to be an exaltation from the state of sinfulness to that of grace, and of adoption of the children of God; that is to say, an annihilation of the union of the will with the sinful Adam (a removal of original sin, and of every other sin committed before justification), and the contraction of fellowship with Christ, the Holy and the Just One, a state which is, in a negative sense, that of remission of sin, and in a positive sense, that of sanctification.⁶⁸⁷

This is a classic scholastic articulation, and Möhler embraced it. But it does not end there. His goal was to present a scientifically rigorous explication of the different Christian confessions and thereby reveal the integrity of Catholic doctrine over and against Protestantism, especially in light of modern philosophical developments. It is a post-Kantian account of human subjectivity and a post-Hegelian dialectical historical analysis of faith—and it used a post-scholastic Catholic Romantic philosophy capable of addressing the critiques of Kant and Hegel to do this. The following quotation from *Symbolik* continues from the earlier one and demonstrates the way that Möhler's Romanticism transcends the scholasticism of Trent without negating its claims. It deals with grace in terms of intentionality, as the sanctification of the 'natural' person in loving relationship with God.

The Council [Trent] ... represents justification as a renewal of the inward man, by means whereof we become really just, as inherent in the believer, and as a restoration of the primeval state of humanity... by the act of justification, Faith, Hope, and Charity, are infused into the heart of man; and that it is only in this way he is truly united with Christ, and becometh a living member of His body. In other words justification is considered to be sanctification and forgiveness of sins, as the latter is involved in the former, and the former in the latter: it is considered an infusion of the love of God into our hearts, through the Holy Spirit; and the interior state of the justified man is regarded as holy feeling,—as a sanctified inclination of the will,—as habitual pleasure and joy

⁶⁸⁷ Johann Adam Möhler, *Symbolik: Oder Darstellung Der Dogmatischen Gegensätze Der Katholiken Und Protestanten Nach Ihren Öffentlichen Bekenntnisschriften*, Zweite verbesserte und vermehrte Auflage. ed. (Mainz: F. Kupferberg, 1833), 100 (1843ed).

in the Divine law,—as a decided and active disposition to fulfill the same in all the occurrences of life,—in short, as a way of feeling, which is in itself acceptable and well-pleasing to God.⁶⁸⁸

This is precisely the drive of Ketteler's own Romantic theological position. It is the articulation of faith in the church through history. It threads the division between the claims of scholasticism to objectivity and the idealist focus on subjectivity in an ecclesiology that focused upon the community's organic development over time.⁶⁸⁹ It adopts the core doctrines of the tradition but transposes them in concepts and terms capable of addressing contemporary philosophical concerns and developments without being subordinate to them. Ketteler did this most creatively in terms of incorporating the legal and political ideas of the Romantics like Savigny and later Bauer. Ketteler's account of the supernatural is Romantic in that does not take for granted that nature is a lifeless material thing, but imbues it with a potential to reveal the divine. The supernatural does not change nature; it completes it. Faith, therefore, is a way of knowing that gives insight into true being. For Ketteler, it could no more be separated from the practical life of politics than the diagnostic tools of medicine could be placed off limits for a medical doctor.

Thus, with respect to the practical implications for social policy, there is little differentiation between the natural end, i.e., the good life, and the supernatural end of the person, eternal life with God. His argument does not switch gears when talking about the consequences of social disorder or the dangers of eternal punishment, which he also

⁶⁸⁸ Ibid., 100-101 (1843ed).

⁶⁸⁹ O'Meara, *Romantic Idealism and Roman Catholicism*, 4. This is a general thesis in O'Meara's book, articulated most succinctly on page 4.

invokes from time to time. From a perspective of mistrust of religion in the public sphere, the sermons seem to collapse the orders of nature and super-nature within the structure of the organic social theory as outlined in the chart above. They thereby seem to endanger the pure realm of political reason appropriate to the public sphere. This suspicion is not without its merits, but it needs to be balanced by Ketteler's legal frame of mind, which venerated the protections of the law within society's systems of social order.

His argument for the necessity of faith for social order did not go into doctrinal detail; belief in a personal transcendent God sums up the criteria for the faith necessary for social order. The negation of that faith has detrimental social consequences because it undermines the principle that God, the creator, is the absolute owner of all things.

Ketteler leaves the question of content open-ended enough that, for example, there is nothing that would inherently exclude a Protestant from the envisioned good society.⁶⁹⁰

The lack of this belief in a personal transcendent God, however, leads to the deification of humanity. Without a view of the creator, the creatures have no understanding of their *telos*, and do not understand that their rights are qualified and restricted by their ends.

Without regard for its true end, therefore, property is used to satisfy human desires that are voracious and uncontrollable. Here the critique was focused upon the internal and affective disorder of absolute property rights. Liberalism gets it wrong on the personal level because its approach leads to disordered and vicious citizens. Its moral and legal principles require and presuppose already virtuous citizens, but its policies are either indifferent to, or even destructive of, the actual virtue of citizens.

⁶⁹⁰ It is an argument Maritain will make one hundred years later regarding the basic requirements of politics according to the natural law.

The exclusion of the religious revelation of the true human purpose provided by faith, argued Ketteler, insures a disrupted political teleology demonstrated by the denial of limits to property rights. In practical terms, the destructiveness of liberalism's absolute property rights is demonstrated in the empirical fact of shortages such as famines and poverty. Society is impacted by the denial of social goods that property rights were meant to create. This principle is known as 'stewardship' today.

The right to private property (*Eigentumsrecht*) is, as we have seen, simply a right provided to humanity by God (*von Gott eingeräumtes Recht*), so that the goods of the earth might be used according to the divine order. It entails this intention, that from the goods of the earth, all humanity would receive their basic necessities for living (*nothwendigen Leibesbedürfniss*).⁶⁹¹

The principle of property rights, like all practical questions of the natural law, was judged by its fruits. If it were more effective to hold and administer property in common, judged according to the well-being of society, communism would have an argument for legitimacy. Conversely, the lack of general social well-being tarnishes the liberal policies of state.

With a nod to communism, Ketteler even found some truth in the claim that all property is theft, if property is understood as a private good independent from the well-being of the community. The empirical demonstration of great inequality among people and the simultaneous waste generated by that inequality in the face of great material deprivations themselves testify to the unnatural conditions created by liberalism's absolute property rights. The parallel indifference of the wealthy to people in great need is a further sign of social decay. Here an awareness of the social situation is important.

⁶⁹¹ *SWB I*, 1:28.

The famine in Ireland in 1846 to 1848 was not an isolated situation. The potato blight had also hit the continent and was only one of many natural catastrophes that were compounded by human greed and government incompetence. People knew the misery of material want and Ketteler did not ignore that reality.

7.3.9. Ketteler's Critique Of Communism Reveals A Theory Of Rights Dependent Upon Prudence

It is not the Catholic Church, but instead the lack of faith and Godlessness that have brought this about—just as it is responsible for, among the poor, destroying the desire to work, and among the rich, destroying the spirit of love for the poor.⁶⁹²

The *Communist Manifesto*, written in 1847, was a contemporaneous response to the social upheaval during this early industrial period in Germany. Without mentioning Karl Marx or any other communist organizer by name, Ketteler's rejection of communism required him to address and differentiate the arguments and solutions of the Catholic Church from both liberalism and communism. Marx was not the only communist active and publishing in Germany in 1848 and he may not have even been the most well known, but he is representative of the position against which Ketteler argued.

Marx was also concerned with the breakdown of social relations caused by the development of absolute property rights that he associated with the bourgeoisie. And though his response is the polar opposite of Ketteler's, Marx provides us with an important insight into the mid-nineteenth-century critique of absolute property rights and, like Ketteler, he located the crux of the issue in the structure of social meaning as

⁶⁹² *SWB I*, 1:28.

opposed to social policy.⁶⁹³ He developed the idea of property as theft, following Proudhon, and examined the transition in Europe from a feudal economy based upon the feudal estate and dominated by aristocrats and guilds, to the bourgeois economy based upon capital and dominated by a centralized government. Practically speaking, Marx had no desire to keep the trappings of the middle ages, and he lauded the revolutionary violence of the French Revolution, which abolished all feudal and religious claims. Marx argued, however, that the abolition of feudal rights in Germany was simply a cover for the bourgeois propertied class to rob the peasants of important aspects of their livelihood under the self-serving banners of liberal catchphrases such as ‘equality.’ Under feudalism, peasants had, for example, a right to the branches and fruit that had fallen to the ground in the forest, and they had a right to use the commons for grazing a certain number of animals. They were protected from eviction from the land, and the strength of the guilds protected the labor regulations such as standard workweeks and holidays.

Marx viewed the upheaval as a necessary stage, and while Ketteler retained nostalgia for the organic nature of feudalism, he was pragmatic in addressing the reality of the social developments. In any case, it would be impossible to reverse the liberal reforms that began with the enclosure laws and culminated with the work of Stein and Hardenburg. They accomplished the legal transition of the estate to private property with the right to alienate the property. The lord had become the ‘owner’ of the entire estate and could do with it as he desired, including selling the entire estate for capital—not previously a legal possibility. In this arrangement, peasants became at best renters but

⁶⁹³ Karl Marx, “The Bill Proposing The Abolition of Feudal Obligations,” *Neue Rheinische Zeitung* No. 60, Cologne, July 29, 1848.

also possibly homeless and jobless in tough times with surplus labor. Their relationship to the lord was no longer one of mutual rights and responsibilities (even when those rights were already one-sided), but was reduced to terms of capital. They became alienated (a term first used by Baader).⁶⁹⁴ The practical effect was that once feudal rights were dissolved, the peasants lost important sources of firewood, food, and additional income. This was devastating to the peasants, whose interests were suppressed as many were forced into the cities to work in the factories. The idealization of property, according to Marx, identified the interests of the propertied class with that of the state. So aligned, the state generated laws and rights that protected the propertied class to the detriment of the poor.

Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class.

The selfish misconception that induces you to transform into eternal laws of nature and of reason the social forms stringing from your present mode of production and form of property—historical—relations that rise and disappear in the progress of production—this misconception you share with every ruling class that has preceded you. What you see clearly in the case of ancient property, what you admit in the case of feudal property, you are of course forbidden to admit in the case of your own bourgeois form of property.⁶⁹⁵

This is the attack that Ketteler addressed in the first sermon. In countering communism and locating private property at the center of his argument, however, he needed to demonstrate that his system was not merely another cover for the material

⁶⁹⁴ O'Meara, *Romantic Idealism and Roman Catholicism*, 117.

⁶⁹⁵ Karl Marx and Fredrick Engels, *Manifesto of the Communist Party*, ed. Fredrick Engels, trans. Samuel Moore, English ed. (1888). Quote from section: "Proletarians and Communists."

interests of the rich. In addition to the intellectual critics such as Marx, there were already Catholic sources such as *Der Katholik* and the *Historisch-Politische Blätter* that vehemently criticized the growing power of the state under the influence of liberalism as well as the deleterious effects of liberal economic policies upon the poor. They, like Marx, carefully observed the conditions of workers in England and France and predicted similar developments in Germany with liberal economic policies.⁶⁹⁶ They too were aware of the powerful liberal interests in the *Paulskirche* and used the material deprivation of the poor as a key guide to the danger of the liberal social policies. Ketteler read these papers and must have been influenced by them, but his response to liberalism and his rejection of communism in the first sermon are not simply attributable to any single source.

Ketteler had two arguments against communism, one from a teleological perspective and one from an empirical perspective, and both relying upon Aquinas. In terms of teleology, communism was destructive of social order because, like liberalism in practice, it allowed only narrowly secular concerns to dictate its policy, thus blinding social policy in terms of its final end. And from an empirical perspective, using practical reason, property held in common without specific ownership has not proven to be effective. It therefore lacks sustainability and thus is contrary to its natural end, i.e., the abolition of private property would lead to damaging social consequences. Ketteler, however, offered no sociological data, but relied on simple common sense and personal experience in refuting the communist plan as structurally inefficient and thus contrary to proper order.

⁶⁹⁶ Hogan, "Ketteler's Interpretation of the Social Problem", 14..

When property is held in common, he argued, the person's lack of identity with a 'thing' as 'specifically belonging' leads to a corresponding deficit of responsibility. "Because every person takes better care of personal possessions, than what is held in common with others."⁶⁹⁷ This argument for property as a private right is a lesson that may have been learned in the experience of growing up in a big family, or of having supervised people in organizations. But he does bring Aquinas to bear here as well: "As St. Thomas says, the recognition of the individual right to private property is essential for the social order—for the earth's goods to be fully cultivated, to be appropriately preserved. If everyone had to care for everything, that would create a situation of general chaos."⁶⁹⁸ Chaos (*Verwirrung*) is the ever-present danger for those responsible for social order. That order required a conscientious and uninterrupted care for its material resources. The social organism can be pruned, watered, braced, and every other organic analogy for cultivation, but it cannot be taken apart and reassembled, because society is not a machine. "If this order is disrupted, it would endanger the well-being of humanity."⁶⁹⁹

In the *Communist Manifesto* Marx anticipated and rejected the criticism that communism's abolition of private property would lead to laziness. "It has been objected that upon the abolition of private property, all work will cease, and universal laziness will overtake us..."⁷⁰⁰ But he dismissed the criticism as a lacking force because it assumed within its criticism that the situation of wage labor was a necessary one. Whether or not

⁶⁹⁷ *SWB I*, 1:29.

⁶⁹⁸ *SWB I*, 1:29. "St. Thomas wrote, only by the private ownership of property will that order be preserved which is necessary for the efficient exploitation of the goods of this earth. If everyone is in charge of everything, there will be general confusion" (*Ederer*, 14).

⁶⁹⁹ *SWB I*, 1:29.

⁷⁰⁰ Marx and Engels, *Communist Manifesto*. Quote from section: "Proletarians and Communists."

the conditions ever existed for a productive communism to prove Marx's point, or whether Ketteler's criticism was prescient in light of the experience of Eastern Europe and Russia, are questions for another day. Here, what is most interesting regarding Ketteler's argument is his method of understanding and applying the natural law to a specific social question.

Ketteler argued that private property, held as a 'right,' was conducive to and necessary for responsible husbandry of God's resources, whereas holding all things in common leads to disorder and contention. This was a lesson taught by simple experience and thus was open to empirical data. He claimed that this is obvious (*unbestreitbar*) in interpersonal relations such as in a family, but it is also applicable on a macroscopic level. Ketteler was not idealistic in his view of human nature, to say the least. On the one hand, it was self-evident that humans are lazy and will avoid work if they are not held personally accountable. It is human nature to act in such fashion and thus the social order must be structured to account for such human tendencies, i.e., in accordance with the natural law. On the other hand, proper understanding and administration of property lead to greater peace, less violence, less war, and thus better appropriation of resources.

Ketteler also brought 'divine law' to bear in the form of the fifth commandment; communism is contrary to God's law because the redistribution of material resources would constitute stealing. His emphasis, however, was on its contradiction of the natural law, because goods administered in common would fall into ruin. "Communism, the sense that the earth's goods should be forever redistributed, contradicts the laws of

nature. This is so because it destroys the good administration of the earth's good and thereby the achievement of their natural purpose."⁷⁰¹

Thus, the natural law is revealed in three basic phases, beginning with the study of human nature as experienced in all its potential goodness and depravity. This is not determinative in itself.⁷⁰² The second basic phase identifies the 'ends' of human living, i.e. the aspects of a good society where persons may flourish according to their given abilities. The divine *telos* of the human person is considered as integral here. The final phase uses practical reason to specify the laws that are conducive to human ends.

The ontology is constant and thus the natural law is not subject to vacillation. The social context, however, is developing and thus requires the constant application of practical reason for discerning the natural law. Communism, for example, was judged to be contrary to the natural law because Ketteler determined its incompatibility with the natural law by using practical reason. Finally, regarding rights, the laws that are discerned through practical reason to be necessary for the production of true human ends can be defined with rights language. The standing principle here is that rights are always understood in the context of the ends they serve. This obviously differentiates him from the liberal understanding of rights as absolute—especially regarding property. Ketteler criticized such rights as reified when understood to be unconditional and thus independent of their *telos* or end. Specifically, he called them *starre Rechte*: inflexible,

⁷⁰¹ *SWB I*, 1:30.

⁷⁰² G.E. Moore's critique of Natural Law critiqued the deriving of 'oughts' from what 'is.' This would apply if one were to remain in the first phase here.

rigid, forced rights, and as such a false teaching and a continuing sin against nature (*eine fortgesetzte Sünde wider die Natur*).⁷⁰³

Ketteler considered private property a key for underpinning and healing his society, but his social theory and theory of rights were not the direct object of Marx's critique in the *Communist Manifesto*. In fact, the organic social theory itself addressed many of the communist concerns regarding the objectification of human beings in nineteenth-century capitalism. In addition, Ketteler set the church and his social policy as a permanent challenge to the policies of the state. Further, the church's reliance upon Christian principles was a check upon the state's material and secular interests. Though history demonstrates that the church was often not true to its own principles, its structure as separate from the state maintained a level of independence from secular influence. Its deficits were distinct from those Marx attributed to "the parsons" following after their absolutist governments and the 'illusionists' shielding the bourgeois interests of the state behind religious moral values.⁷⁰⁴ Both Marx and Ketteler denounced the liberal system based on its dehumanizing policies: its alienation of the human person from him/herself as well as from society through the reduction of human value to crass material and capital terms. Both criticized the dehumanizing ideology of capitalism that structured human desires as if they could be realized in material terms.

That critique, however, is where the similarity ends between Ketteler and the radical communists. They developed completely different interpretations of historical development and polar opposite responses to the liberal agenda. Both Marx and Ketteler

⁷⁰³ *SWB I*, 1:31.

⁷⁰⁴ Marx and Engels, *Communist Manifesto*. From section: "German or 'True' Socialism."

insisted upon praxis, i.e., not only understanding history, but also changing it. The fundamental difference, however, between the two contemporaries was in their teleologies. For Marx, religion was a diversion from the true human end. For Ketteler, religion was its revelation.

7.3.10. Ketteler's Early Response To Poverty: Protection Of Human Dignity And Christian Charity

The first sermon ends with a reflection upon the harmony of the divine plan and the relation of the human person within it to God. In solid Thomistic fashion, Ketteler argues that the human person finds fulfillment when human potentialities are actualized. The most basic human potency is that of the intellect and will, so persons are dignified when their intellects and wills find fulfillment in their proper ends. The goods of the earth granted to foster all human ends are subverted when they are restricted to a few. Some inequality is proper for the purpose of management and distribution, but gross inequality is a rejection of God's divine will.

Ketteler's earliest answer to this problem was that Christians need to respond to this situation with Christian charity that does not include basic structural change. "Once more, my Christian brothers and sisters, let us use the works of love to win over the world, and to bring them back to the Catholic faith! Amen."⁷⁰⁵ Though he had followed Baader's example of method in much of the sermon, he veered from it in refraining to engage the state as a necessary element of a larger approach to the social question.⁷⁰⁶

⁷⁰⁵ *SWB I*, 1:33.

⁷⁰⁶ Vigener's negative assessment of the *Sermon's* originality and effectiveness points to Baader's much more groundbreaking work in 1835 and the adoption of Baader's insights into the workers'

7.4. First Sermon: The ‘Times’ Reveal That Christian Charity (*Liebe*) Is Needed To Reconcile Destructive Social Indifference

The argument of the *Second Sermon* has essentially three phases. It identifies the pressing social problems as the ‘signs of the times’ and makes a case that they are indications of not only material deprivation, but more fundamentally of moral failings. It then recalls the essential argument from the first sermon—that God the creator is the primary possessor all goods of the earth, and humans have rights only in terms of that fundamental fact. “The person has a right only insofar as it is granted by God (*Der Mensch hat nur in sofern ein Recht, als Gott es ihm einräumt*).”⁷⁰⁷ The right to possession, therefore, is *usufructus*, i.e., the right to use. The third phase makes the case that the only effective means of curing the social problems identified is a change of heart. This third phase demonstrates the necessity of conversion and the ineffectiveness of state-implemented social techniques.

Whoever accepts that God is the Almighty Creator of Heaven and Earth, and whoever agrees further that nature is destined for the support of all mankind, he would have to agree with the teaching which I have put forth here whether he is Christian or just simply a reasonable person. These two teachings are both products of natural revelation, i.e., they are ascertainable by human reason—since only the fool says in his heart, there is no God! [Ps 14,1].⁷⁰⁸

The rhetorical force of the second sermon draws from St. Paul’s letter to the Romans: “So that we will recognize the time, because now the hour is here to wake up from our sleep [Rom 13,11].”⁷⁰⁹ The scriptural passage brings an urgency to the social

problems by the “astoundingly well-read” Buss in 1837. Vignier, *Ketteler: Ein Deutsches Bischofsleben*, 109..

⁷⁰⁷ *SWB I*, 1:35. From the second sermon.

⁷⁰⁸ *SWB I*, 1:35. From the second sermon, translation: *Ederer*, 23.

⁷⁰⁹ *SWB I*, 1:35. From the second sermon.

question that, Ketteler insisted, hinged upon a fundamental choice between believing in God or not, rhetorically rendered as believing in Christ or remaining asleep, i.e., unconsciousness of the dire reality of present social conditions. With images worthy of the Romantic landscape painting of his contemporaries, Ketteler alluded to storm clouds gathering to emphasize the dangers facing society. True to its context in the cathedral during Advent, the sermon was delivered to inspire faith. What is interesting, however, in terms of the theme here is the connection drawn between faith and the social realm, and the further development from the first sermon of the natural law underpinning social flourishing. Referring back to the chart of Ketteler's organic social structure, charity supports social flourishing by directing the intentionality of a people. *Laissez faire* liberalism, in contrast, crumbles this pillar (*Pfeiler*) of society by diffusing people's intentionality, fostering egoistic models of happiness, and thus weakening the social glue. Ketteler explicitly argued that this is a point that can be made in terms of human reason from the natural law—charity is not simply a divine precept. In fact, he argued, it is the consciousness of the social situation itself that will lead to a faith. “We should, first, truly recognize the time in which we are living. This recognition should motivate us, second, to abandon that previous life without Christ and to begin a new life in Christ.”⁷¹⁰ Therefore, in addition to being a proclamation of faith, the second sermon may be properly examined as a ‘sociological’ argument—an argument that Ketteler explicitly claims can be made in terms of the natural law.

⁷¹⁰ *SWB I*, 1:34. From the second sermon.

7.4.1. Signs Of The Times: Identifying The Pressing Social Problems And The Moral Poverty That Causes Them

The discussion of the first sermon has already established Ketteler's manner of approaching questions from a historical perspective and a reliance upon St. Thomas Aquinas' *Summa Theologica*. The second sermon adds an analysis of the contemporary social situation to his larger argumentative strategy. "If we wish to understand our times, then we have to understand the social problems of our times. He who grasps these, understands our era; and he who does not, for him both the present and the future remain an enigma."⁷¹¹ In the structure of the sermon, the 'analysis' of the social situation takes the form of rhetorical questions that draw attention to certain social anomalies.

The analysis differentiates the liberal position of absolute property rights from that of a Thomistic natural law, which regards God as the primary and only absolute holder of 'property rights,' as argued in the first sermon. In a typical move, he presents the hearer with an existential hypothetical question. Either you accept God the creator as the ultimate foundation and bearer of all property rights, or you do not. Without God, the argument continues, the happiness of humans, *qua* material non-transcendent beings, takes the position as the term or purpose of human life. Because liberal ideology effectively removes divine considerations from political discourse, it deprives it of discussion about the full meaning of human life. The only *telos* that may be contemplated is this-worldly happiness: a happiness that is dependent upon material goods. This leads to the following dilemma. Those with material goods, on the one hand, experience no

⁷¹¹ *SWB I*, 1:35. From the second sermon, translation: *Ederer*, 21.

satisfaction of their human desires from material goods. Without an alternative to material goods, however, they ceaselessly crave material possessions in a vain attempt at fulfillment. This leads to great social disparities, social divisions, and thus social animosities. “The two great evils which have rent our social fabric are an insatiable greed and a pleasure cult along with great selfishness. These have virtually annihilated Christian charity.”⁷¹² Those without material wealth, on the other hand, are deprived of the only possible happiness that liberalism offers and are thus doomed to a liberal ‘hell.’ This much greater majority of the population does not even have the opportunity to find out that material wealth cannot truly satisfy its most fundamental desires. Thus deprived of both material goods and the possibility for meaning in their lives, people will not participate in society as laborers and will have no stake in a stable political situation. The conclusion is inevitable social misery and conflict.

Thus, there are two possible lives to be had in a *laissez faire* world: one with wealth and one without. Ketteler’s argumentative strategy here is *ad absurdum*, attempting to prove that both possible lives are deficient and therefore the liberal trends and ideology must necessarily regress into a debased way of life. Ketteler’s rhetorical anomalies build from this fundamental argument. They repeatedly link the problems of the day to the *laissez faire* liberals’ mistaken understanding of rights, which had separated the use of created things from the intended purpose of Creation.

As far as we can discern this present times and social situation, my Christian brothers and sisters—it is essentially a consequence of the unnatural opinions of the right to property (*der widernatürlichen Auffassung des Rechtes des Eigentums*). This is essentially a consequence of the misunderstanding of our

⁷¹² *SWB I*, 1:42. From the second sermon, translation: *Ederer*, 12.

relationship to God, the diminishment of a vital faith in God.⁷¹³

The sermon follows this pattern of rhetorical questioning, drawing the hearers' attention to the many ways that society is unconscious of the contradictions in their lives. Ketteler draws attention to the way that material goods are used, whether it be to travel, to eat, or enjoy certain pastimes or endeavors. Then it confronts the listener with an anomaly. How is it possible to enjoy overflowing wealth when there are people desperate from material want; to gorge when there are those hungry; to travel and live ostentatiously when there are those who are trapped in poverty? The answer is the fact of original sin, Ketteler argues while referencing Pascal.⁷¹⁴ The reasonableness of this central Christian doctrine was supported by the manifest injustice in his society's material inequality. "How is it possible that we can see the wealthy squandering their fortunes in denial of the simplest natural laws and with undisturbed consciences, while, at the same time the poor are dying from hunger and destitute children are left to run wild?"⁷¹⁵

Whether or not even his own hearers were convinced by the logic, what is crucial is that he felt compelled to emphasize the applicability of the Christian doctrine to the social realm and that it was defensible in terms of reason within the structure of the natural law. He recognized that the 'children of this world' (*Kinder der Welt*) would not even contemplate the possibility of his conclusion, making the hermeneutical point that their bias is in fact evidence of their unreason.⁷¹⁶ They are so prejudiced that they are not able to accept the reality of the scientific statistics that demonstrate Ketteler's point, he

⁷¹³ *SWB I*, 1:37.

⁷¹⁴ *SWB I*, 1:38.

⁷¹⁵ *SWB I*, 1:37.

⁷¹⁶ *SWB I*, 1:39.

claimed. Thus the social quagmires demonstrate that the ‘social question’ is not at root a problem of scarcity, nor of social programs, but a moral problem of intentionality, of stubborn blindness to neighbors’ needs—a lack of charity. Because it is a moral problem, it can only be resolved with a moral solution.

In making the claim that he was arguing on level accessible to all reasonable people, he consciously rejected the parameters of autonomous Kantian reason, such that the ultimate evaluation of truth is the degree of logical universality achieved by principles or maxims. Reason here is abstract and detached. The reasonable person is the one capable of precisely applying rationality abstractly, propositionally, and categorically.

Conversely, Ketteler’s understanding of reason was integrated with his anthropology such that human limitations made the ideal of perfect abstract and irreproachable reasoning an idol. Rather, reasoning together with intelligence were faculties of the soul actualized when the mode of actualization was appropriate to the faculty itself. “We arrive at natural truths through the natural faculties of our soul, i.e., intelligence and reason; we reach supernatural truths with the aid of these same faculties applied to what God’s messengers have revealed to us and the grace which Christ has earned for us.”⁷¹⁷

The capacities of human reason and intelligence can grasp the necessity of Christian truths, for example, because their revelation was appropriate to the capacities. Ketteler’s language here is not technical, but it is consistent with the general approach of such influential figures as Sailer, Möhler, and Kühn, and represents a clear-headed reading of

⁷¹⁷ *SWB I*, 1:36. From the second sermon, translation *Ederer*, 23.

Aquinas.⁷¹⁸ Ketteler's reasonable person is prudent in being able to judge the consequences of different paths of property rights theories, for example, rather than in being able to outline a logically airtight syllogism on the topic—or in being able to make all their maxims consistent with the categorical imperative. The reasonable person can weigh the relative merits of narrative scenarios and judge the coherency of arguments based upon experience as well as arguments. Moreover, reasonable persons have no illusion that the entire contents of their understanding rest upon first principles that they themselves have been able to establish independently from the influence of a community and the tradition of scholarship and wisdom of that community. Reason is not itself an abstraction independent from the reasoner, according to the anthropology outlined in the sermons, but is a human capacity that is nurtured in the virtuous person such that its practice contributes to the fulfillment of all human capacities, individual and social, within a community. In terms of faith, moreover, this non-Kantian understanding of reason follows the example of Schelling insofar as it is open to the mysteries of nature itself, which is no lifeless passive thing, but revelatory of its creator in its complexity.

⁷¹⁸ Kaplan provided extremely helpful summaries of these figures' theological approaches in terms of revelation. Kaplan, "Answering the Enlightenment". Especially helpful was Kaplan's discussion on 1) Kant's application of reason to the field of reason (Section: 1.2.6), 2) the appropriation of Aquinas' theory of Grace (Section: 4.5.5 and 3) the related differentiation between the natural and supernatural (Section: 4.5.5). Ketteler makes no mention of Kuhn in the Sermons, but Iserloh's notes that Kuhn's teacher, the bishop of Regensburg Michael Sailer, was the source of much of Ketteler's anthropological insights for the sermons' account of organic human development. Möhler's *Symbolik* (another teacher of Kuhn) made the case for anthropology being the foundation of denominational differences in doctrine. This is an approach which Ketteler takes in his argument against Rousseau's freedom as lack of restraint theory. The point here, which Kaplan demonstrates, is that there was a general anthropological approach in the Tübingen school of theologians that drew from Aquinas and was used to explain the fundamental doctrine of grace. Despite Ketteler's lack of direct attribution, his sermons bear the mark of this approach and theology over against a neoscholastic reading of Aquinas.

The mystical is conscious insight. Schelling replaced the Kantian categories of reason with the intuitive power of the knowing self, which could reach to absolute spirit. The mystical too is a path to the divine disclosed in numinous creation. More than a symbol or an allegory, the materiality of life is the place or atmosphere where the human and the divine meet.⁷¹⁹

Ketteler's understanding of reason leaves it open to realities that it is not able to explain entirely, especially regarding God, without falling into irrationality. Intuition, in the sense outlined by Schelling, is an aspect of human knowing that opens the person to the reality of such notions as infinity, divine, creation, and mystical experience, which lie ultimately beyond full human understanding. It is "only the fool," recalled Ketteler, who would reject the manifest arguments and experience that underpin the existence of God: "because only the fool says in his heart, 'There is no God!' [Ps 14:1]."⁷²⁰

With this background framework, Ketteler had no qualms about arguing that the message of the Gospel is the most reasonable means of underpinning a flourishing society, including providing it with its necessary material resources. The sermon then argued for the significance of the Christian scriptures for social policy. He outlined the basic New Testament lessons regarding the need for conversion, the futility of material wealth, and the nature of true happiness in loving God and through that love in loving one's neighbor. "As capable (*mächtig*) as this doctrine of Christianity is to recognize the evils of society, to that extent is the doctrine of world (*Lehre der Welt*) powerless (*ohnmächtig*). Indeed, Christianity is all the more capable of healing these evils, and the world is all the less capable."⁷²¹ Regarding the poor, the example of Christ is the answer

⁷¹⁹ O'Meara, *Romantic Idealism and Roman Catholicism*, 26..

⁷²⁰ *SWB I*, 1:36.

⁷²¹ *SWB I*, 1:44.

to their social problems. Rather than applying the superficial salves of social programs or leaving the schools to train new generations with the right thinking, only living Christian witnesses of mercy and love will be effective at solving the world's social ills. "Let us look now to the life of Christ. What he taught, he exceeded in the actions of his life."⁷²²

At heart, the second sermon is about charity as the 'pillar' of society that ties people together intentionally. The theological virtue is thus given secular significance on an equal level with the cardinal virtues, such as justice, where rights are more properly discussed. On the one hand, this raises flags for a modern audience concerned with respecting the diversity of people's religious traditions in a pluralist world. On the other hand, and to the point here, it reveals Ketteler's non-liberal philosophical foundations in the midst of his confident use of rights language. He did not differentiate between public/secular and private/religious spheres such that religious arguments were primarily for internal Roman Catholic consumption. His basic arguments in the *Sermons* were consistent with his previous public comments in the *Paulskirche* and in his *Leichenrede*. He recognized the difference between supernatural and natural revelation, but they were not subordinated in terms of their relevance for social theory, nor were they differentiated according to their appropriate audience. Ketteler did not claim, for example, that Christ serves as an example only for Catholics. His use of rights claims is part of the same social theory package and is in no way a public face of a private belief system. The third sermon, falling under the cardinal virtue 'fortitude' and dealing with the philosophical question of freedom, treads on territory more specifically relevant to the reasonable

⁷²² *SWB I*, 1:46.

foundation of rights claims. The sermon's argument, however, is for freedom as yet another 'pillar' of society, i.e., a structural feature that bears the weight of supporting social flourishing together with the other pillars both theological and cardinal.

7.5. Third Sermons: The Strength, or Fortitude, of Christian Freedom In God's Law Over That Of The Rationalist 'Ungläubige'

In the third sermon, Ketteler offered an account of freedom in terms of the natural law in order to bolster the flagging faith of Catholics, which he perceived to be endangered by liberal conceptions of human meaning. At the same time, he offered an account of faith in order to bolster the flagging social order undermined by liberal 'distortions' of human freedom. The struggle (*Kampf*) was for fundamental principles, uppermost of which was the principle of human freedom—the pillar of society that specifically supported its conceptions of law and rights. The question could be narrowed down to this: Was the moral, legal, and therefore social order based upon something real, objective, and internal to a created order as held by a Christian natural law position, or could the social order be conceived in purely subjective terms without reference to a higher order? If the former, then human freedom was to be understood in terms of the structure of a given moral order. If the latter, then human freedom is left to be articulated by persons for themselves.

The unbeliever has, for practical purposes, nothing left but man himself. He does not recognize any subordination of one man to another according to a higher order of things beyond what is merely human. Therefore, he must logically proclaim the sovereignty of each individual. Every law (*Gesetz*) imposed by God or by his fellowman, in fact any rule (*Gesetz*) which is not fashioned by himself, is no law at all but merely compulsion or an unjust

intrusion on his sovereignty.⁷²³

Ketteler held that the liberal ‘distortion’ of the principle of freedom affected society by undermining the objective force of good order and law, including rights. By insisting upon an autonomous realm of political reason and an autonomous realm of personal freedom, they denied the true foundations of society. The social problems of 1848 were palpable and inescapable, but the greatest danger they posed, argued Ketteler, was not the actual physical manifestations of poverty or great disparity of wealth, and not in the alienation of people from each other or other social injustices. The greatest threat posed by the social problems was the opportunity they posed for dangerous theories to fill the vacuum of meaning left by the de-legitimation of the old regime. By interpreting the times in terms of a struggle for meaning, Ketteler understood the reality of poverty, alienation, and injustice as symptoms of society’s fundamental disorientation, i.e. its lack of faith in God. Thus, the danger of the physical human tragedies was compounded when the response was to further alienate social meaning from its true orientation.

The rhetorical force of the third sermon depended upon his identifying, articulating, and differentiating the amorphous social unease subjectively experienced by his congregation and the larger population. Yes, he told them, the times were difficult. Yes, there was injustice. And yes, something must be done. The desire for change, however, was itself another danger if unharnessed and lacking judgment. He then offered a framework for understanding the times in terms of faith, the apparent consequences

⁷²³ *SWB I*, 1:52. From the third sermon, translation *Ederer*, 45. The last sentence is critical: “Jedes Gesetz, das Gott oder ein Anderer dem Menschen gibt, überhaupt jedes Gesetz, das ihm von Außen zukommt, ist für ihn kein Gesetz, sondern nur ein Zwang, ein unberechtigter Befehl.”

already present because of the lack of faith, and the proper response, in faith, to the dangers present in society. Thus, the logic and argumentative structure in the sermons directly parallel Aquinas' treatment of the virtue fortitude in the *Summa Theologica*.⁷²⁴ In the beginning of the *Summa Theologica*'s "Treatise on Fortitude and Temperance," Aquinas locates the place of fortitude in relation to virtue itself and the other virtues:

Wherefore it belongs to human virtue to make man good, to make his work accord with reason. This happens in three ways: first, by rectifying reason itself, and this is done by the intellectual virtues; secondly, by establishing the rectitude of reason in human affairs, and this belongs to justice; thirdly, by removing the obstacles to the establishment of this rectitude in human affairs. Now the human will is hindered in two ways from following the rectitude of reason. First, through being drawn by some object of pleasure to something other than what the rectitude of reason requires; and this obstacle is removed by the virtue of temperance. Secondly, through the will being disinclined to follow that which is in accordance with reason, on account of some difficulty that presents itself. In order to remove this obstacle fortitude of the mind is requisite, whereby to resist the aforesaid difficulty even as a man, by fortitude of body, overcomes and removes bodily obstacles. Hence it is evident that fortitude is a virtue, in so far as it conforms man to reason.⁷²⁵

The first sermon, regarding the question of property, addressed the rectitude of reason in human affairs. The second sermon on charity addressed the condition of the will as properly ordered to God in love/charity. Understood theologically, which is how Ketteler wanted to be understood, Christ's redemption made this charity a reality in the world. This third sermon deals precisely with the difficulties that continue to obstruct the action of the will, in charity, according to reason. It then describes the Christian notion of human liberty that is necessary for social flourishing.

⁷²⁴ Aquinas, *Summa Theologica*.

⁷²⁵ Ibid. II-II "Treatise on Fortitude and Temperance," Question 123, "Of Fortitude," art. 1, "Whether fortitude is a virtue?"

The obstacles identified by Ketteler all have to do with competing interpretations of meaning in the world that were causing the falling away from Christ and the church. The lack of meaning was a disease, a sickness, manifested in the alienation of people from each other, and caused by a falling away from faith. The proper response, Ketteler preaches, is to drink again from the source of wellness, from the fruit of Christ's redemption. "If we wanted to summarize the entire effect of the redemption in a single sentence, it should be that humans should learn to know God. This knowledge (*Erkenntnis*) [of God] communicates to them the power to live according to their knowledge."⁷²⁶ Revealing again the frustration of his days in the parliament, he criticized speeches about equality, external remedies of legislation, efforts to redistribute wealth, etc, from friends of the people (*Volksfreunde*) who "have no other evidence of their love of the people (*zum Volke*) than their hatred of the rich."⁷²⁷ To address them, therefore, he needs to demonstrate the more adequate response in the Christian approach to social theory—thus the sermon deals primarily with theory and not practical social issues. It presents both the most complete outline of his own social theory (and as such is the basis of the chart above), and the reasons why a life contrary to this system destroys the full dignity of the person and the integrity of society.

This is not to claim that Ketteler had matched the great system builders of the nineteenth century in thoroughness and complexity. But it is to claim that Ketteler did have a holistic system influenced by the great system builders (especially Möhler and

⁷²⁶ *SWB I*, 1:49. From the third sermon. The use of *Erkenntnis* conveys the sense of personal familiarity, knowing some 'one,' as opposed to a *Verstand* knowledge that implies the knowledge of some 'thing.'

⁷²⁷ *SWB I*, 1:48. From the third sermon.

Baader), that the system was anti-liberal, that it included a strong theory of rights, and that it was based upon a close reading of Aquinas, which was quite distinct from the later scholasticism of the nineteenth century. The third sermon demonstrates something that both Ketteler's later detractors and defenders seem to miss, though such contemporary figures as Görres and Marx seemed to understand quite well: that the true battle of the times was an ideological one and that poverty and political unrest were symptoms of this larger question. Changing social conditions required an understanding of the root causes of the conditions. Ketteler, following Baader's analysis of alienation (*Entfremdung*) points to the inner disposition that is disordered not simply by the *de facto* differences between rich and poor, but by their understanding of the meaning and purpose of possessions.

In considering our present social conditions, we have reached the conclusion that the real reason for our plight—where men are alienated from one another [*großen Entfremdung der Menschen untereinander*] and a gulf separates rich from poor—does not actually lie in how wealth is distributed or in the poverty of some as contrasted with the riches of others. It is to be found rather in the inner disposition of people which manifests itself outwardly in these symptoms.⁷²⁸

This is the most fundamental focus of the sermons and Ketteler attempted a real solution to the ideological question with his defense of freedom in the natural law—a solution that accepts the basic *Stände* status quo as acceptable and even preferable to the extent that it is directed to the common good. The hierarchically structured society was no obstacle for Ketteler. He approached the solution using again the rhetorical structure of the existential hypothetical choice of following Christ or not. Following Christ

⁷²⁸ *SWB I*, 1:52. From the third sermon, translation, *Ederer*, 40.

promotes the organic unity and growth of society. Rejecting Christ is the way of selfishness, misunderstanding of the social situation, and continual social strife. True freedom is following the will of God as revealed by Christ's life—by his own acceptance of poverty, his treatment of the poor with whom he had contact, and by the love that he demonstrated in his saving action on the Cross. After laying out the social analogy of organic growth, of the opportunity for healing the social disease, of drinking the 'living water,' of eating the fruit of the Redeemer, etc, Ketteler outlined the foundations of the social order as described in the chart above.

7.5.1. Ketteler's Social Structure: Addressing The Critique Of Ketteler's Level Of Discourse

Ketteler's most thorough, and critical, biographer, Fritz Vignier, allowed that Ketteler was always ready in his personal life to apply himself to the practical problems of society. He also allowed that it was commendable that Ketteler had even attempted to address the social questions, but Vignier dismissed the value of the *Sermons* in terms of the intellectual content of his social theory. He was especially critical of what he calls Ketteler's simple scholastic wave of the hand.

He dismissed the help of the state, the most important thinking of governmental public policy, with a simple scholastic wave of the hand. He was only interested in knowing about the social power of the church. However, he did not demonstrate just how the old little shop of the church was supposed to create a great new force for change. And he especially did not demonstrate any lines of contact to the situation of the common workers.⁷²⁹

Hogan responded to this critique in three ways. First, the format of the *Sermons* was not appropriate for practical, effective, and theoretically systematic proposals. Second, that

⁷²⁹ Vignier, *Ketteler: Ein Deutsches Bischofsleben*, 107..

Vigener's historical understanding was lacking in his locating the social problem as already a labor problem, rather than a problem of social inequality. Ketteler was in fact addressing more general questions of social inequality. Third, that "for German listeners it was the first systematic public discussion of the social question by a member of the clergy."⁷³⁰

This social theory can be judged by its internal intellectual originality, its level of philosophical sophistication, or its reiteration of Catholic moral principles in light of the contemporary issues. In terms of the first two criteria, Ketteler does not score any great merit. In terms of the third criteria, Ketteler is on solid ground. What I find most interesting, however, in terms of Ketteler's contribution to his times and his relevance for today is his grasp of Catholic natural law as a dynamic system amenable to social evolution and historical development. It is true that he supported a hierarchically structured political and social system with elements of the *Herrschaft* ideology, but the primary focus in his parliamentary speeches, here in the *Sermons*, and in his later writing, is not purely defensive or reactionary. Rather, it was realistic about the inevitability of political development, it was not fundamentally identified with a single political system, and it was political in the best sense of the word, i.e., it engaged the debate in a public and rational discourse. In the parliament, he became a representative for participatory government. As the industrial revolution hit Germany in the 1850s and 1860s, he would not call for a return to an agricultural society. In addition, when Bismarck's armies conquered Austria's, he would come to terms with the future minority status of Catholics

⁷³⁰ Hogan, "Ketteler's Interpretation of the Social Problem", 41..

in a Germany under Prussian leadership. He was able to remain relevant as the credible representative of the Catholic Church in Germany because his social system did not primarily identify itself with any single social class, political system, or party. Instead, he maintained strong social principles such as the dignity of the human person, a Christian theory of freedom, criteria of true human flourishing, and an understanding of the relationship of human to God's law in terms of practical reason. We need only compare Ketteler's system to *Mirari Vos'* (1832) identification of God's rule with that of the princes.

The *Sermons* can be thus defended against the critique that they were either intellectually unoriginal and therefore irrelevant, or more damagingly, 'simply sermons,' i.e., not serious intellectual endeavors.

The language and fervor of Ketteler's social sermons surpassed his earlier sermons and showed that he had touched upon a subject near his heart. Yet all Ketteler seemed interested in doing was to reawaken in the faithful some kind of interest in the social question. By enlightening the minds of his hearers on the widest concepts of the social question, he sought to help relay the foundations of a Christian society. Society, he taught, must relearn its old respect for property, freedom, marriage, the family and the authority of the Church.⁷³¹

The proof for a more substantial view of Ketteler's *Sermons* is threefold. First is the inner coherency of the social structure itself—demonstrated here and previously. Second is the consistency of the social thought with the intellectually rigorous social theologians who influenced Ketteler, especially Baader, Möhler, and Görres. The many correlations between his social theory and Aquinas' demonstrate his reliance upon not merely the questions on property in the *Summa Theologica*, but upon the entire section on the

⁷³¹ Ibid., 59..

virtues. His attention to the importance of reason for the virtues and moral principles reinforce the thesis that he was reading Aquinas in the original. Third is the practical usefulness demonstrated in Ketteler's actual life. This third criterion, that his actions as bishop proved his concern with the *Sozialfrage*, is generally granted even by Vignier, so the following discussion will deal with the first two criteria.

7.5.2. Foundations Of Human Society Depend Upon Faith That Reveals True Human Freedom And Rights Within The Context Of Social Relationships, Not In The Individual *Per Se*

True to form, Ketteler begins the analytical part of the sermon with a historical perspective. In order to understand history, three things must be understood. First, one must acknowledge the anthropological fact that humans are spiritual creatures with an inborn sense of God. This is manifested in the religions of every human culture, including the pagan peoples (*heidnischen Völkern*). Second, one must recognize the historical fact that the human will is often inclined to evil, as expressed in the doctrine on original sin. Third, one must be attentive to the reality that historical social problems can be traced to the distortions of the will as demonstrated in unchecked passions for violence and greed, i.e., violations of God's law. Into this historical argument, Ketteler merged a Cartesian ontological proof for God's existence. From the existence of the idea of God, God's existence is proved, and this is demonstrated both logically and historically. His logical argument lacks rigor and seems rhetorically forced, as if he were sprinkling the sermon with some philosophical phrases to give it weight. The more important argument that fits the scheme of the *Sermons* is the appeal to the empirical reality that humans are religious in nature, on the one hand, and, on the other hand, that the passions distort humans' best

nature and cause great social harm. The emphasis on the passions as opposed to the intellect, and on charity as opposed to legislated norms, underpins the thesis that his system is based upon the virtues.

Ketteler was no doubt appealing to the great interest that the Romantics had in the cultures of other states and especially the Near East and the Far East. Scholars like Schelling and Görres spent great effort in learning the languages of Eastern cultures in order to read their myths. This was the age of sociology, and religion was the key to understand the structures of meaning of different peoples. For Catholic scholars like Joseph Görres, who himself learned Sanskrit for such research, these cultural studies provided insight into the mystical reality of God within human nature, and thus into God's accessibility to humans. Revelation is not external. It is not a package that could arrive by mail and it cannot be deduced by applying mathematical logic. Rather it is internal and part of the human experience. Görres' *Die christliche Mystik* (five volumes from 1836-1842), often referred to as simply *Mystik*, could hardly have escaped the notice of Ketteler, who was in Munich at the time of publication and was good friends with Guido Görres, the son and biographer of the author. In any case, the argument in the third sermon is a condensed outline of *Mystik's* narrative. Görres' five volumes had studied historical examples and models of spirituality and sought to find the universal principles from the study of various forms of religious experience. The work examined the progress of human spirituality in history with special attention to the tension between the spirit and the material worlds and the struggle between good and evil.

Mystik has an Augustinian bent in its thesis that humans, as God's creatures, reflect aspects of God's being and have access to that divine being in mystical experience. Thus, the human person is suspended between the realms of spirit and matter, or more accurately, the human person reveals the lie that there even exists such a definitive division between spirit and matter. Christian revelation, especially in the incarnation, represents God's most complete unity of the divine and the physical, and this unity is most fully appreciated in the Catholic tradition.⁷³² Even when dealing with mysticism, Görres was polemical and political, leveling the insights of his research against Protestant theology as rationalist and thus destructive of God's revelation. He criticized idealist philosophy as trying to figure out the mysteries of belief—regarding God, the Trinity, and the Eucharist—from naked reason and without the benefit of the scriptures or tradition. Finally, “he criticized the trend of his times (*Zeitgeist*) as a ‘pantheism of the flesh’ that had reduced the creator of the heavens and earth to a ‘constitutional God, the Bureaucrat-in-Chief of the world-state.’”⁷³³ Bureaucrats seemed to have had that reputation which lawyers suffer from today in the United States, but in the 1840s that legalistic political development was associated with the rationalist movement towards centralization and liberal constitutionalism.

Ketteler's sermon maintained a similar polar rhetoric. You were either open to God's revelation or closed to it. That openness was revealed not in systems or in speculative intelligence, but in the lived practice of virtuous lives. Divine revelation was not most fundamentally propositional—God's grace was experienced internally and most

⁷³² Bauer, *Der Athanasius Von Joseph Görres*, 57-59.

⁷³³ Translation from German in *Ibid.*, 59. (Inner quotes from Görres *Mystic*.)

fundamentally affected the human will. Ketteler used the example of the Jewish people to demonstrate this point, again fitting Görres' historical narrative of the progress of spiritual mysticism: "To the Jews had been given the true ideas about God, as well as the Law (*Gesetz*)—which flowed from that same revelation. They were unable to maintain the law, however, so they became separated from God as they continually disfigured the law and fell into idolatry."⁷³⁴ Thus opposed to a rationalist and intellectualist position, true human freedom is living a graced life, i.e., living directed towards the true human good, which is revealed by the one who created the humanity and recognized it to be good. The *Ungläubige*, conversely, rejects any reality beyond the material and what can be discovered by naked reason; they are left only with themselves.

Laws [*Gesetz*] are only restrictions which a man imposes on himself of his own free choice. In such a context, to be free means merely to do as one pleases. Every man is free to contradict everything that anyone else has ever proclaimed as true and good and right until he has proved it to his own satisfaction.⁷³⁵

The question of belief has implications in the realm of rights and law, because disbelief does not accept any foundation either for theology or for the entirety of the objective moral order. Law is purely functional and freedom is purely individual. Liberty is freedom from constraints and can make no claim to truth. Ketteler continued to argue that rights in such a system could only be construed in terms of external force.

The second half of the sermon developed the positive account of the Christian theory of freedom and tied it explicitly to an understanding of rights and law in society. The

⁷³⁴ *SWB I*, 1:51.

⁷³⁵ *SWB I*, 1:52. From the third sermon, translation *Ederer*, 45.

whole structure, as outlined in the chart above, is built upon a foundation of belief according to the broad outlines of Christianity:

- 1) God, infinite, all-powerful, and all knowing, created the earth reflecting his loving nature and as such is absolute sovereign over all.
- 2) Human beings, as creatures, reflect God's nature especially in the capacity for freely willing goodness, truth, etc...
- 3) Free will, however, also allows the rejection of good things and thus the destruction of what God had willed into Creation. This is original sin.
- 4) Christ's actions restored the possibility of acting according to God's will, and thus the restoration of the potential for the fullest dignity of human nature.
- 5) The redemption, however, did not rob humanity of free will, and so the rejection of God is still possible: It leaves all humans with the choice to follow the path God revealed, or to reject it.
- 6) The rejection of God's will is the opposite of freedom; it is the rejection of following the true human end, a life with God.⁷³⁶

The conclusion Ketteler draws from this basic argument is that since free will is a reflection of God's Creation, its exercise should be protected as a 'right.' The language he uses to articulate this right is identical to the constitutional language he advocated in the *Grundrechte*, even going so far as to claim that even God would not violate it.

Christianity grants (*beilegt*) the person a true right of self-determination (*ein wahres Recht der Selbstbestimmung*). In this right, it recognizes the great dignity and deepest sacredness (*innerlichstes Heiligthum*) of the person. Christianity recognizes the extreme consequences of this right even in its doctrine regarding eternal damnation. There, the church teaches that God himself will not encroach upon the person's sacred [self-determination] to the point of allowing the person to remain in eternal contradiction [against God].⁷³⁷

⁷³⁶ The six steps are paraphrased from third sermon, *SWB I*, 1:46.

⁷³⁷ *SWB I*, 1:52. From the third sermon.

The rest of the sermon draws out the implications of this argument. Because the argument depends so heavily upon belief in God, it outlines another proof for God's existence, this time the cosmological one. He connects the 'lawgiver' to the pattern of physical laws and then to the reality of moral laws such that freedom is found in the understanding of and living within the boundaries set by them. Health and virtue mean living according to law. Sickness results when the laws are challenged and rejected. Humans have no power to reject the laws of nature, and neither do they have the power to reject the laws of thought and conduct. When acting according to inner impulses without the guidance of God's law in nature, it leads to death; in thought it leads to delusions and error; and in morality, it leads to disorder in society.

Thus, Ketteler had drawn out the structure of his social theory as inspired by the enthusiasm of the Munich Romantics. He brought the insights from Görres' *Mystik* to light, but always within the context of his original reading of Aquinas. After his purchase of a German translation of the *Summa Theologica* when he was a seminarian in 1842, it was his steady companion and the most important source of his thought.⁷³⁸ He confidently placed the natural law philosophy he read there in the context of his own times, especially in the context of the social question, and he spoke about the objective moral law in terms of the virtues as needing to be defended from the assaults on Christian meaning in his times. "The consensus of all mankind will always condemn the attempt to deny the objective moral law as it is expressed in the teaching of Christian virtues."⁷³⁹ The problem, Ketteler claimed, was the loss of faith, which had already been

⁷³⁸ *SWB II*, 1:194. Ketteler letter (#53) to his sister Paula, from Munich, April 17, 1842.

⁷³⁹ *SWB I*, 1:52. From the third sermon, translation *Ederer*, 48.

demonstrated in his outline of Aquinas' argument for private property. The edifice of society comes crashing down without faith or the essential pillars supporting society. Besides property, the other pillars of society are human liberty, human destiny (*Bestimmung des Menschens*), marriage, and the family, which he put aside for later sermons. To shore up the foundation, society required the courage, or fortitude, to bear up against the dangers of the day. Aquinas noted that fortitude is "chiefly about fear of difficult things, which can withdraw the will from following the reason."⁷⁴⁰ The third sermon attempted to remove those difficult things by exposing the weaknesses of the liberal system that endangered society and the strength of the Christian tradition.

7.6. Fourth Sermon: On Hope, Our Destination Is With God—Or Not

The last four sermons were delivered in successive nights beginning on the Sunday before Christmas, December 17, 1848. The themes of the four sermons are successively more similar and inter-related, with their analysis of the pillars of fortitude, hope, temperance, and faith, respectively. The analysis of the sermons in terms of the virtues makes the most sense of the themes he chose. The fourth sermon begins with a summary of the third, in which he reiterated the need for faith to defend against the dangerous workings of the *Ungläubige*. He even adds a layer of further emphasis by identifying Rousseau, the author of *die soziale Politik*, among those who were undermining society by their rejection of a personal transcendent God while trying to establish a social system upon purely human foundations. Rousseau is an example of the danger that must be

⁷⁴⁰ Aquinas, *Summa Theologica*. II-II Question 123, "Of Fortitude," art. 3, "Whether fortitude is only about fear and daring?"

defended against with the virtue fortitude. The main argument of the fourth sermon then begins with the existential question: Why are we here? “It is amazing, in fact, how anyone can go through life without ever seriously asking themselves the question: ‘Why am I on earth?’”⁷⁴¹

The turn here from danger to expectation is precisely the difference between the virtues of fortitude and hope in the Christian tradition as outlined in Aquinas’ *Summa Theologica*. Hope is described there, like the other virtues, as that which is in accord with reason and which makes the actor good. Fortitude achieves this by maintaining reason in the face of danger. Hope, however, is the expectation of the attainment of God. Ketteler even uses the distinctive Thomistic concept of attaining God himself, “*in dem Besitze Gottes selbst*,”⁷⁴² to describe the *telos* of hope. Aquinas treats this in the first article of his first question in his section on hope:

According to the Philosopher (Ethic. ii, 6) “the virtue of a thing is that which makes its subject good, and its work good likewise.” Consequently wherever we find a good human act, it must correspond to some human virtue. Now in all things measured and ruled, the good is that which attains its proper rule... Now the act of hope, whereof we speak now, attains God. For, as we have already stated [I-II, Q40, art 1], when we were treating of the passion of hope, the object of hope is a future good, difficult but possible to obtain.⁷⁴³

This virtue is differentiated from charity in that hope is the expectation of union with God, while charity describes the state of being in a loving relationship with God as treated in the discussion of the second sermon. The rest of the fourth sermon draws out this perspective with a discussion of the role of the virtue ‘hope’ in society. Hope is by its

⁷⁴¹ *SWB I*, 1:57. From the third sermon.

⁷⁴² *SWB I*, 1:65. From the fourth sermon.

⁷⁴³ Aquinas, *Summa Theologica*. II-II “Treatise on the Theological Virtues,” Question 17, “Of Hope, Considered In Itself,” art. 1, “Whether hope is a virtue?”

very definition a teleological concept—it is the object of hope that draws the person, and by analogy society, towards their ends. Once this is grasped, the argument is simple.

Without hope there is no final end, no expectations, no reason to act one way as opposed to another; therefore society falls into chaos. It is the claim of social nihilism that the prescient Baader had predicted.

Two things bear notice in the fourth sermon in terms of the Ketteler's system. First is the ever-present imprint of the *Spiritual Exercises* of St. Ignatius that is more than simply a stylistic or rhetorical approach. All six sermons bear the marks of the *Exercises*, but here there is a distinctive stamp of St. Ignatius' leading the retreatant to make a choice. The "First Principle and Foundation" defines the person as a creature meant to praise, reverence, and serve God. The teleological method begins there and then leads the retreatant with successive meditations to reflect upon the nature of that creaturehood in terms of dependence upon God. Once the dependence upon God has been established, the retreatant is lead to reflect upon a response. If you are a creature of God, and Christ has revealed God's love in his life, death, and resurrection, and if inherent in that revelation is a call for each to follow 'his way,' what then? The choice is either to follow Christ or not. Ketteler was deeply moved by his own practice of the *Exercises* and he was influenced by the Jesuits from the time of his secondary education. His rhetoric breathes the *Exercises*: "There are just two conceivable reasons for living which relate back to whether a man believes in a personal, transcendent God or not."⁷⁴⁴ It is the dynamic of the existential choice: Who are you? Why were you created? What are you going to do

⁷⁴⁴ Ederer, 55. From the fourth sermon.

about it? Without God, the consequences are dire, he argues, and lead consequentially to a nihilism. In that case, only physical pleasure brings meaning, and society can only meet with disaster on such foundations. If the poor were to come to such conclusions, there would be chaos, because their circumstances bring them little pleasure. Ketteler even offers a meditation on death, again in the *Exercises*.⁷⁴⁵ Also like the *Exercises*, however, the fourth sermon does not depend upon the fear of hell to generate momentum for being good, though it does instill the fear of distance from God. Rather, it brings the listener to the experience of gratitude for God's creative action that is continuing in the desires of all people to bring about God's will for Creation.

Justice for Ketteler, therefore, is not primarily an aspect of rules or mathematical equality; it is the yearning for goodness and fairness. This is a passionate thing and thus is most adequately treated with the virtues. That is the second thing that bears notice in the sermon: its notion of justice within which his talk of rights is located. On the one hand, people have this sense of justice that is present even among the most hardened criminals who want to be treated fairly. On the other hand, this inherent sense of justice points to the source of justice in God. The virtue hope plays the role of connecting the two—our desire for justice, and the expectation for justice that depends upon faith.

Just as truly as soul of the person is called to justice, so truly is there a Lord of heaven and earth who holds the scales of justice in his own hands, a court where justice will be decided, [and] an eternity in which every person will reap what they have personally sown: the wages of justice, or punishment for

⁷⁴⁵ *Spiritual Exercises*, #71 "...If the one giving the *Exercises* judges that it would be profitable for the exercitant, other exercises may be added here, for example, on death and other punishments of sin, on judgment, etc."

injustice.⁷⁴⁶

Beyond this, the implications for Ketteler's actual language of rights are minimal in terms of his social theory. The fourth sermon emphasizes the deeply Christian and spiritual context for his social theory, which conceives justice as integrated within a theology. The sermon further demonstrates his reliance upon Aquinas with its emphasis upon reason and objective moral law that, through the virtues, is not a laundry list of do's and don'ts, but is subjectively experienced in the properly integrated person and society.

7.7. Fifth Sermon: Sustaining Society: The Family, Women, And Anthropology

Given the Romantic worldview and the Thomistic philosophy at the heart of Ketteler's system, it is no surprise that the fifth sermon addresses the structure of the family and its place in society. The organic theory was developed in the course of his successive sermons, establishing the basic principles of his system. After the theory had built up momentum theoretically and rhetorically, Ketteler brought it to bear in the fifth sermon on some practical concerns to demonstrate the significance of belief in God for sustaining the social structure. The lack of belief had caused the social problems of the day, he claimed, and since the remedy was a return to belief, and the family is the most important location for the inculcation of belief, the integrity of the family is essential for society. The Christology here reveals his understanding of grace and the role that faith has in a marriage, and by association, the role that faith has in the family and society: i.e., God's action through faith does not alter 'nature in itself.' It restores nature in its integrity

⁷⁴⁶ *SWB I*, I:64. From the fourth sermon.

and gives it transcendence: Christ's action in the world did not alter its nature, but purified it. "The work of Jesus Christ was not to destroy the order of nature which God had established. Rather, he wanted to purify it from sin and the corruption sin had wrought, and to restore the order according to its original purpose."⁷⁴⁷ Marriage, as a sacrament, reveals the possibility for transcendence in its demonstration of love, unity, and indissolubility. As such, it counters the aspects in society that follow from a false understanding of liberty: deep worldliness, sensuality, and corruption (*tief versunken in der Welt, Sinnlichkeit und Verderben*).⁷⁴⁸ The virtue that deals with the passion for physical goods is temperance, and Aquinas' treatment of temperance informs this sermon:

Accordingly, just as the virtue of fortitude, which by its very nature bestows firmness, is chiefly concerned with the passion, viz. fear..., so, too, temperance, which denotes a kind of moderation, is chiefly concerned with those passions that tend towards sensible goods, viz. desire and pleasure, and consequently with the sorrows that arise from the absence of those pleasures.⁷⁴⁹

This sermon, like the fourth, deals less overtly with the topic of rights, but contains elements that are relevant to the discussion on rights. First, the discussion on marriage reveals Ketteler's view of women's role in society—an understanding that he articulated in a language of rights. The claim is that outside of a Christian understanding of marriage, in which the virtues are fostered and thus temperance is exercised, women become subject to the basest passions of men. Where such passions lack the Christian

⁷⁴⁷ *SWB I*, I:71. From the fifth sermon.

⁷⁴⁸ *SWB I*, I:73. From the fifth sermon.

⁷⁴⁹ Aquinas, *Summa Theologica*. II-II Question 141, "Of Temperance" art. 3, "Whether it is only about desires and pleasures?"

limits of reason and virtue, women have no rights. “A woman was no longer a person, but a thing. She had no rights, no independence of her own, and her only destiny was to serve the will and the lusts of men.”⁷⁵⁰ Also positive is Ketteler’s direct application of the *imago Dei* concept to women without qualification: Because Christianity elevates human love in marriage as an example of Christ’s love for the church, human love must be pure and true, and the human person (*Mensch*) is capable of this through grace as the image of God, *Ebenbild Gottes*.⁷⁵¹ Thus, Ketteler continued, women are elevated by Christianity to spiritual/intellectual (*geistige*) beauty, purity, and nobility (*Hoheit*). That said, Ketteler’s view of the role of women in society is entirely contained in the role of wife and mother. Moreover, he offered no non-Christian examples of virtuous women despite the fact that he did recognize some virtues among non-Christian men, such as the great generals or political leaders of classical times. While relegated to the private realm of the home, the virtuous mother is responsible for raising the children with virtues and living in a loving relationship with her husband, thus anchoring him in virtue. The Blessed Virgin Mary serves as the model of virtue only for women because of her humility, seclusion from the world, attention to the family, self-sacrifice, chastity, and purity.

A true Christian mother is the greatest gift a person could have because she is the most important influence on the development of human virtues. The nature and development of the human person is the second element of the fifth sermon relevant to the discussion on rights because of the relation of the person to the social structure.

Iserloh suggests that an important source of this anthropology was Michael Sailer

⁷⁵⁰ *SWB I*, 1:70. From the fifth sermon, translation *Ederer*, 71.

⁷⁵¹ *SWB I*, 1:73, From the fifth sermon.

(Bishop of Regensburg, teacher of Möhler, etc), who also emphasized early childhood development for human integration and flourishing.⁷⁵² Delivered eight years before Freud was even born, Ketteler seems to be referencing Sailer here: “With one of the greatest Christian thinkers, I say that a person’s formation/education is mostly completed in the first six years upon the mothers’ lap.”⁷⁵³ Ketteler does not have a theory of the ‘superego,’ but he does develop the thesis about how the relationship of the mother is essential for later stability and success. “The image of the pious Christian mother (*die fromme edle Gestalt seiner christlichen Mutter*) continues to be a powerful source of faith and virtue for the person in later life.”⁷⁵⁴ Ketteler rejected the theory attributed to Rousseau that the human person develops most naturally when he or she is true to what is within them. This is mocked as absurd. “If that were so we should have to withhold the mother’s milk from the child and deprive the child of the warmth and closeness of a mother’s heart...”⁷⁵⁵ Thus, Ketteler’s whole social model is boiled down to the very personal relationship between a mother and her child that, if blessed by the virtues of Christianity, is sufficient. Conversely, a society lacking such a foundation falters.

The regulation of the national economic household is basically the same as the economic activity of the largest and smallest businessmen; and just as none of

⁷⁵² Dietrich’s description of Sailer’s anthropology (66,72) and focus on virtues (68) has many parallels with Ketteler’s. Sailer’s larger project also serves as an important foundation for Ketteler. Sailer confronted the social as well as intellectual effects of the Enlightenment’s marginalizing of religion. “He confronted an anthropocentric culture in which men wanted to free themselves from God, Christ and the Church”(74)” All references in Dietrich, *Catholic Theology in the Age of Idealism*.

⁷⁵³ *SWB I*, 1:75. Iserloh gives the following edition as an example: Michael Sailer, *Über Die Wichtigste Pflicht Der Eltern in Der Erziehung Ihrer Kinder*, ed. L Kellner, *Bibliothek Der Katholischen Pädagogik*; 4 (Freiburg i. Br.: 1891), 21.

⁷⁵⁴ *SWB I*, 1:76. From the fifth sermon.

⁷⁵⁵ *SWB I*, 1:79. From the fifth sermon, translation *Ederer*, 78.

these is able to ignore certain common principles, in the same manner, the moral foundations on which family life rests are the same as those on which the state rests.⁷⁵⁶

Ketteler's anthropological claims, insofar as they provide insight into the nature and requirements for human flourishing, are relevant to his understanding and use of rights. Rights are not aloof from or independent from the social structure, but are the result of the practical reason of the lawgiver with a view to the flourishing of human society. Given the teleological structure of the system, rights articulate needs and limits proportionate to that flourishing.

7.8. Sixth Sermon: Questions To Faith, Religious Authority And Reason

For Ketteler, faith in God is the most central and pivotal human 'claim' or identity. This separates him from the rationalists on a fundamental level. His sixth and final sermon relies upon Möhler's *Symbolik* to address the implications of his position for faith itself, for authority in the public realm, and for the concept of reason. The sermon begins with a quote from Matthew's Gospel that sets the tone for his discussion on authority and the church. "Blessed are the poor in spirit; the kingdom of heaven is theirs." (Mt 5:3-4) Ketteler sets up the poles of the debate between liberal egoism and Catholic sacramentality. On the one end, the liberal egoism of the unbelievers (*Ungläubige*) denies all authority external to their own exercise of reason. On the other end of the pole, the Catholic sacramental vision denies the absolute disconnection between political authority as based on reasonable discourse, and religious faith as a purely private matter.

⁷⁵⁶ *SWB I*, 1:76. From the fifth sermon, translation *Ederer*, 76.

The key issue here is authority. The *Ungläubige* follow an essentially Kantian argument that all authority must be based on reason—reason autonomously conceived. Ketteler deconstructs that view as hubris at best and callously self-interested at worst. What is more interesting than his critique is the way he vindicates authority within a Catholic sacramental vision. The church’s authority is related to its belief that God has revealed the truth of the human condition through the incarnation of Christ. This is not contrary to reason, but could hardly be proved by reason autonomously conceived. This is where Ketteler demonstrates his direct reliance upon Möhler’s *Symbolik*, Chapter Five, “Differences with Respect to the Doctrine of the Church.” The following quotation demonstrates how Möhler’s ecclesiology is a consequence of his Christology:

The Son of God, our Redeemer, is a distinct being: he is what he is, and none other, eternally like unto himself, constantly one and the same... As Christ, therefore, is one, and his work is one in itself, accordingly there is but one truth, and truth only maketh free, so he can have willed but one Church; for the Church rests on the basis of belief in him, and hath eternally to announce him and his work...

The end of revelation requires a Church, as the Catholic conceives it; that is, a Church one, and necessarily visible. The manifestation of the eternal Word in the flesh, had the acknowledged end to enable man, (who by his own resources was capable neither of obtaining, with full assurance, a true knowledge of God and of his own nature, nor of mastering that knowledge even with the aid of old surviving traditions, to enable man, we say, to penetrate with undoubting certainty into religious truths. For those truths, as we stated above, will then only give a vigorous and lasting impulse to the will in an upward direction, when they have first taken strong hold of the reason, whence they can exert their effects.⁷⁵⁷

⁷⁵⁷ Johann Adam Möhler, *Symbolism: An Exposition of the Doctrinal Differences between Catholics and Protestants as Evidenced by Their Symbolical Writings*, trans. James Burton Robertson, 1997 edition with introduction by Michael J. Himes ed. (New York: A Crossroad Herder book, 1997 c1833), 258-259.

In contrasting the Catholic view above with that of Luther, Möhler argued that the fundamental shift in Luther was not of doctrine but of authority. In fact, Luther's theological positions were in the beginning relatively orthodox and even many of his later theological positions were quite consistent with Catholicism. His ecclesiology was not false, necessarily, but it was one-sided⁷⁵⁸ and it reflected a movement to egoism. Möhler locates the start of the Reformation at that precise moment when the question was put to Luther to choose between his own authority and that of the church. "Hence, it appeared to him more honourable to execute what his own spirit suggested—rather to command as a father, than to obey as a son. He now laid the foundations for another church to be erected *by himself*."⁷⁵⁹ Möhler recognized the power of Luther's intellectual analysis and the truth of the Protestant critique of the moral lives of many bishops and teachers.⁷⁶⁰ But after Luther had renounced the validity of an authority outside himself, claiming instead that God was working 'immediately' through him, he was led to reject all "historical and traditionary guidance, and incapable of calling back in person the Apostles themselves, in order to be authorized by them in the name of Christ, he saw no other expedient than an appeal to an invisible, internal authorization."⁷⁶¹ This move to the purely subjective validity of truth and the purely spiritual nature of the church that Möhler attributed to Luther is understood by Ketteler to be continuing to work in the heart of liberalism.

⁷⁵⁸ Ibid., 326.

⁷⁵⁹ Ibid., 252. (*italics by translator*).

⁷⁶⁰ Ibid., 270. "Hell hath swallowed them up. Avowals of this kind Catholics must not shrink from, and never have shrunk from: it would be even idle to attempt to elude them."

⁷⁶¹ Ibid., 315.

Möhler is crucial for Ketteler because he structures an understanding of faith as wholly reasonable in the context of obedience to authority. Freedom was the central preoccupation for the entire nineteenth century, and authority, a related concept, was debated largely along liberal vs conservative lines. Ketteler followed Möhler in identifying the liberal ‘type’ with Protestantism and the conservative ‘type’ with Catholicism. The liberal *Ungläubige* allow no other source of reason outside of the self, and thus allow no other basis for law external to the person. Ketteler’s critique of this position is itself an external critique of the principles upon which liberalism is founded, and it is directly related to Möhler’s critique of Luther. Of Ketteler’s arguments, the strongest is from his anthropology and connected to the narrative of the fifth sermon. “The desires and thoughts (*Wollen und Denken*) of a child in its first years are maintained not by anything internal, but by the desires and thoughts of the mother.”⁷⁶² Thus, the realization of the cognitive and intentional (voluntaristic) powers of the child requires the authority of the mother. The development of the child is as dependent upon the mother’s love as upon her teaching by word and action. That authority is transferred from the mother and family to the teacher in the child’s school years and even when full maturity is formed, it is hardly reasonable to hold that every adult has achieved significant enough intellectual development to be free from authorities of some kind or another. Further, the denial of external authority in the name of ‘reason’ only proves to give credence to poor and danger authorities, and thus is ultimately unreasonable and dangerous to the social order.

⁷⁶² *SWB I*, 1:81.

The question remains, however, regarding the choice between legitimate and illegitimate authority. For the historical school, the answer is to be found in the development of reason in history—with authority clinging to those teachings and institutions that have proven themselves over time. Ketteler was swayed in this direction, but followed Möhler by relying upon Aquinas' treatment of faith in the *Summa Theologica*.

The belief of the Catholic Church rests on the principle that man, to be completely reasonable, can reach nowhere else but for the hand of the authority which God established here on earth. Thus, there is no conflict between faith and reason. Faith does not require that we use our belief to stamp out reason. On the contrary, through authority, faith wishes man to attain to the full and true use of his reason. As the dew which penetrates the plant does not suppress the plant but helps it to develop and unfold, so authority does not suppress the proper life of the soul but helps it to true development and fulfillment.⁷⁶³

According to the criteria of the *Ungläubige*, religious beliefs and faith in God are simply not applicable to the principles of reason. It is something about which the reasonable person may not publicly speak, and it certainly is not relevant to political discourse. It is thus relegated to the private realm. According to Baader, however, (section 1.3.3) God is the foundation of all being, Creation reflects God's being as love, and thus humans' most fundamental identity is as creatures reflecting God's love. This sacramental philosophy's concern with the material and social order of the universe recognized the danger to the social realm posed by the exclusion of the insights of faith in the political realm. In this vein of argument, Ketteler also relies upon Aquinas to come to the insight that questions about ultimate meaning are not optional. They demand that we stake a claim—and the claim of belief in God is open to rationality on many levels,

⁷⁶³ *SWB I*, 1:79. From the sixth sermon, translation *Ederer*, 86.

especially when understood in terms of the centuries of religious practice and theological understanding, as well as when compared with the other options for ultimate meaning. Evidence must be appropriate to the nature of the thing in question. Thus, mathematical questions require different evidence than biological questions. This Aristotelian approach adopted by Aquinas recognizes the difficulty of different species of knowledge. Ketteler's approach applied this insight to the complexity of the religious question, recognizing that a formula of belief is much less adequate as proof than the actual lives lived according to belief. In terms of the virtues, the final end of the human person is present in the human will in the virtues of charity and hope, and it is present in the human intellect in the virtue of faith. As the object of faith is God—the creator of all things including reason—faith cannot be contrary to reason, and for it to be true, it must bear the fruit of social flourishing.

With this, my Christian brothers and sisters, we have completed the our task, which was to subject both the Catholic Church and the *Ungläubige* to a thorough examination of basic principles. [The conclusion is,] from our consideration of their consequences, that disbelief (*Unglauben*) has the force of death, of destruction, of confusion, and that belief has the force of life, of design/formation (*Gestaltung*), of order.⁷⁶⁴

The argument is fundamentally epistemological and relies upon Aquinas' analysis of faith in the *Summa Theologica* where intellectual certitude is differentiated according the subject and the object. According to the subject, it is true that faith is not very certain because the human intellect does not actually grasp God. According its object, however, faith is quite certain because the object is divine truth. Further, because the will may only

⁷⁶⁴ *SWB I*, 1:86.

be moved towards what is understood intellectually, faith precedes all the virtues.⁷⁶⁵ If the *Ungläubige* are correct and there is only human authority, then the implication is nihilism. If the basic tenets of faith in Christ are to be held, however, then the consequence according to Möhler and Ketteler is the legitimation of the church's authority. Ultimately, the hermeneutical position is that the relationship of human persons to the world depends upon their ultimate grasp of its meaning. For the believer in God, this ultimate grasp is explicit and articulated as 'faith,' especially when that faith includes the participation of the person within the believing community of the church. Ketteler claims that the rationalist must also have an ultimate grasp of understanding, but this 'grasp' is obscured, denied, or not articulated. In addition, the lives of the rationalists demonstrate the unreasonableness of their claims, as evidenced in their position on private property and their disregard for the poor. Ketteler did not try to meet the criteria of reasonableness set by the *Ungläubige*. Instead, he rejected the presuppositions underpinning their philosophical positions.

From this point, Ketteler, like Möhler, drew the further consequences of the church's authority to embrace the infallibility of the church to the extent that it is the continuing mystery of God's presence in the world. The argument of infallibility is a necessary one, given the premises put forward by Möhler and followed by Ketteler twenty-two years prior to the encyclical declaring infallibility. This doctrine, which Ketteler would later hold to be valid, though impolitic in the form of a Papal claim, is a theological claim reflecting the reality of Christ's continuing presence in the church. It was never

⁷⁶⁵ Aquinas, *Summa Theologica*. II-II, Question 4, "Of the Virtue Itself of Faith," art. 7, "Whether faith is the first of the virtues?"

incorporated into political claims or meant to be reflected in the church's secular power. Thus, Ketteler's position of infallibility does not contradict his lasting dedication to the articulation of religious independence of paragraph 147 in the *Grundrechte*. The article is translated here literally:

Every religious community administers its own matters independently, remaining, however, subject to the general laws of the state. [*Jede Religionsgesellschaft ordnet und verwaltet ihre Angelegenheiten selbständig, bleibt aber den allgemeinen Staatsgesetzen unterworfen.*]
 No religious community enjoys state privileges above others—furthermore, there is no state church. [*Keine Religionsgesellschaft genießt vor andern Vorrechte durch den Staat, es besteht fernerhin keine Staatskirche.*]

Möhler died too early to follow through with the full implications of his theology for social thought, but some of the directions he was alluding to in *Symbolik* (the last volume of which was published posthumously) point to how he might have developed his all-embracing theory. Following his Romantic and idealist roots, Möhler envisioned Christianity enlivening all of society. For example, he had a theory that to the degree civilizations progressed, they recognized their mutual dependence upon one another, especially beyond the boundaries of nations. “The more this communion and mutual dependence is extended, that is to say, the more the notion of what is foreign disappears, the more humanity is exalted.”⁷⁶⁶ This optimism is not evident in Ketteler's 1848 sermons, but Möhler's historical and systematic insights certainly are. In addition, what I find crucial here is their common claim that Christianity is necessary for social order and flourishing, but there is no claim that a Christian government (*christlicher Staat*) is

⁷⁶⁶ Möhler, *Symbolism* (Himes Ed.), 264.. Also see: Peter Hünermann, "Soziale Und Politische Orientierung Des Katholizismus Im Werk Der Älteren Tübinger Systematiker," in *Katholizismus, Konservative Kapitalismuskritik U. Frühsozialismus Bis 1850*, ed. Albrecht Langner (Paderborn: Schöningh, 1974).

necessary for flourishing, and there is never an identity of the *Reich Gottes* with the *Reich*.

7.9. Conclusion To Sermons: The Unbelievers (*Ungläubige*) Undermine The Foundations Of Society By Attacking The Basis Of Law And Rights

Ketteler's manifest reliance upon Möhler ties him to the Romantic Catholicism of Tübingen, with its enthusiasm for engaging the academic world on equal terms. It also ties him to Möhler's historically nuanced and developmental ecclesiology and his understanding of the relevance of the church for bringing Christ's salvation to the world. The Kingdom of God existed in the person Christ, who conveyed it to the apostles, who in human fashion conveyed it further. "Through external media, the religious consciousness of these had been awakened by the incarnate Son of God, and they had, accordingly, received the *outward* calling, to announce the Gospel to others, they went into countries where, in like manner, the kingdom of God was not."⁷⁶⁷ The emphasis is always upon the Word made flesh, the incarnate *Logos*, which is present in the visible church and, as such, continues the universal mission of that *Logos*. Present in that ecclesiology is the tension between the particular identity of a tradition and the universal mission that that tradition embodies. Ketteler assumed this tension in the *Advent Sermons*, but with it, he needed to address the complexity of the German situation in 1848. The difficulty lay in the tension of applying a single tradition universally in a political sense because, of course, that is the tension of absolutism. Therefore, the concurrent organic principles of freedom and subsidiarity balance this danger of

⁷⁶⁷ Möhler, *Symbolism* (Himes Ed.), 323..

absolutism with an anthropology and sociology that locate the universal principles of Christianity within the lived experience of societies in particular communities and states.

This balance against absolutism is three-fold. First, it is present in the critique of the liberal attempt to apply universal laws irrespective of the legal traditions of a land—a critique that Ketteler repeats in the conclusion of the last sermon. “Throughout the course of world history, it has occurred over and over again that one segment of the human race has tried to prescribe laws and to regulate the thought and actions of another segment. That is happening today still, even among the apostles of unbelief (*Anhängern des Unglaubens*).”⁷⁶⁸ Ketteler rejected the colonizing nature of the concept constitution (*konstitutionelle Verfassung*) and thereby addressed the liberal principle of freedom contained in the natural law *Begriff* jurisprudence of the Enlightenment constitutionalists. The second balance against absolutism is contained in his understanding of law that draws from, but is not identical to, Savigny’s historical jurisprudence. Like Savigny, Ketteler recognized the positive developments in the political realm brought by the liberal ideas. He recognized it without much specification in the conclusion *Sermons* (see quotation below), but his work in the parliamentary procedures of the *Paulskirche* demonstrated his respect for participatory government as a means of instituting legitimate law. But he rejected the consequent claims of sovereignty by that or any other general governing body that claimed to ‘embody’ the will of the people. Following Savigny, Ketteler held to the claim that the mysterious notion of sovereignty cannot be simply expressed in a governing body or a legislated document abstractly conceived. It is rather

⁷⁶⁸ *SWB I*, 1:86. From the sixth sermon, translation *Ederer*, 95.

contained in the community (*Gemeinde des Volkes*) and revealed in the tradition of the community's lived social, legal, and political experience. Thirdly and finally, following Aquinas, the principle of the human conscience is balanced against the principle of authority.

The Catholic Church embraces within her whatever truth there is in the basic principle of [the *Ungläubige*], at the same time that she rejects what is untrue about it. She accepts the profound truth that man need not obey any mere man or believe him, and it therefore overthrows all merely human authority. She further acknowledges that any authority from whatever source it may come must justify itself in man's conscience, in his soul, before he needs to obey it.⁷⁶⁹

This is an extraordinary claim coming five days before Christmas and concluding a year of revolutionary tumult and great expectations for democratic reforms that were built up and then shattered. Moreover, with the Austrian delegation's leaving the proceedings, the Catholic position with reference to Prussia was very insecure. Ketteler's response to these developments, as demonstrated in the passage above, was certainly in part defensive, but it was also courageous and in its own right revolutionary. He recognized the 'deep truth' that 'mere human authority' need not be obeyed. The human conscience may not be simply forced to comply with law, but needs reasons. For authority to be legitimate, it needs to be in accordance with divine principles and to recognize the reality that humans are transcendent beings as creatures of God and thus share God's divine nature. Theologically, these themes are not his own developments, but are tied to the Romantic theologians of Munich and Tübingen. Legally, again, there is no innovation here in the contextualization of the principles of the historical school of jurisprudence at

⁷⁶⁹ *SWB I*, 1:87. From the sixth sermon, translation *Ederer*, 96.

the end of 1848 and the articulation of those principles according to reason in a language of rights. Politically, however, the sum force of the *Advent Sermons* is certainly formidable during that time lacking consensus regarding authority and political legitimation, and in this sense the *Sermons* may be unique. Ketteler's accomplishment was: 1) to understand, acknowledge and tie himself to the theological, social, and legal traditions of Germany—all conservative moves; 2) to further unite the diverse Catholic factions in the German states from liberal Baden to conservative Bavaria under a common cause with clear positions; 3) to articulate a path of action in the modern representational political context; and thus, 4) to thereby put Prussia on notice that the German Catholic position was a political force willing to reject 'mere human law.'

Finally, though the conclusion of the *Sermons* does not explicitly repeat claims in terms of rights, the implications of Ketteler's position is explicitly drawn out in terms of law in a way that has direct implications for his understanding and use of rights. First, the term 'law' is used univocally to apply to the divine rules as well as human positive legislation. It reflects Ketteler's 'social imaginary' that there is an order to the universe because the universe reflects God's nature and thus nature is 'ordered' to reflect God's will. As Taylor notes, "the image of order carries a definition not only of what is right, but of the context in which it makes sense to strive for a hope to realize the right."⁷⁷⁰ For law to be legitimate, it cannot be contrary to God's will, which is the flourishing of human society on its most basic level, and the drawing of all human intentions to God's love on the most theological of levels. Because the latter cannot be forced politically—

⁷⁷⁰ Taylor, *Modern Social Imaginaries*, 9.

that would be contrary to the order of freedom, at the very least—law must not interfere with that freedom. Positive law as claims (*Ansprüche*) of positive law or more universal law may be made if they can be reasonably defended in terms of the teleology of human flourishing. Rights reflect proper power or authority (*Befugnis*) to the extent that they are rooted in the tradition of the community and consistent with God’s order as reflected in natural law. Thus the poles of rights, the due process of the law (*Rechtliches Gehör*) on the one hand and principles of justice (*Gerechtigkeit*) on the other hand, are included in Ketteler’s understanding and use of rights in the *Sermons*.

The individual, subjective, and self-standing rights claims, though non-canonically attributed to Aquinas as Tierney argues, are compatible with the larger framework of social theory in the *Summa Theologica*. Ketteler seemed to have had the volume of the *Summa Theologica* that dealt with the virtues open on his desk while he wrote. Its imprint is ubiquitous in the *Sermons*’ structure: its anthropology and focus on the virtues, its sociology and focus on justice within a diverse (and hierarchical) society, and its account of grace in terms of the natural and supernatural spheres. Like Aquinas, Ketteler understood that with justice, “right or just depends on commensuration with another person,”⁷⁷¹ but that since that commensuration takes place within a social context, the social context continues to be relevant for justice. A stable anthropology allows for general principles of justice to be articulated and referred to as ‘natural law,’ but rights are never understood apart from the community and its *telos* of flourishing. Here Aquinas shows his Aristotelian influence concerning justice in terms of the state. “All other

⁷⁷¹ Aquinas, *Summa Theologica*. II-II “Treatise on Prudence and Justice,” Question 57, “Of Right,” art. 4, “Of the precepts relating to justice.”

differences between one person and another in a state, have an immediate relation to the community of the state and to its ruler, wherefore there is just towards them in the perfect sense of justice.” (57.4 ad3) So that there is a basic justice between people by virtue of their being humans with a common sovereign, but also that justice is always understood practically as being colored or given content within the matrix of human relations of a complex social organization organized according to natural principles and intending the common good.

The fact that rights are ordered to the common good or articulated in terms of human flourishing and not abstractly as universal claims, however, does not take away from their force or diminish their sway. The subsidiarity principle together with the theories of the human person and society in fact require the articulation of positive demands (rights) upon the state respective of its level of authority and responsibility for human flourishing. On the national level, the *Grundrechte* are the clearest proof of rights claims made which in no way indicate the consequent adoption of a liberal anthropology or sociology. Following Aquinas, Ketteler understood the complexity of justice within the state and thus located it in the application of reason as a virtue, rather than in wooden principles.

All who are included in a community, stand in relation to that community as parts to a whole; while a part, as such, belongs to a whole, so that whatever is the good of a part can be directed to the good of the whole. It follows therefore that the good of any virtue, whether such virtue direct man in relation to himself, or in relation to certain other individual persons, is referable to the common good, to which justice directs: so that all acts of virtue can pertain to justice, in so far as it directs man to the common good... And since it belongs to the law to direct to the common good, ... it follows that the justice which is in this way styled general, is called ‘legal justice,’ because thereby man is in harmony with the law which directs the acts of all the virtues to the common

good.⁷⁷²

The backing of the *Grundrechte* is consistent with Aquinas' placement of the common good at the center of the reasonable application of rights through law such that rights, and therefore laws, make sense only in terms of the common good as their proper object. Ketteler had argued against his opponents, using the *Summa Theologica*, that his system had reason as its foundation, and the authority of the church was one that did not suppress people's freedom, but defended it.⁷⁷³ The conclusion in the *Sermons* summarized the contending argument of the liberals as attempting to force an external law of their own making:

At the same time, however, in the *Unglaubens'* outrage against every law and every truth that comes from a source other than humans themselves, there is an implicit Godlessness and untruth. It is that [the *Ungläubige*] refuses to be subject to any higher law and the higher truths regarding God and external to God. Moreover, he recognizes no divine authority and in truth desires to be a God himself.⁷⁷⁴

For Ketteler, wisdom is revealed in the course of history through the lived traditions of the church and society. He thereby finished the sermon with his 'theory of tradition.' This philosophical, theological, and sociological conception had infused his thinking from the beginning of his legal tutelage under the historical school. It influenced his opposition to the Prussian state during the Cologne Conflict as well as his theological education under the influence of Möhler and Görres. And it inspired his words and actions in the *Paulskirche*. His concept of tradition held that Christian revelation and the subsequent centuries of Christian reflection are part of the deposit of human wisdom.

⁷⁷² Ibid. II-II Question 57, "Of Right," art. 5, "Whether justice is a general virtue?"

⁷⁷³ Ibid. II-II Question 57, art. 8.

⁷⁷⁴ *SWB I*, 1:86.

Ideas about 'reason' emerged from this tradition, which continuously protected it as a valuable tool of mediation. Faith is thus ultimately and essentially reasonable, and it anchors society amidst the challenges presented by misleading ideologies. Ketteler distilled the complexity of the issues to a single ultimate question for the listeners of the *Sermons*: they had the choice to accept this position as their ancestors had done from the time of the early church or to reject it and substitute the authority currently shifting passions.

Our choice is not whether we wish to submit to authority or not, but rather to which authority we wish to subject ourselves... Our decision will determine whether later generations, as well as God Himself, will declare us blessed or cursed when sentence is passed on us. Amen.⁷⁷⁵

⁷⁷⁵ *SWB I*, 1:88. From the sixth sermon, translation *Ederer*, 97.

PART THREE:
Rights Discourse In The Vacuum Of Justice Of Prussian
Absolutism: Without Political or Legal Means, Ketteler's Later
Rights Discourse Appealed Directly To 'Justice'

The single most striking thing about Ketteler's later writing is that it comes from the pen of a lawyer. As bishop, he was a pious lawyer, but his argumentative style, his references to authoritative texts, and his understanding of precedents and procedures all reflect the temperament and approach of a man steeped in the study of law. This legal mind-set is just as important as Ketteler's Romantic social imagination for understanding his discourse of rights, though, both overlapped in the historical school of jurisprudence—especially in the Germanist branch that Ketteler favored. Given the precarious position of the Catholic Church in the increasingly Prussian-dominated German confederations and later nation, it was in great need of an advocate. Most often the role of the lawyer is determined by the narrow concerns of particular cases—this describes the great bulk of his writing for the first decade after he was ordained a bishop. Even when he synthesized the lessons of those particular cases to address the larger concerns of his times in major works, those larger works tended to be motivated by particular historical confrontations.

Historians define the period following the 1848 revolutions with reference to the political 1870 union of German states in a nation dominated by Prussia.⁷⁷⁶ National unification fulfilled the hopes of many Germans, flush with pride in the military victories over Austria in 1866 and over France in 1870. Ketteler and many leaders of the newly

⁷⁷⁶ Craig's "The Unification of Germany" is one example. Gordon A. Craig, *Germany 1866-1945* (New York: Oxford University Press, 1978).

founded Center Party, however, were wary of the new empire's (*Reich*) political structure established under Bismarck's leadership. The future leader of the Center Party, Ludwig Windhorst, remarked on the German victors planning the structure of the new empire in 1870, "Versailles is the birthplace of a military absolutism like that brought to bloom by Louis XIV."⁷⁷⁷ Ketteler had sounded a similar fear after the 1866 victory, comparing the confusion of military victory for justice and moral government to that of the days of Louis XIV to Napoleon.⁷⁷⁸ During the heady debates of 1848, Ketteler had joined in the discourse regarding the nature and structure of rights. The Frankfurt Parliament was debating the nature of laws, rights, and governments, and the discourse within and outside of the *Paulskirche* was appropriately philosophical and theoretical. Ketteler became bishop of Mainz in 1850 and his subsequent discourse reflected the concerns of his position. Whereas 1848 was a time of ideas when 'rights' were the topics debated on a fairly abstract level, his tenure as bishop was a time of realism.

⁷⁷⁷ Quoted in *Ibid.*, 50.

⁷⁷⁸ *SWB I*, 2:30 from *Deutschland nach dem Krieg* (1866).

8. Bishop And Leader Of German Catholic Church During Time Of Conflict: 1850 To 1877

8.1. Prussian Absolutism And Positivist Jurisprudence Undermined Legitimate Rights Discourse In The Public Sphere

The period leading up to the German national union in 1870 mirrored the political structure of the union itself, and as such, is treated as a continuum here. During this period taken as a whole, the political and legal structures within which rights could be claimed collapsed. Denied these structures, Ketteler's rights claims appealed to more universal foundations, namely in theories of justice. At the same time, he resolutely defended those legal freedoms that did persist.

The constitution of this 'imperial federation,' as Craig describes it, is a good example of the way subjective rights claims were undermined in late nineteenth-century Germany. The constitution "was to create the institutions for a national state that would be able to compete effectively with the most powerful of its neighbors, without, however, sacrificing, or even limiting, the aristocratic-monarchical order of the pre-national period."⁷⁷⁹ In theory, the administration of civil concerns in the new Germany was left to the provincial governments. In practice, in exchange for loyalty, Prussia gave a free pass to the authoritarian rulers of the individual states to resist reform. From the local to the national level, the legal and political forums for the defense of individual liberties were severely limited. As bishop after 1850, Ketteler was concerned with protecting the church's freedoms endangered locally, in Mainz's diocese within Hesse-Darmstadt, as

⁷⁷⁹ Craig, *Germany 1866-1945*, 39.

well as in the German union that was increasingly dominated by Prussia. He continued to use rights language and he maintained his basic social theory, but the changed context of the debate did diminish his expectations of a just political system with legitimate and constitutionally recognized rights. His addresses before the Reichstag after the king had been made an emperor show both Ketteler's wariness of the new government as well as his concern for justice.

To the strong foundations of the empire belong, in addition to a virtuous people and an intelligent military leadership, before all else, what the ancient saying says, *justitia est fundamentum regnorum* (justice is the foundation of governing). I hope, from the bottom of my heart, that this foundation will not be excluded from the new German empire, but that is something that will have to be seen in its construction. Yes, that must be demonstrated, whether justice—a foundation of morality—is in the empire, namely the fear of God.⁷⁸⁰

For justice to be demonstrated in the empire's construction, it would have to be part of the government's legal structure. Ketteler was not able to rely upon a legal or political culture to provide a check to the state. It is no accident that during this period that of scarce political legitimacy, the professors of legal science distanced their jurisprudence from moral considerations. Reimann traces this development to Kant's rejection of (essentially Wolff's) natural law philosophy and his differentiation of law from morality. "Kant had separated law from morals and had limited it strictly to the regulation of external acts."⁷⁸¹ Savigny, following Kant, understood the law as establishing boundaries for "individual spheres of freedom."⁷⁸² In the early part of the century, however, as Habermas notes, Savigny was still able to depend upon an integrated social structure and

⁷⁸⁰ *SWB I*, 4:3. Ketteler's address before the Reichstag, March 30, 1871.

⁷⁸¹ Reimann, "Nineteenth Century German Legal Science," 891.

⁷⁸² *Ibid.*

shared cultural values.⁷⁸³ Reimann argues that Savigny's system offered many advantages to the increasingly complex nineteenth-century Germany, but its 'formal' system was narrowly relevant to 'private law' and lacked philosophical and political justification. It offered no theory of state and consequently no protections to the individual against the state.⁷⁸⁴

Thus, parallel to the formation of a national state in the second half of the nineteenth century that provided little protection for fundamental liberties,⁷⁸⁵ the courts and jurisprudence in general focused upon the practice of private law as a non-political sphere. This trend was already present in Savigny, but it was completed by Ihering, Puchta, and other positivist legal scholars. It was during this period that academic jurisprudence separated the law from its moral foundations, and subjective rights were considered to be, as Habermas quotes Ihering, "from a conceptual standpoint, ... [the] power of law conferred on the individual by the legal order."⁷⁸⁶ Until this period, Habermas argues that subjective rights had been "morally laden," and that they could "claim normative independence from, and a higher legitimacy than, the political process."⁷⁸⁷ But the political, philosophical, and social developments of late nineteenth-century Germany degraded that "encompassing societal ethos" that bound together "cultural value patterns and institutions."⁷⁸⁸ In this impoverished legal and political context, Ketteler's discourse often sounded desperate and disparaging of rights. Unable to

⁷⁸³ Habermas, *Between Facts and Norms*, 85.

⁷⁸⁴ Reimann, "Nineteenth Century German Legal Science," 893.

⁷⁸⁵ Craig, *Germany 1866-1945*, 41.

⁷⁸⁶ Habermas, *Between Facts and Norms*, 86.

⁷⁸⁷ *Ibid.*, 89.

⁷⁸⁸ *Ibid.*, 95.

reference constitutional safeguards or generally accepted legal principles of ‘right,’ he made direct appeals to justice and the foundations of the social order.

Ketteler did not wash his hands of the political or legal process, however, and his most treasured piece of law was Article Fifteen in the Prussian constitution that first came into effect in 1850 and was adopted in tact by the imperial constitution in 1871. Ketteler called this the Magna Charta of religious freedom in Germany.⁷⁸⁹ The legislation was an important source of freedom for the church, but it also represents the ambiguous nature of rights language for Ketteler during this period.

The Evangelical and Roman Catholic Churches, just as every other religious community, are independent in their structure and administration. They remain in possession and use of their particular institutions, foundations and funds for their religious practice and, teaching.⁷⁹⁰

On its face, this article bears many similarities to the articles of religious freedom in the Frankfurt Parliament’s Basic Rights (*Grundrechte*) document. The critical difference of Article Fifteen, however, is that it did not grant the churches any ‘rights,’ and the document as a whole included no attempt to base its articles upon a foundation of justice. It was not a ‘right’ to religious freedom, as made clear when the question is asked: Who makes this law?⁷⁹¹ Rather, it was merely a rule that reflected the current will of the legislator. Habermas addressed this question of legitimation in *Between Facts and Norms* by distinguishing between the law’s ‘facticity,’ and its ‘validity.’⁷⁹² One of the law’s

⁷⁸⁹ *SWB I*, 4:12. Ketteler’s address before the Reichstag, April 3, 1871: *Rede über den Grundrechtsantrag des Zentrums*.

⁷⁹⁰ Udo Sautter, *Deutsche Geschichte Seit 1815: Daten, Fakten, Dokumente. Band 2, Verfassungen*, vol. 2 (Tübingen: A. Francke Verlag, 2004b), 80.

⁷⁹¹ Dietrich uses this question as a critical tool to reveal the law’s legitimacy.

⁷⁹² Habermas, *Between Facts and Norms*.

most distinguishing characteristics is that its reality, or ‘facticity,’ is literally enforced by the coercive power of the state. The law requires another characteristic, however, for it to function in a society; it must have legitimacy, i.e., ‘validity.’ Legitimacy requires that the ‘facticity’ of the law as a system of coercible rules be accompanied by the citizens’ general agreement that the rules are just. Because the criteria for justice are dependent upon the values of the governed community, when the governed community shares no single normative scheme, a crisis of legitimation is to be expected. The American Constitution made claims to represent the “We the People,” and the French Civil Code made claims of more universal justice. The failed 1848 revolutionary parliament made weaker justice claims in its constitution’s catalogue of rights, but the performative actions of the parliamentary body substantiated its legitimacy as a forum for the will of the people. The year 1849, however, marked the beginning of a dismal period for legal legitimacy in Germany, when the king rejected the constitution and knocked the wind out of the few sails still flapping for reform.

German society in the subsequent years had no free discursive forum—not in the political arena, the university, or the larger public sphere. Ketteler’s 1870 response to this disappointment with the government was a singularly modern turn to religious freedom on a level not even proposed by the liberal party.⁷⁹³ He called for a legal recognition of all religions as fully equal (*volle Parität*) and fully free from government control. He essentially advocated a ‘right’ of ‘free exercise’ based upon the principles of Christianity

⁷⁹³ Lenhart, *Ketteler: Staatspolitiker, Sozialpolitiker, Kirchenpolitiker*, 119-120.

itself (*selbstbegründeter Religionsfrieden*). And he claimed that it alone represents a standpoint of full justice (*allein der Standpunkt der vollen Gerechtigkeit*).⁷⁹⁴

It belongs to justice, that we grant to each his right; that is our proposal. It is just to those who recognize Christianity as it has been traditionally known. And it grants tolerance to those who believe, what I myself hold as impossible, a Christianity that can be held without any confessions of belief. Our demand is a demand concerning all, without qualifications.⁷⁹⁵

On the one hand, this was a political development for which there was little precedent in Germany or probably in Europe. Ketteler was careful to articulate his position as consistent with Christian ideals. Yet on the other hand, the move was also a pragmatic realization that the modern national form was too powerful and remote from the concerns of religion to be trusted with its care. Ketteler was ahead of the curve in proposing this radical level of tolerance, but it must also be seen as a judgment inspired by realism. It was a strategic move that appreciated the political turn to ‘strategic action’ where the public sphere and the more formally political spheres became locations for social bargaining, and less forums for public rationality. Aware of anti-Catholic feeling in German society, his clear and progressive sounding approach was formed with an awareness of its public impact. Again relying on Habermas here, in the midst of the pluralism that described Germany after the failed 1848 revolutions, there was no place for society to create the kind of solidarity and consensus needed for social functioning. The religious communities that had previously provided this solidarity were marginalized for internal and external reasons. The liberal movement in Germany bargained away its

⁷⁹⁴ *SWB I*, 4:12-13. Ketteler’s address before the Reichstag, April 3, 1871: *Rede über den Grundrechtsantrag des Zentrums*.

⁷⁹⁵ *SWB I*, 4:13. Ketteler’s address before the Reichstag, April 3, 1871: *Rede über den Grundrechtsantrag des Zentrums*.

political ideals for economic benefits, first in the customs unions and later in Bismarck's government. And the conservative ideals of the organic social structure proved to be a thin façade in light of the German aristocracy's single-minded reach for power in Prussia's bureaucracy and the economic system it supported.

Ketteler's rights language as bishop, therefore, was spoken in a vacuum of actual political legitimacy. The constitution promulgated by Frederick William in 1850 was a sham that represented no respectable normative scheme of justice, and it was ratified by a parliament elected under a façade of democratic representation.⁷⁹⁶ Ketteler's cherished Article Fifteen protected the churches' freedom to practice, essentially *jura in sacra*, but it lacked legitimacy. It was not structured as a right, it was linked to no explicit or inherent claim to justice, and thus it represented little more than the present will of the monarch. Further, it was enforced by officials who had no independence from the monarch's reach. That was the legal context that Ketteler found himself in when he began his tenure in Mainz. And that legal context was only reinforced by the structure of the new German nation in 1870.

8.2. Ketteler And The German Church 1850-1877: The 'Perfect Society' In An Imperfect World

Having achieved national prominence during the events of 1848, Ketteler was picked as the new rector of St. Hedwig's in Berlin, a parish with national significance in Prussia's capital city. This was a significant promotion for a young priest and the position became a stepping stone to the bishop's seat in Mainz. Both moves, to St. Hedwigs and to

⁷⁹⁶ Sheehan, *German History, 1770-1866*, 718..

Mainz, contained elements of the church/state conflict present in his initial entry to the priesthood. Uertz describes the kernel of these conflicts as lying in Prussia's legal vagueness regarding the boundary between properly inner-church matters (*jura intra sacra*) and properly state matters concerning the church (*jura circa sacra*).⁷⁹⁷ It was a conflict of cultures, or imaginaries, and it was rooted in the different political and religious histories of Protestants and Catholics in Germany.

Samuel Pufendorf is associated with the legal principle that the church is a voluntary association or corporation composed of equals, a *collegium aequale*, that gave rise to its name 'collegism' (*Kollegialismus*). 'Collegism,' distinguished from the term collegiality, became an important legal principle associated with mostly Protestant jurists.⁷⁹⁸

Pufendorf based this principle on an ecclesiology that denied any divine relevance to the hierarchical church structure, the "*societas inaequalis*," and obviously excluded the possibility of a church, a religious community, as a "*societas perfecta*."⁷⁹⁹ For him, rather, the church is most adequately described as a community of believers (a college) freely organized according to democratic principles and within the structures of private law. I mention this not because it corresponds to any government policy in Germany, but

⁷⁹⁷ Uertz, *Vom Gottesrecht Zum Menschenrecht*, 141..

⁷⁹⁸ Stephan Schwarz, *Strukturen Von Öffentlichkeit Im Handeln Der Katholischen Kirche: Eine Begriffliche, Rechtshistorische Und Kirchenrechtliche Untersuchung, Kirchen- Und Staatskirchenrecht* (Paderborn, Munich: Schöningh, 2004), 116.

⁷⁹⁹ *Ibid.*, 123. Himes notes that this term originated in the period after Trent when it meant that the church was a society that contained its own resources for its own ends. The state was not required for the church's proper *telos*. The term's later history was influenced by Bellarmine, who defined the church by its outward appearances, as a society composed of believers. Later, just as the term 'state' became identified with its leadership, the term 'church' was identified with the hierarchy. The tension of later ecclesiology rises with the question of infallibility, where 'society perfecta' could imply the perfection of human church leaders, *qua* human.

rather to point out precisely the opposite: In Germany, the governments of both Catholic and Protestant provinces reserved a significant role for the state's administration of affairs pertinent to the church, *jura circa sacra*. In Catholic provinces, the struggle for power in the church was often bloody, but it was conventional and predictable. In Protestant provinces, the Protestant Churches were formed according to congregational models that theoretically accepted a significant 'lay' involvement in inner-church (*in sacra*) affairs. Protestant governments resented the idea that a 'foreign sovereign,' the pope, could wield such significant power within their own boundaries. For Catholics in those provinces, they could not abide a Protestant bureaucracy inserting itself into matters it considered *jura intra sacra*. The Cologne Conflict was only one manifestation of this fundamental and deep-seated disagreement.

Bolton describes with great detail the political complexity of Ketteler's move to St. Hedwig. It was the only Catholic parish in Berlin, begun after Frederick the Great bestowed the property and a draft sketch of the sacred edifice to the Catholic church as a sign of his generous toleration. It was situated within the city's monumental district and Frederick's classical architectural design for the church complemented his plans for a glorified political capital. The domed house of worship was modeled on the Roman Pantheon, matched Prussia's government buildings and epic statuary, and lacked any recognizable elements of Catholic architecture. It was nevertheless a welcomed gesture that Catholic leaders continued to appreciate a century later. The German bishops envisioned St. Hedwig's as a Catholic embassy to the Prussian government and its rector (*Probst*) as their ambassador. The Protestant northeast was considered important

missionary territory and there were also ambitions for the parish as the nucleus of a new diocese. The parish presented many complications, however. Officially, for example, the pastor received his appointment from a Prussian bureaucrat, the “Minister of Public Worship,” and the parish was run according to a Prussian-approved charter that significantly limited the role of the pastor.⁸⁰⁰ Thus the appointment of its pastors, including Ketteler in 1849, illuminates the hopes and tensions of Catholics in a Germany under Prussian rule.

Ketteler’s correspondence during the machinations of his appointment exhibit a surprising confidence and independence from both state and church authorities. He was wary of accepting a post too quickly without insuring first that he had the freedom to lead the parish as he saw fit. With experience in both Prussian and Catholic bureaucracies, he knew that a position of leadership without the backing of superiors was hazardous duty, and he would be especially exposed as a Catholic in Berlin if he could not count on support from the bishops. He quickly and firmly rejected the first invitation for St. Hedwig’s appointment that he received from Prussia’s ministry for religious affairs, even though the letter was written by a Catholic minister, Matthias Aulike, whom Ketteler knew from his days at the Frankfurt Parliament. His response to the invitation goes beyond the usual clerical humility and feigned lack of ecclesial ambition that such letters call for, and its swiftness excludes the possibility of much counsel.⁸⁰¹ He was thus

⁸⁰⁰ Bolten, “Watch, Pray, Fight: Ketteler as Priest-Politician”, 173.

⁸⁰¹ *SWB II*, 1: 377-380. Letter from Ketteler to Matthias Aulike, the Catholic bureaucrat who petitioned for Ketteler’s transfer to Berlin. Aulike’s original letter forwarding the intentions of the Prussian Minister of Culture was dated April 10, 1849. Ketteler’s reply from Hopsten was dated April 17, 1849.

judging by his own lights, and it was inconceivable to him that he should accept a church position from a Prussian bureaucrat. His subsequent letters to bishops concerning his appointment bear the formulas of obedience and respect, but he was firm and even lecturing as he quoted canon law to his mentors. In one instance, for example, he scolded Bishop Diepenbrock for delegating church business to government officials. Ketteler interpreted Aulike's letter as the state participating in the formal process of appointing a Catholic rectorship, a matter properly *jura intra sacra*.⁸⁰²

He eventually accepted the position humbly, but only in response to the bishop's invitation—an invitation that assured him full responsibilities of office and the backing of the bishop. Satisfied that these were granted, he accepted the position, but his correspondence quickly returned to the “complete conflict between the law of the state and my conscience.”⁸⁰³ Always aware of the importance of legal fine points, after he took office in the parish, he advised the bishop that the principles of Prussia's 1812 charter instituting St. Hedwig's needed to be rejected because they, first, contradicted the principles of Catholic hierarchy, and second, they hindered the proper role of a pastor to care for souls.⁸⁰⁴

The skills and approach of a jurist are clearly present in Ketteler's letters as rector. His quarrel included a defense of church rights, unexceptional in itself, but notable in that he extended those rights to include the specific rights of individual pastors to care for

⁸⁰² Bolten, "Watch, Pray, Fight: Ketteler as Priest-Politician", 176. *SWB II*, 1:413. Ketteler's letter to Bishop Diepenbrock, from Hopsten, June 8, 1849.

⁸⁰³ *SWB II*, 1:432. Ketteler letter to Bishop Diepenbrock, December 12, 1849.

⁸⁰⁴ *SWB II*, 1:433. Ketteler letter to Bishop Diepenbrock, December 12, 1849.

souls.⁸⁰⁵ This seemingly subtle move reveals a continental shift in theory as Ketteler began to essentially translate the principles of a pre-modern Catholic worldview into the rights claims within a modern *Rechtsstaat*. In 1862 he contrasted the *Rechtsstaat* with the absolute state in a curious mixture of modern and Catholic legal philosophy. The *Rechtsstaat*, he argued, contains: 1) the protection of every right, corporate and individual; 2) an independent and just court of law; and 3) a legislation that represents an objective justice.⁸⁰⁶ The difficulty of establishing this third point was addressed with an outline of Aquinas' thought on law. The law (*Gesetz*) is the participation in eternal law, valid to the extent that it represents true justice, and realized in the natural law with the "light of natural reason,.... practical reason (*Vernunft*)"⁸⁰⁷ The notion of prudence was foremost in his application of Aquinas to his own situation, together with the persisting insistence that God is the source of all law.

Ketteler also applied his legal approach to his interaction within the church, quoting canon law to the Bishop Diepenbrock, who was responsible for his appointment. Here, he demonstrated a correspondingly modern view of the believer vis-à-vis the church's hierarchy. He made it clear that his conscience trumped even the clearly articulated written directives of his bishop if they strayed from the principles of church law. Whether or not Ketteler's intentions were to clash with the Prussian authorities regarding the

⁸⁰⁵ *SWB II*, 1:433. Ketteler letter to Bishop Diepenbrock, December 12, 1849. "Nach dem Kirchenrechte stehen dem Pfarrer als rector ecclesiae und als Stellvertreter der lehrenden Kirche alle die Rechte persönlich zu, die das Statut dem Kirchencolleg überträgt, und er kann sie mit dem Colleg so wenig theilen wie die Weihe, die er allein empfangen und wodurch er seine Befähigung zu diesem Amte erhalten hat."

⁸⁰⁶ *SWB I*, 1:285. *Freiheit, Autorität und Kirche*. (1864)

⁸⁰⁷ *SWB I*, 1:287. *Freiheit, Autorität und Kirche*. (1864)

running of St. Hedwig's in Berlin, he did not have time to follow through. He received word regarding his possible appointment as bishop of Mainz in February of 1850.⁸⁰⁸

Ketteler's subsequent 'election' to the episcopacy included a significant share of political tension, but like his appointment to St. Hedwig, Protestant government officials championed his career advancement. Despite his Prussian antipathies, his conservative credentials secured during the Frankfurt Parliament trumped any bureaucratic misgivings about him; both St. Hedwig's rectorship and the bishop's seat in Mainz required the state's approval. Aulike's 1849 recommendation to Frederick William IV for St. Hedwig shows the source and nature of Ketteler's national reputation:

He has gained an eminent reputation for his work with the poor and suffering as well as for his preaching. He has proved his worthiness during these exceptional times as a man with resolute political character and true loyalty. As a testament to this, he proved his moral integrity and courage all by his actions at the Frankfurter National Assembly... and especially at the memorial services for Prince Lichnowsky and General von Auerswald.⁸⁰⁹

The consequence of Mainz's episcopal election had diminished considerably after the diocese had lost its *Kurfürst* status and great properties under the French reorganization of the Rhineland. Still, the 1849/1850 election was followed by great public anticipation, especially as the seat had remained unfilled for over a year. Officially, according to agreements of the Hessian state with Rome, the bishop in Mainz was elected by a cathedral chapter of diocesan priests from a list of candidates acceptable to the Hessian ruler.⁸¹⁰ The candidate chosen was then essentially subject to the approval of the pope.

⁸⁰⁸ *SWB II*, 1:444. Letter to Ketteler from Heinrich (Mainz), February 10, 1850.

⁸⁰⁹ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 126. Quotation from the "Akten des preuss. Kultusminis." Cited in Hogan, "Ketteler's Interpretation of the Social Problem", 43.

⁸¹⁰ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 138.

Vigener's judgment of the election was that the cathedral chapter contained a majority of moderate canons who reflected the reasonableness of Bishop Kaiser, the deceased bishop of Mainz.⁸¹¹ This moderate majority, he argued, were opposed by three conservative canons under the leadership of a reactionary priest, Adam Franz Lennig, who also had the Hessian government's backing to succeed Kaiser. Bolton's assessment was that the long-reigning but distracted old bishop, Kaiser, had allowed a liberal contingent to gain advantage within Mainz's cathedral chapter, so that by 1849 they were able to reject the conservative candidate, Lennig, and nominated instead Peter Schmid, "a free-thinking professor of the University of Giessen."⁸¹² Schmid was painted as a 'pantheist' associated with the national church movement in Germany and Lennig succeeded in raising public protests from Mainz's Catholic faithful against him.⁸¹³

In the very public melee that followed, it was actually the government that undermined the cathedral chapter's election by withdrawing support from Schmid. This strange alliance between a Protestant government and conservative Catholics opened the door to such figures as Reisach to enter the fray and engineer a result more appealing to the German bishops and the Vatican. Officially, according to the nuncio's invitation to Ketteler, the cathedral chapter could reach no consensus. Instead, "with exceptional graciousness,"⁸¹⁴ the chapter granted the Pope permission to choose a compromise

⁸¹¹ Ibid., 144.

⁸¹² Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 182.

⁸¹³ Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 154.

⁸¹⁴ *SWB II*, 1: 214. Letter to Ketteler from the nuncio, Sacconi, from Munich, March 26, 1850.

Ketteler had to forward the letter to Bishop Reisach for a translation from the Italian.

Understanding the problems of communication, he sent the next letter in French, with a comment

candidate, and to that end offered three suitable candidates. Of the three, Ketteler was the ‘compromise’ candidate nominated by the beleaguered cathedral canons and chosen by Pope Pius IX—most probably according to the recommendation of Reisach, who enjoyed the pope’s close confidence and served as his liaison for the German church. Ketteler accepted the invitation with some eagerness, this time offering only his miserable Latin as a reason for his unworthiness.

The cathedral chapter’s welcome letter reveals some bad feelings about the whole affair, which is understandable considering that their important role in the diocese had been undermined. Ketteler’s response shows that he was well aware that his appointment was unusual, but that he considered it fully legitimate. His letter stressed his humble and obedient submission to the holy father’s call.⁸¹⁵ The stress on the pope’s decision was a clear indication that despite the disagreements, Ketteler considered his appointment fully valid and would take office with the confidence of that singularly essential mandate. Ketteler also enjoyed the support of the Hessian government and eventually worked closely with its Protestant ministers to negotiate concessions for his diocese that proved unreachable in other German Protestant provinces.

Mainz was a relatively minor German diocese in many ways, but Ketteler’s influence extended beyond Mainz during his twenty-seven years there until his death. As bishop during this precarious time, he became the advocate for the entire German Catholic Church, and continued to use the principles of the historical school of jurisprudence—as

that though it is not essential, he hoped that Ketteler could learn to write in Latin quickly. Corresponding in the German language was not a considered option.

⁸¹⁵ *SWB II*, 1: 478. Ketteler letter to the Mainz Cathedral Chapter, from Berlin, April 8, 1850.

he had learned it, and not as it had developed in the second part of the century. One of Ketteler's main themes as bishop was that the church was essential to the life of all society, and not just to those in the pews. 'Performatively,' the truth of this claim is proved by the effect of his own life, partially in his influence on Catholic political efforts like the founding of the Center Party, but also in his influence upon the great social encyclical, *Rerum Novarum*, which played a crucial role in the development of the Catholic Church's own self-understanding in relation to modern society.⁸¹⁶

The following concentration of his 'performance' of rights discourse as bishop responds to the contexts of three historical periods. The first period corresponds to the time of German political reaction begun in 1850. During this early engagement, Ketteler mostly attended to the concerns of his own diocese, except for the important exceptions noted here. When he used rights language during this period, he generally addressed very particular concerns like the re-establishment of the Mainz seminary, the property rights of specific endowments, or some other local issue. The second period, a middle engagement, treats Ketteler's writing relevant to the social and political developments beginning with the conflict of Germany with Austria. This was a time of industrial development and modern warfare, and Ketteler responded to both with writings that used a language of rights. The 1866 war spelled the end of Catholic hopes for religious parity in the German nation, and the 1870 war with France led to a German national structure complete with a new constitution. The third period here treats Ketteler's later theoretical responses to the social questions of the nation.

⁸¹⁶ Craig, *Germany 1866-1945*, 63.

8.3. Defending the Rights of the Church vis-à-vis the State: Religious Freedom & Conscience

Ketteler's time as bishop corresponds to the high period of Roman Catholic 'Ultramontanism,' a period that church historian Claus Schatz describes as peculiarly modern in its populist identification with the simple and poor masses, its use of popular means like newspapers, petition drives, and huge gatherings, and (in Germany) its concern with social questions.⁸¹⁷ Schatz ironically notes that the Catholic Church in Germany was the only beneficiary of the 1848 Revolution, benefiting from the pressure of opposition to create a unified front. Ketteler's appointment to Mainz was therefore timely, but he remained fairly quiet in the national scene after becoming bishop. One early work that raises some questions regarding his later use of rights, however, is "The Law (*Recht*) and the Legal Protection of the Catholic Church in Germany."⁸¹⁸ It came out in 1854 and still referenced the 'present church conflict,' as if the conflict beginning in 1837 was still a 'present' conflict. The document marks a continuation of his concern for the freedom of the church, and it represents the continuation of his understanding of corporate rights as analogous to individual rights.

For every legally recognized right, every well ordered society must also have a respective protection of that right. There must be a force capable of protecting injured rights. All individual and financial rights have this legal protection also against the power of the state in an independent court. A right without legal

⁸¹⁷ Klaus Schatz, "Die Phase Des Ultramontanismus (1850-1880)," in *Vorlesungen: Katholische Kirche, Liberalismus und Demokratie* (Munich: 2001), 69.

⁸¹⁸ *SWB I*, 1:133. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland, Mit Besonderer Rücksicht Auf Die Forderungen Des Oberrheinischen Episkopates Und Den Gegenwärtigen Kirchlichen Conflict.*

protection has no worth.⁸¹⁹

Following his standard argumentative methodology, Ketteler referenced history to trace the continuities and the discontinuities of law regarding the relationship of the church and the state, beginning with the middle ages. Since the Peace of Westphalia, there had been a continuity of respect for the inner working of the church, but this changed with the secularization of 1803.⁸²⁰ He judged this to be an unjust act whereby churches, schools, universities, monasteries, and other church properties were taken and mostly handed over to secular authorities. Again, the injustice of secularization was demonstrated according to various categories and standards of property possession. He used internal criteria of German laws regarding possession, and external criteria referencing points of universal justice. The present issue, building on the half-century of injured rights, was the encroachment of the state upon the “sovereignty” of the church, i.e., over the churches’ properly internal governance, *jura intra sacra*.⁸²¹ The focus of the work was on the church’s rights, but those rights were now also seen through the lens of the individual members comprising the church. Lacking a constitutional structure of ‘rights’ that he could reference, his argument instead referenced the internal criteria of German legal principles. Since private property was the clearest example of individual rights in German

⁸¹⁹ *SWB I*, 1:140. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland*. “Für jedes gesetzlich anerkannte Recht muß es in wohlgeordneten Zuständen auch einen entsprechenden Rechtsschutz geben, keine Gewalt, von der das gekränkte, verletzte Recht geschützt wird. Alle persönlichen und Vermögens-Rechte haben diesen Rechtsschutz auch der Staatsgewalt gegenüber in den unabhängigen Gerichten. Ein Recht ohne Rechtsschutz hat keinen Werth.”

⁸²⁰ *SWB I*, 1:145. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland*.

⁸²¹ *SWB I*, 1:154. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland*.

private law, the violation of intra-church independence was demonstrated as analogous to the plunder of secularization.

A red flag appears, however, in the great majority of rights references to the church in comparison to subjective rights cited in the text. The document's fear of liberalism and its continuing vehemence against the French Revolution mirror the century's early papal documents and depart from Ketteler's approach just a few years earlier in Frankfurt. Unique among Ketteler's extant works, since he dictated his later works, this manuscript was personally written and shows the corrections from his aides, Heinrich and Lennig. Ketteler benefited greatly from their editorial and research work; Iserloh notes that Ketteler always had Heinrich check his work before publishing and he never rejected his aide's corrections.⁸²² This is also attested to by the general consistency in his rhetorical method, yet the 1854 document's passion separates it from his later more dispassionate works.

In this document, we are privy to Ketteler's perhaps more spontaneous rights language, as well as to Heinrich's editorial pen that amended such language. Ketteler wrote that under the Protestant government, "the rights (*Rechte*) of Catholics had been violated"⁸²³ by proselytization. Heinrich corrected that rights phrase with "the laws (*Gesetze*) of the provinces were violated."⁸²⁴ Further insight is gained when Ketteler made the argument that the history of positive law in Protestant provinces was heavily swayed against the Catholic Church. He wrote that all the arguments of the "historical

⁸²² *SWB I*, 1:xi, Foreward by Iserloh, editor.

⁸²³ *SWB I*, 1:156. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland.*

⁸²⁴ *SWB I*, 1:156. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland.*

school of law” support his position, while Lennig changed it to “history of law.”⁸²⁵ This is critical because later in the paragraph, Ketteler scorned the “flags of human rights”⁸²⁶ that accompanied the bullets of revolutionary movements. In itself, it could be interpreted as a scorn for subjective rights. Yet, in the original, Ketteler’s identification with the historical school of law indicates a more pointed critique of liberalism, and not at the principle of subjective rights, which is well established in the historical school with which Ketteler explicitly identified himself.

Similar to the approach of the ultramontanes, “The Law and the Legal Protection of the Church in Germany” applies rights language primarily to corporate entities and government figures, however, showing possibly the influence of the more ultramontane Heinrich and Lennig on the young bishop.⁸²⁷ As opposed to the previous influences of Görres and Döllinger, this work demonstrates a significant parallel with the Protestant legal professor Friedrich Julius Stahl’s legal and social philosophy.⁸²⁸ Both Stahl and Ketteler began with the teleological principle that all law and justice are ultimately revelations of God’s purpose or *telos* for humanity. Stahl’s critique of the French Rights of Man was much more aggressive than Savigny’s. Although they essentially placed themselves within the historical school methodologically, both Stahl and Ketteler distanced themselves from later *Geschichtsjurisprudenz* scholarship with their greater emphasis upon the German origins of law over against the Roman influences. Both saw

⁸²⁵ *SWB I*, 1:162. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland*.

⁸²⁶ *SWB I*, 1:163. *Das Recht Und Der Rechtsschutz Der Katholischen Kirche In Deutschland*.

⁸²⁷ Müller, “Staatsphilosophischen Grundlagen Der Politik Kettelers”.

⁸²⁸ Friedrich Julius Stahl, *Die Philosophie Des Rechts Vol 1: Geschichte Der Rechtsphilosophie*, 4 ed., vol. I (Heidelberg: J.C.B. Mohr, 1870a; reprint, Elibron Classics series, 2003).

the need for the churches to play a role in Christianizing society, and both had monarchical theories that understood the king as a ruler under the law, not the source of law. Furthermore, they both placed great weight upon the moral sensibilities of the king—that the ruler embodies the will of the people in a way that transcends structural definitions. The monarch also had the responsibility to preserve the people’s Christian and moral character.

But there was a great difference between Stahl and Ketteler.⁸²⁹ Stahl became a non-critical shill for the Hohenzollern monarchy in the years after the revolution, granting him an origin that is ‘given’ in society, not dependent upon a social contract, a constitution, or any other objective criterion that would serve to limit his power.⁸³⁰ Stahl praised the wisdom of the king in rejecting the Frankfurt Parliament’s constitution with its catalog of rights. Ketteler, on the significant contrary, had worked to formulate that catalogue of rights, supported the adoption of the parliament’s constitution, and relied upon such articulations of the law to rein in the state’s power. Ketteler recognized the importance of such law as the state became increasingly centralized nationally, and as it continued to threaten the freedom of the church. The church had a purpose distinct from the state for Ketteler, but he held that the church possessed an authority of equal dignity to the state.

⁸²⁹ Karsten Petersen, *Wilhelm Emmanuel Von Ketteler Und Die Freiheitsforderungen Seiner Zeit "Ich Höre Den Ruf Nach Freiheit"; Eine Studie Zum Verhältnis Von Konservativem Katholizismus Und Moderne Im 19. Jahrhundert, Veröffentlichungen Der Kommission Für Zeitgeschichte; 105* (Paderborn: Schöningh, 2005), 85 Petersen demonstrates here the difference between Ketteler and Stahl.

⁸³⁰ Friedrich Julius Stahl, *Die Philosophie Des Rechts Vol 2.2: Rechts- Und Staatslehre Auf Der Grundlage Christlicher Weltanschauung, Die Staatslehre Und Die Principien Des Staatsrechts*, 4 ed., vol. II, Part 2, Book 4 (Heidelberg: J.C.B. Mohr, 1870c; reprint, Elibron Classics series, 2003), 11.

With a nod to precedent and perhaps a jab at Stahl, Ketteler insisted that the church possessed a much more ‘objective’ connection to God’s revealed intentions, since it was founded by Christ. Also, Ketteler’s practical sensibility gave him the flexibility to understand the difference between a medieval and a nineteenth-century monarch. Stahl, on the contrary, was content to rely upon the aristocracy as the moral conscience of society, protecting its Christian character out of an inborn sense of duty.⁸³¹ Ketteler had long realized the moral depravity of his class in their self-interested clinging to titles and privileges at the expense of the common good.

In 1862, after a dozen years in his bishop’s office and now past fifty, Ketteler’s “Freedom, Authority and the Church” represented his more developed response to the German liberals regarding the nature of freedom in terms of religious belief and practice, and the resulting nature of the church in a political state. He showed little signs of Stahl’s influence and, instead, engaged liberal thought from a more confident philosophical position in terms of his rights language—specifically referencing the rights of individuals. Ketteler essentially argued that a state which hinders the free work of the church deprives citizens of their freedom. The church, correspondingly, may not hinder the actions of the state or adopt means like physical coercion that are exclusively state measures. When expressing his conception of the proper relationship of the church to the state, he projects a remarkably modern notion of the public sphere and the role of the Catholic press to direct public opinion towards justice. While the state (*weltlichen*

⁸³¹ Ibid., xxv.

Souveränität) is ordered towards justice, the church has the role to instill the virtues that inform justice. The care of justice in the state is defined practically and juridically.

A principle duty of the state is to legally protect all rights, as well as the prompt and careful dispensation of justice. We are lacking greatly in this most important aspect of civil life! Under the demands of the time, there is no more important benefit, than the ability to have our rights protected by a court of law. The Catholic press must diligently work towards this end. The protection of denied rights has always been respected as one of the highest moral virtues of Christianity.⁸³²

This principle is central to the legal principles of the historical school of jurisprudence, but Ketteler described it in a way that would appeal to a liberal-minded public. He had already indicated the importance of public opinion, and he here performatively demonstrated his point by rhetorically claiming a typically liberal plank for his own house. This point is followed by a concern for the state's "lofty" role in creating law.⁸³³ Without denying the state's role here, he bemoaned the confusion of existing law and compared it to the perfect simplicity of the pre-modern German peoples' 'lived' cultural law. "Our German ancestors loved the law; they had a deeply cultivated sense of the law (*Rechtssinn*) and venerable norms for their *Rechtsverhältnisse* (the matrix of legally definable human relations)."⁸³⁴ The rhetorical shift is noteworthy in that he shifted from the key terms of liberalism and tied them together with the key ideas of

⁸³² *SWB I*, 2:249. *Freiheit, Autorität und Kirche*: "Hierher gehört erstens **Rechtsschutz** für alle Rechte, verbunden mit einer schnellen und wohlfeilen **Rechtsprechung**. Wie Vieles fehlt uns noch von diesen höchsten Gütern des bürgerlichen Lebens! **Unter den Forderungen der Zeit ist wohl keine berechtigter, als daß jedes Recht zu seinem Schütze** auch ein Gericht finden könne. Dieser Richtung muß sich gewiß die katholische Presse mit allem Eifer annehmen. Der Schutz eines unterdrückten **Rechtes** ist zu jeder Zeit als eine hohe sittliche Tugend im Christenthume angesehen worden." [bold mine]

⁸³³ *SWB I*, 2:249. *Freiheit, Autorität und Kirche*.

⁸³⁴ *SWB I*, 2:249. *Freiheit, Autorität und Kirche*.

the Germanist branch of the historical school of jurisprudence. He even cites the “*Sachsenspiegel*,” which is one of the oldest and most cherished written forms of Germanic law. What Ketteler does not do is replicate the anti-subjective rights discourse of his earlier document—a rhetoric that continued to dominate papal documents until the appearance of *Rerum Novarum* in 1891, nearly thirty years later.

This is the key insight of Adolf Birke’s *Ketteler und der Deutsche Liberalismus* (1971)—that Ketteler had recognized the power of liberal arguments concerning freedom, that the church could not afford to appear contrary to this great human good, and that he had to position the church not only to appear to be, but to truly defend freedom as a ‘right’ from its dangers. In this way, Birke notes, Ketteler “did not distinguish himself from the liberal Catholics of Western Europe, with whom he shared the difficulties of representing to the church a position favoring tolerance.”⁸³⁵ To Catholics he based his position on tolerance on classical theological principles, and to those outside of the church, he had to fight the ingrained presuppositions that the church was an intolerant institution, an attitude cemented with the promulgation of the *Syllabus* in 1854. His hinge category, with which he focused his arguments to both sides of the question, was the human conscience. And for this, he looked to Aquinas and his understanding of practical reason.⁸³⁶ In many ways, according to Birke, even the delving into the social question can be seen in light of this question, as Ketteler’s turning the light of reason upon itself, and seeing itself from the perspective of the liberal critique of the church. Contrary to Habermas’ presupposition that religious communities, as ‘pre-

⁸³⁵ Birke, *Ketteler Und Der Deutsche Liberalismus*, 29.

⁸³⁶ *Ibid.*, 32.

rational' life-world spheres, would crumble under the scrutiny of reason, this scrutiny seems to have provided new life to the German Catholic Church.⁸³⁷

While the emphasis here is on rights discourse, it is important to note that Ketteler's achievement was more than a shift to a modern rhetoric, though the language element is key. By translating essentially Catholic principles of social thought into modern applications, he revealed a strength in that thought that was able to build upon the insights of social thought foreign to itself. The veneration of law, including rights, was a long-cherished Catholic value. Ketteler recognized that liberalism's explicit focus of rights upon individual freedoms was consistent with Catholic principles and in fact had a power to reveal aspects of human dignity that had been historically lacking in Catholic tradition. His hierarchical social theory, protected from abuse by legally structured and recognized subjective rights, even came to be articulated in a language of rights that emphasized the interrelatedness of human existence. By critiquing the egoism of liberalism and its tendency to value the 'rights' of the most wealthy or most powerful, Ketteler was as much as saying that all people have the right to live in communities not endangered by persons claiming rights dangerous to the community. The principle of subsidiarity orders embedded and interrelated spheres of integrated communities towards a common good. The common good is articulated according to a full vision of human flourishing revealed by a Christian anthropology. When the varied human spheres are collapsed in a centralized state, such that every individual stands equally impoverished before the power of the government, human culture is degraded.

⁸³⁷ Habermas, *Between Facts and Norms*, 21. Also, "The Social-Structural Transformation of the Public Sphere," Chapter 5 from Habermas, *Structural Transformation of the Public Sphere*, 141.

Rights to human goods, such as private property, benefited from the traditional understanding offered by Aquinas and others, as well as their relation to modern notions of freedom. Also relevant here is the argument Ketteler made here and later in “Liberalism, Socialism and Christianity”(1871) that the modern notions of freedom, equality and such were not only compatible with Christianity, but were harmed without the contributions of religion.⁸³⁸ Liberalism and Socialism, for example, when cut off from the reality of human transcendence as revealed in Christianity, are united in their tendency towards absolutism. It is not enough for procedural structures for society to thrive—those procedures must be just. The *Rechtsstaat*, Ketteler argued, required a bureaucratic structure for the protection of every right, an independent court of law, and a law that represents justice. Yet absent a belief in the Christian God, the creator and purpose of all human life, law lacks purpose and is simply convention. Ketteler quoted Aquinas’ *Summa Theologica* as well as Augustine for these insights.⁸³⁹

In turning his critical eye to the church, as well as to those same Christian principles that he had applied to society, Ketteler articulated a theory of religious freedom in a language of rights. First, he did not allow any case where faith is forced or where the church uses violence to achieve its ends. There are no exceptions to this principle. Further, the state itself is restricted by the right of the individual to freely choose a religious faith. On the level of *jura intra sacra*, however, the church has the right to expel

⁸³⁸ *SWB I*, 4:21. “Liberalismus, Socialismus und Christenthum. Rede gehalten auf der XXI. General-Versammlung der katholischen Vereine Deutschlands von Wilhelm Emmanuel, Freiherrn von Ketteler, Bischof von Mainz.” Mainz: Franz Kirchheim 1871.

⁸³⁹ *SWB I*, 2:286. *Freiheit, Autorität und Kirche*. Aquinas, *Summa Theologica*. I-II “Treatise on Law,” Question 90, “Of the Essence of Law,” art. 1, “Whether law is something pertaining to reason?”

members who do not share the faith.⁸⁴⁰ Curiously, Ketteler applied the principles of subsidiarity and rights to the church, outlining a proper relationship of the church to the state. Beginning with Jesus Christ, “the first right is the right of Christ,”⁸⁴¹ and every other right in the church is founded on this one. The church is free from the state insofar as it is carrying out the will of Christ, and therefore it has a right to that freedom from the state. Bishops have rights within their proper spheres, as do pastors and teachers, and finally families and individuals have their rights regarding their faith from Christ. The state has the *Patronsrecht*, or right and duty to protect the church, but that is external to the central element of the church, which is belief.⁸⁴²

In Ketteler’s later writings, this was essentially the structure of rights that informed his arguments. Thus, regarding Jesuits in his diocese, he argued that he, as bishop, had a right to continue the labor of Christ and parents have a right to educate their children and teach them their faith. The Jesuits pose no specific threat to the state and so the state’s exclusion of Jesuit institutions from German soil is a violation of his right as bishop and the parents’ right to educate their children.⁸⁴³ Similarly, the principle of subsidiarity is applied to the property rights of previously secularized church lands and funds in his book *The Workers Question and Christianity*, published in 1864.⁸⁴⁴ There, he argues that even aside from the question of unjust acquisition, the great value of property taken from the churches ought not to go to the state, but to that social sphere most in need of it. The

⁸⁴⁰ *SWB I*, 2:309. *Freiheit, Autorität und Kirche*.

⁸⁴¹ *SWB I*, 2:317. *Freiheit, Autorität und Kirche*.

⁸⁴² *SWB I*, 2:318. *Freiheit, Autorität und Kirche*.

⁸⁴³ *SWB I*, 2:549. “*Die Jesuiten In Mainz Und Die Beschwerde Des Gemeinderathes*. (1864)”

⁸⁴⁴ *SWB I*, 2:376. “*Die Arbeiterfrage und das Christenthum*. (1864)”

church has the right to fulfill its function, including the care for the poor. And the poor have the right to flourish in their own familial communities. Thus, given that there is already a claim by the church on the secularized funds, and given the principle of subsidiarity, the secularized funds should be extended to the churches for the purpose of caring for the poor.

The practical nature of Ketteler's rights argument allowed him to reach some levels of compromise during the middle period of his tenure as bishop. During this time especially, he stressed the need for the nation to build up the virtues of the community, and the role that the church has in aiding that effort, especially in education.

Central to Ketteler's argument regarding rights was his conception of true freedom. Ketteler's conception of freedom was closely related to virtue and it located the responsibility for fostering that freedom within the community through education. This was fundamentally at odds with the liberals who viewed freedom much more along the line of an absence of restrictions. Thus many political crises between the churches and the state flared over school issues. Ketteler's argument flowed from his organic understanding of the person and society where the development of the child is the responsibility and right of the parents, the first natural teachers of children. Ketteler accused the liberals of giving that right to the state, such that education was to be a public affair and thus devoid of religious instruction. Birke's *Bischof Ketteler Und Der Deutsche Liberalismus* went into detail in outlining Ketteler's difference with liberalism, showing that Ketteler's 'illiberalism' was of a peculiarly modern and German character.

The parameters of the debate were demonstrated in an early exchange between Judge Thüssing and Bishop Ketteler. Thüssing challenged Ketteler and granted the community no rights of self regulation in the school.

The community is only an institution which has title to existence in virtue of the state and without the state it cannot be so much as thought of. Self government for a community is a concession from the state, The state alone is the only receptacle of rights; it alone has its legal existence of its own right or from the people as a totality, but not from any community.⁸⁴⁵

This is a classic German liberal stance with a strong Hegelian understanding of rights stemming from the state, a state which embodies the spirit or will of the people but which stands very much apart from the people. The state, according to the German liberals, was not even subject to the binding force of critical reason and universal law.⁸⁴⁶ Ketteler countered with his own understanding of the state, of rights, and of how those rights adhere to the local community in its obligation to foster a good society. Similar to Stahl, true law is always a participation in the eternal law, or God's law, such that properly structured law participates in the eternal law to the extent that it is true. Parents, as mentioned above, have rights regarding their children according to their role as parents. This right is holy and inviolable. Stahl goes so far as to say that parents are never bound by oaths sworn regarding this right.⁸⁴⁷ Ketteler echoes this principle here.

It is my leading principle, gentlemen and fathers of families, that you yourselves by divine and natural law are the responsible persons for your children and that you, parents, have the holy and inviolable right to decide how

⁸⁴⁵ *SWB II*, 1:346. Letter from Thüssing to Ketteler, September 2, 1848.

⁸⁴⁶ Dietrich, *Catholic Theology in the Age of Idealism*, 22-23.

⁸⁴⁷ Friedrich Julius Stahl, *Die Philosophie Des Rechts Vol 2.1: Rechts- Und Staatslehre Auf Der Grundlage Christlicher Weltanschauung, Die Allgemeinen Lehren Und Das Privatrecht*, 4 ed., vol. II, Part 1, Books 1-3 (Heidelberg: J.C.B. Mohr, 1870b; reprint, Elibron Classics series, 2003), 483.

your children are to be educated.⁸⁴⁸

Ketteler's theory of state pertained to the relation of the church to the state and the need for the churches to raise moral questions and suggestions regarding social problems. The following works are especially relevant here: *The Labor Problem and Christianity* (1864); "The Labor Movement and Its Goals in Terms of Religion and Morality" (1869); "The Charitable Concern of the Church for the Working Class" (1869); and "The Sovereignty of the State" (after 1865); and "The Separation of the Church and the State" (1875).⁸⁴⁹ Ketteler first argued for his 'right' to speak on this issue as separate from his duty, and then he went on to argue for some fundamental rights of all people in terms of their dignity as human beings. Being treated as a commodity degrades the worker, and deterministic economic theories leave the worker with no practical help. "It is like the supposed friend who has pushed his comrade into the water and now stands on the river bank concocting various theories as to how the drowning man might be saved."⁸⁵⁰

Ketteler built the argument on the right to what amounts to be a living wage upon the argument for private property. As the practical circumstances of our natures determine that property is necessary for just living, so too ought the private property generated by labor be commensurate to the needs of the workers for meeting their most basic requirements for family life. But even here he accepted the validity of variability in the

⁸⁴⁸ *SWB II*, 1:325. "Offenes Schreiben des Deputirten in der deutschen National-Versammlung Pfarrers von Ketteler an seine Wähler. Sept 17, 1848."

⁸⁴⁹ *Die Arbeiterfrage und das Christenthum (SWB I*, 1:367); "Die Arbeiterbewegung und ihr Streben im Verhältniß zu Religion und Sittlichkeit: Eine Ansprache, gehalten auf der Liebfrauen-Haide am 25 Juli 1869" (*SWB I*, 2:407); "Die Fürsorge für Fabrikarbeiter, Gesellen, Lehrlinge und dienstlose weibliche Dienstboten," (*SWB I*, 2:429); "Die Souverainetät des Staats," (*SWB I*, 5:373); "Trennung von Kirche und Staat," (*SWB I*, 5:388).

⁸⁵⁰ *Ederer*, p. 327, from *The Labor Problem and Christianity*.

application of this law: “The particular national character of a people also influences and introduces particular peculiarities into the development of the private property right.”⁸⁵¹ Into this rights equation Ketteler also weighed the common good and human dignity, which is best nurtured in a society guided by Christian principles that prohibit the exploitation of the poor as workers.⁸⁵² Upon this foundation Ketteler approved of workingmen’s associations and trade unions which further their cause, and he approved of the use of strikes by trade unions to achieve their goals: “It is a requirement of justice and of Christianity that the workingman is entitled to a just wage.”⁸⁵³

8.4. Final Engagement: Still Striving For Integration—The Church Is Needed To Defend Human Principles

On July 1866 the Prussian-led forces decimated the Austrian army, forcing an Austrian retreat not only from the war, but from influence in the northern German provinces. The ‘little German’ solution was the name given to the structure of a German nation with Austria excluded. Catholics in the remaining provinces had to come to terms with being a minority in the Prussian-dominated national structure that was realized after another war in 1870, then with France. Birke described the reaction of the Catholics as pessimism and disappointment on the one hand, and the reaction of many others as falling into line with Bismarck’s political policies on the other hand. The success of the armies on the ground gave force to his political approach to governing by his lights without limits to his power. He was certainly aware of the need for certain levels of

⁸⁵¹ Ederer, p. 361, from *The Labor Problem and Christianity*.

⁸⁵² Ederer, p. 398, from *The Labor Problem and Christianity*.

⁸⁵³ Ederer, p. 444, from *Die Arbeiterbewegung und ihr Streben im Verhältniss zu Religion und Sittlichkeit*.

public support, but he was unhindered by constitutional laws, ruling essentially unconstitutionally since 1862 because of a dispute about the raising of funds to support the army.

Bolton offers a less dismal picture of the situation for Ketteler, who had achieved significant freedom for the church in his own diocese despite its Protestant government. In fact, Bolton argues, a Catholic ruler combined with a liberal legislature could pose a significantly greater threat to the church, *jura intra sacra*, than Protestant rulers like the Hohenzollerns, who tended to respect Ketteler's cherished constitutional article of religious freedom for the churches.⁸⁵⁴ Bolton suggests that the Vatican's consideration and ultimate promulgation of an infallibility doctrine were also a great cause of concern for the church in Germany.⁸⁵⁵ Though it is an essentially theological claim, its significance underlines the interconnected nature of the church and state during this time. Ketteler's course was one of moderation and compromise, insuring the wrath of extremists on both sides of the issue. The Vatican and the German ultramontanes considered that Ketteler was caving to liberal pressures. The new German political alliance between conservatives and liberals (joined together in the period of national consciousness under Bismarck) considered Ketteler a threat to full political integration in the new nation.

Birke notes that the convergence of Prussia's successful bureaucracy, army, and politics inspired religious interpretations of the historical events. The defeat of Austria was seen as a victory for Protestantism, which was destined to unite the German nation

⁸⁵⁴ Bolton, "Watch, Pray, Fight: Ketteler as Priest-Politician", 8.

⁸⁵⁵ *Ibid.*, 302.

by subsuming the Catholic Church in a new German Church.⁸⁵⁶ This idea had a history in Prussia, where Ketteler's old parish, St. Hedwig's in Berlin, was designed a half-century earlier to be a temple of this unified German Church. In this atmosphere, after a couple of months of regret, Ketteler published his "Germany After the War of 1866" to provide the church with direction. His solution, true to form, was to insure the continued freedom of the Catholic Church in a nation under Prussian leadership, but limited by the insurance of constitutional limitations. Ketteler assigned the blame for the war equally to the Prussians, who were willing to use any means to achieve their aims (*Realpolitik*), and the Austrians, who exhibited hubris in blocking Prussia's national hopes. The greatest danger facing Germans was the continued advance on a trajectory of military absolutism that accepted no limits to its power. It would only succeed at the expense of justice. God allowed these things to happen, Ketteler theologized, but then he provides the grace necessary to deal with them.⁸⁵⁷ Not surprisingly, Ketteler suggested that God's grace be made present in the form of rights that protected the work of the church.

With the unification of different peoples, it is the work of the government to insure the continuation of rights that those peoples had previously enjoyed.⁸⁵⁸ These rights protect the religious freedoms previously enjoyed, and conversely, the recent papal encyclical *Quanta cura* poses no threat to the rights of non-Catholics in Germany.⁸⁵⁹ Ketteler realized that he needed to both propose the principle of religious freedom and defend the Catholic Church's public stance on freedom in the same breath. He maintained

⁸⁵⁶ Birke, *Ketteler Und Der Deutsche Liberalismus*, 73.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *SWB I*, 2:36. *Deutschland nach dem Krieg, 1866.*

⁸⁵⁹ *SWB I*, 2:75. *Deutschland nach dem Krieg, 1866.*

the principle of tolerance by excluding the possibility that force and faith were compatible. It was a quite modern notion of tolerance which, at least as stated, was not an acceptance of the lesser evil, but rather the promotion of a good—the freedom to believe—in a legal form.

Birke notes that Ketteler's attempt to steer a middle course met little success, and it was followed by the preparations for the First Vatican Council that boded ill for the German Catholic Church, which was already reeling from *Quanta Cura*. Ketteler went to the bishop's conference in Fulda to prepare for the council with a letter to Pope Pius IX containing a plan to deal with social problems in Germany, and was quickly forced to abandon it.

The signs of the times, it appears to me, call for me to put forward the principles of justice and love, whereby the different classes in the human community might be able to join in a common life, the rich and poor, the aristocratic and the worker, etc ⁸⁶⁰

The legitimacy of his system required a public face that reflected the reality of the church's deepest claims, but the actions of the larger church as represented by the claims of the Vatican Council were interpreted by non-Catholics as evidence that their claims of rights were hollow sanctuaries of self-interest.

This chapter opened with the image of Ketteler the fighter addressing the Reichstag after the founding of the Empire with its weak constitution. The image is of the bishop both bold and defensive, rising to a political podium, according to the transcripts, that opened the speaker to considerable abuse. Ketteler gave as good as he got, exchanging barbs as well as delivering speeches on grand themes. What is key, however, is that he

⁸⁶⁰ *SWB I*, 2:113. *Deutschland nach dem Krieg, 1866*.

engaged in this discourse and recognized its importance even when it lacked considerable legitimacy. Further, his early legal training was followed by almost three decades of social and political theory that trained his attention upon the spirit, letter, and practice of the law.

Ketteler took to the podium again in November 1871 to debate the relative jurisdiction of the Empire's constitution over the individual provinces. This was another topic of subsidiarity and Ketteler addressed it from the internal substance of the law. The new Empire had formed a constitution that was fairly empty of legitimacy; the Reichstag itself had only an advisory role. And yet the proposal was that it overruled the constitutions of the individual provinces that, in some cases, contained the long-standing legal traditions of those peoples. This gave him pause to scold the liberal party that was supporting the measure. To paraphrase—'You used to be the party that opposed the government and defended principles of liberty. Now you have grown up to become the minister's party.'⁸⁶¹ Bismarck had orchestrated first the weak Reichstag that he could easily maneuver. Then he declared a universal suffrage act, confident that he could control popular opinion more easily than the previous political powers in Germany. And with this third move, towards subordinating the provincial constitutions to the national one, he was further manipulating a political system with tools that were, on their face, liberal ones: popular suffrage, centralization, constitutional rule.⁸⁶² Ketteler opposed the measures, and yet his participation in the system was the performative demonstration of his deference and respect for the political process. Further, his goal was the defense of

⁸⁶¹ *SWB I*, 4:41. Ketteler's Speech before Reichstag, Nov 2, 1871.

⁸⁶² *SWB I*, 4:40. Ketteler's Speech before Reichstag, Nov 2, 1871.

established law, which had evolved to include subjective rights as the essential protections of social justice in the modern nation structure.

CONCLUSION:

9. Conclusion: “Subjective Rights” Past And Present

9.1. Subjective Rights In Nineteenth-Century Germany

Ketteler utilized a language of rights to defend not only claims of justice for the church and the state, but also for individuals in a way which was consistent with and foreshadowed the church’s twentieth-century use and understanding of human rights. His writings on political and theological issues from 1848 to 1872 represented a significant early Catholic engagement with modern forms of representational and constitutional governments and theories. He was a consummate political pragmatist with a keen awareness of legal practice and political theory. He addressed and respected many liberal critiques of the social, economic, and political order, but he unequivocally rejected the individualistic and atomistic premises of the liberal political theory he encountered in Germany. He acknowledged and learned from the social analyses from the left,⁸⁶³ but in response to the staunch secularism of liberalism, he argued that religion was necessary to reform the tragic social conditions that plagued Germany as it transitioned to an industrial market economy. His own position was both traditional and pioneering as he clung to a classical natural law philosophy, but he creatively applied the texts of this tradition to his own time. In doing so, he was drawing from the Romantic principles of the historical school of jurisprudence (*Geschichtsjurisprudenz*). This legal school, profoundly influenced by Savigny, provided Ketteler with the hermeneutical tools to apply the

⁸⁶³ Lasalle was the most prominent of the socialists whom Ketteler addressed. Vigener, *Ketteler: Ein Deutsches Bischofsleben*, 506,543-545.

philosophical, religious, and cultural insights of his tradition to the contemporary world. It is important to emphasize again, however, that as German jurisprudence shifted to a legal positivism in the late nineteenth century, Ketteler recognized the danger and distanced himself from it.

His 'interpretation' of the Catholic tradition for his own time began in 1848 with a series of sermons that acknowledged St. Thomas Aquinas' authoritative teaching in the classical natural law tradition, analogous to the great tomes of Roman law for the jurists. This approach was also analogous to Savigny's historical jurisprudence in that Ketteler put aside the centuries of scholastic gloss to appreciate the original historical texts. In the thirteenth-century *Summa Theologica*, Ketteler found resources to deal with the social questions (*Sozialfrage*) facing the church in the nineteenth century because Aquinas' work contained wisdom that transcended the medieval context. The wisdom was partially theological, concerning God's nature and God's revelation to humanity through Christ. The wisdom was also philosophical, concerning the potential and limitation of human understanding. Essential for Ketteler was the way that Aquinas demonstrated the inherent relation between theological and philosophical wisdom, as well as how that wisdom is applied practically to human society.

The liberalism of nineteenth-century Germany that Bishop Ketteler opposed was distinct from that of France and England, but still shared basic modern natural law philosophical presuppositions and its secularizing agenda. Maritain used Kant's own description to sum up its theory of rights:

'A person... is subject to no other laws than those which he (either alone or jointly with others) gives to himself.' ... This philosophy built no solid

foundations for the rights of the human person, because nothing can be founded on illusion... it led men to conceive them as rights in themselves divine, hence infinite, escaping every objective measure, denying every limitation imposed upon the claims of the ego, and ultimately expressing the absolute independence of the human subject and a so-called absolute right...⁸⁶⁴

Classical natural law, on the other hand, locates its philosophical roots in Aristotelian moral theory, building on its teleological eudaemonistic framework and its reliance upon practical reason for discerning the human good. St. Thomas Aquinas is the constant referent for the Catholic version of classical natural law, and his *Summa Theologica* is the single most authoritative textbook of its moral theory.⁸⁶⁵ The fact that this is a ‘theological’ book should not be overlooked, for while St. Thomas maintained the distinction between the natural and the supernatural, human ‘nature’ is most completely understood in terms of its divine origin (humans are creature of God), its capacities imaging God’s being (the intellect and the will mirror God knowing and loving, if incompletely), and its ultimate purpose (resting in God). That said, the natural law may be summarized briefly as a ‘moral realist’ philosophical approach that begins with the ontological and anthropological claim that there is a common and essentially social human nature.

Classical natural law holds that humans are intelligent beings ordered to the Good with an intrinsic facility to reason that good practically. Humans discern their personal

⁸⁶⁴ Jacques Maritain, *Man and the State*, Charles R. Walgreen Foundation Lectures (Chicago: University of Chicago Press, 1951), 83. Maritain quotes from Kant’s *Introduction to the Metaphysics of Morals*, IV:24.

⁸⁶⁵ The most relevant passages of Aquinas’ *Summa Theologica* for the modern question regarding subjective rights are, from the “First Part of the Second Part, (I-II)” questions: 91(arts. 1-3), 94 (arts. 1,4.5), 96 (arts. 1-2); and from the “Second Part of the Second Part (II-II),” questions 42 (arts. 1, 2, 7), 66 (art. 2). From class notes: D. Hollenbach.

and common purpose by using reason and, when acting according to their true nature, consider and cultivate their true happiness. True happiness on the natural level is the life of perfect virtue, and because humans are inherently social creatures, it is cultivated in society. Because the faculty of practical reason is limited, however, by deficient understanding and disordered personal and social wills, human happiness is no easy task and relies upon civil government to foster the good life and protect society from threats to the common good. In this, the state uses positive law (the promulgated laws of the state) to foster the ends of natural law, though with the obvious caution that “human law does not prescribe concerning all the acts of every virtue,”⁸⁶⁶ and the law cannot prohibit every vice.⁸⁶⁷

Habermas argues that the classical natural law, in its form remodeled by Aquinas, provided an ethical structure that permeated individual and institutional realms in its vertical dimension, and in its horizontal dimension, “allowed the normative elements of ethical life, politics, and law to intermesh.”⁸⁶⁸ He claims along with contemporary thinkers, however, that the process of rational reflection destroyed natural law’s foundations and emptied its conventions of meaning. The natural law is not simply a list of propositional truths, however. It is a rational commitment to the ontological principles of human nature and purpose. While avoiding the pitfalls of ‘naturalism’ the principles of this natural law are binding because, as Maritain summarizes,

our knowledge of it is no work of free conceptualization, but results from a

⁸⁶⁶ Aquinas, *Summa Theologica*. I-II “Treatise on Law,” Question 96, “Of the Power of Human Law,” art. 3, “Whether human law is competent to direct all acts of virtue?”

⁸⁶⁷ Ibid. I-II Q. 96 art. 2, “Whether human law should repress all vices?”

⁸⁶⁸ Habermas, *Between Facts and Norms*, 95.

conceptualization bound to the essential inclinations of being, of living nature, and of reason, which are at work in man, and because it develops in proportion to the degree of moral experience and self reflection, and of social experience also, of which man is capable in the various ages of his history.⁸⁶⁹

Ketteler demonstrated the truth of Maritain's insight, especially in its emphasis on practical reason. The binding principles of natural law are not derived in pure abstraction, but are developed in the lived experience of reasonable people in history. In sum, the natural law is essentially historical and thus necessarily dynamic, but it is also inherently rooted in a tradition of reason, and thus its principles are abiding.

The principles of the natural law are likewise binding upon people in historically relevant ways. Private property as a 'right,' for example, is a concept with very different elements and implications for St. Thomas Aquinas, Suarez, Ketteler, and Leo XIII when *Rerum Novarum* was written. Yet, the concept in the tradition also has a continuity of meaning and a binding moral logic according to the natural law. In St. Thomas' treatment of private property, for example, Ketteler recognized the argument's continuing binding force despite the different circumstances of the nineteenth century. And because the argument is rooted in essential elements of human nature, the argument has the quality of a persistent principle—even though it will mean different things to people in the future.

Ketteler's treatment of the natural law, moreover, stressed the virtues and the importance of reason in the social person (as opposed to Kant's daring individual), and its metaphysical claims were theologically grounded. In applying Aquinas' principles and insights to the social and political sphere, he was also influenced by the social theory of Franz von Baader, the systematic theology of Adam Möhler, and the early nineteenth-

⁸⁶⁹ Maritain, *Man and the State*, 94.

century Catholic theology practiced in the universities of Tübingen and Munich. With Savigny and the other Romantic influences, Ketteler explicitly rejected the Enlightenment's detached rationality without being immune to its influences.

Abstract and universal concepts of theology and philosophy are of course relevant for this legal hermeneutic—the nineteenth century was the age of great system builders such as Schelling, Hegel, Marx, and many others. Ketteler's work, however, is worthy of study because of his practical wisdom and prudence that revealed the continued relevance of the Catholic tradition's classical natural law. He utilized a language of 'subjective rights,' in theory and practice, that was present in his nineteenth-century moral and legal landscape.⁸⁷⁰ That language of rights, however, was spoken by a conscientious Catholic spokesperson.

9.2. Ketteler's Use Of Rights Language 'Performatively' Challenges The Theoretical Suspicion That Rights Are Inherently Linked With The Enlightenment And Its Modern Form Of Natural Law

Ernest Fortin famously argued that *Rerum Novarum's* articulation of rights and its subsequent tradition were the results of an unfortunate attempt to fuse the teleological medieval tradition with a modern Lockean tradition. Fortin analyzed *Rerum Novarum* through the conceptual opposition of the ancients to the moderns (classical teleological

⁸⁷⁰ I rely here on Charles Taylor's insight regarding the limitations of an intellectualist reading of history as 'revealing rules': "This was the point made by Aristotle, as basic to his understanding of the virtue of phronesis. Human situations arise in infinite varieties. Determining what a norm amounts to in any given situations can take a high degree of insightful understanding. Just being able to formulate rules will not be enough. The person of real practical wisdom is less marked by the ability to formulate rules than by knowing how to act in each particular situation." Charles Taylor, "To Follow a Rule," in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1997), 177.

natural law vs modern natural law), and argued that it owed much more to Hobbes and Locke than to Aquinas. Specifically, he argued that the encyclical moved away from the pre-modern ethics of rights combined with duties, and tried to “Christianize the rights theory by inserting it into a properly moral framework.”⁸⁷¹ This thus supported the theory that the adoption of liberal political theories and their rights discourse in the late nineteenth century was a mitigated good. It is important to note that Fortin’s concern was not the deposed monarchies or the loss of privileges granted in such hierarchical societies. Yet, given his ‘two forces’ narrative, which identifies all rights with the historical developments of liberal England and France, he argued that any use of rights language that does not include the notion of duty opens the door to liberal philosophy and its inherently problematic social theory.

Rerum Novarum is considered the beginning of the Catholic Church’s modern teaching on social questions. Its pivotal role in what has become a coherent body of church teaching, ‘Catholic Social Teaching,’ has significant implications for the church’s role in public life. According to Fortin’s narrative, therefore, when the church picked up the banner of rights, it unwisely raised the standard of its adversary, liberalism. Fortin argues that it is ultimately impossible to have your rights cake and eat it too without ingesting the liberal eggs used to bake it—those eggs being its anthropological individualism and social atomization.

Ernest Fortin’s conceptual critique of rights language as inherently antithetical to classical natural law was based upon a historical narrative of ‘classical’ vs ‘modern’

⁸⁷¹ Fortin, "Sacred and Inviolable: *Rerum Novarum* and Natural Rights," 205.

natural law in the nineteenth century. His oil and water argument has merits, but is ultimately inadequate for two basic reasons. First, it has a diminished appreciation for the historical role of rights. It cannot account for such figures as Ketteler and other modern Catholic social thinkers who have demonstrated the importance of rights in specifically historical situations. And second, it is too narrow and inadequate an account of classical natural law, specifically the role of practical reason in discerning the common good. His critique is still valuable, however, in that it addresses weaknesses in the use of rights language of Catholic social encyclicals, and insightfully points to some inconsistencies in the documents' underlying principles. Most importantly, however, his critique demonstrates the need for a more adequate narrative of Catholic Social Thought in the nineteenth century, one that implodes the conceptual oppositions of Catholic philosophy and post-French Revolution European democratic developments.

For Fortin, human rights were so inherently founded upon liberal presuppositions, especially regarding anthropological claims, that any rights discourse would be basically polluted. Fortin's narrative, described here briefly and simply, is that the nineteenth century was a time of struggle between two great forces, one conservative and the other liberal: The conservative royalists idealized the social and philosophical order of the medieval world and were backed by the aristocrats and the church. They were ultimately defeated by the liberal democrats who bore the banner of rights and had the forces of the Enlightenment and reason on their side. In this narrative, America seized the liberal ideal in one brilliant bound, England's transition was gradual and orderly, and France's achievement was somewhat bloodier and unsatisfactory—though its constitution was the

purest expression of liberalism. The rest of Europe plodded along and resisted most liberal innovations unless heroes like Garibaldi in Italy were able to fell the old regimes.

Rights discourse is inherently liberal for Fortin because, first, its focus on individual freedoms is merely negatively conceived. Secondly, rights discourse permits only juridical procedures to insure those freedoms. Thirdly, this juridical focus neglects the social role of duties and virtues. The ideals of equality and freedom, abstracted from a social context in the juridical framework of rights, are diametrically opposed to the ideals of equality and freedom as defined by classical philosophers.⁸⁷² The focus on rights does not adequately account for responsibilities, virtues, and human inter-subjectivity, and thus he argues that an atomistic anthropology is intrinsic to rights discourse. He denies even the possibility that a rights discourse could be used in Catholic Social Thought. The philosophy of the ‘individual rights bearer’ is incompatible with the philosophy of the person revealed in scripture and the church’s tradition of social and political teaching.

Ketteler’s own life and works ‘performatively’ challenges this claim that rights are necessarily based upon either classical natural law or modern natural law and that never the twain have met. The church/state conflicts of the nineteenth century provide clear examples when the use of rights of the two natural laws was not so distinct. Specifically, Ketteler’s work and the events of nineteenth-century Germany demonstrate that the Catholic Church has used rights language effectively in a context separate from, but as philosophically and juridically sophisticated as France, England, and America—the

⁸⁷² Fortin’s essays on the topic of human rights are collected in: Ernest L. Fortin, *Human Rights, Virtue, and the Common Good: Untimely Meditations on Religion and Politics*, ed. J. Brian Benestad, vol. 3, *Ernest Fortin, Collected Essays* (Lanham, MD: Rowman & Littlefield, 1996).

birthplaces of human rights catalogues that were explicitly based upon modern natural law, *Vernunftsrecht*.⁸⁷³ The intellectual traditions of those nations were, and continue to be, important influences on the rights discussion, but they do not encompass the entirety of the relevant tradition, especially for the church.

Because of this long tradition of rights discourse, the German Catholics would not have been at all surprised by Pope Pius XI's subjective rights language in his 1931 encyclical, *Quadragesimo Anno*: "The function of the rulers of the State, moreover, is to watch over the community and its parts; but in protecting private individuals in their rights, chief consideration ought to be given to the weak and the poor."⁸⁷⁴ And while no liberal, Pius' statement is consistent with Habermas' description of rights as "negative rights that protect spheres of action by grounding actionable claims that others refrain from unpermitted interventions in the freedom, life and property of the individual."⁸⁷⁵

9.3. Contemporary Roman Catholic Use Of Rights Language

Roman Catholic leaders of the contemporary period continue to speak steadfastly about 'rights' including the more modern term, 'human rights,' in order to call attention to the demands of justice for the poor, the oppressed, and the defenseless of society. In doing so, they are following a path prepared by Ketteler. It may have still been a corduroy road with theoretical bumps when rights became part of the church's social discourse in *Rerum Novarum* (1891), but the road has been well-paved since then in such

⁸⁷³ Modern natural law is the philosophy of the Enlightenment—very different from the classical natural law of the ancients and Aquinas, for example.

⁸⁷⁴ Pius XI "Quadragesimo Anno" On Reconstruction Of The Social Order, Encyclical Of Pope Pius XI May 15, 1931, paragraph 25.

⁸⁷⁵ Habermas, *Between Facts and Norms*, 85.

documents as *Pacem in Terris* (1963).⁸⁷⁶ In the fortieth anniversary address of *Pacem in Terris*, for example, John Paul II recalled that encyclical's essential teaching that human rights form the necessary conditions for peace: "The road to peace, [Pope John XXIII] taught in the encyclical, lay in the defense and promotion of basic human rights, which every human being enjoys, not as a benefit given by a different social class or conceded by the State but simply because of our humanity."⁸⁷⁷ In his address, John Paul II recognized that human rights are rooted in the dignity of the human person. He recognized that the concept 'human rights' has developed over time and has been itself a force in history. Very practically, the human rights movements "gave concrete political expression"⁸⁷⁸ to the dynamics that lead to increased freedom in the world, struggles for peace, and the striving to replace dictatorships with democracies and more participatory governments. Human beings have rights "simply because of our humanity,"⁸⁷⁹ and not because of, for example, social class, political power, citizenship status or even a social contract. Building on one-hundred years of modern Catholic social teaching, he argued that human rights are not granted by the state, but are necessary in society because of our very nature.

In advocating so strongly for human rights, John Paul II saw himself entirely within the traditional teaching of his papal predecessors with their foundation in the natural law and their stress upon human dignity. He mentioned no potential conflict with the tradition

⁸⁷⁶ See chapter two, "The Development of the Roman Catholic Rights Theory" in Hollenbach, *Claims in Conflict*.

⁸⁷⁷ Pope John Paul II, "A Permanent Commitment:" Message Of His Holiness Pope John Paul II For The Celebration Of The World Day Of Peace, January 1, 2003, paragraph 4.

⁸⁷⁸ Pope John Paul II, "A Permanent Commitment," paragraph 4.

⁸⁷⁹ Pope John Paul II, "A Permanent Commitment," paragraph 4.

of social teaching of the popes from Leo XIII to Paul VI, even though he had thoughtfully appropriated it in ways his predecessors may not have envisioned. For example, he developed the tradition of social teaching by moving definitively away from the necessarily “hierarchical and traditionalist model of social organization”⁸⁸⁰ avowed by previous popes. In its place, he viewed participatory and egalitarian forms of government as legitimate progress in human history which can be wholeheartedly supported. Democracy was valued as a good and the government has a legitimate autonomy from the church as it rules by law and protects the fundamental rights and dignity of its citizens.⁸⁸¹ Like his predecessors, however, he distanced himself from some elements of the philosophical positions of ‘liberalism.’ He critiqued the liberal tradition, broadly defined, with “its overriding concern with the preservation of liberty negatively understood.”⁸⁸² He also paid tribute to the role of responsibilities or duties in political and social life which must accompany any true implementation of human rights. That said, his deep-rooted critiques of liberalism never curbed his rights language.

The defense of human dignity was the foundation of John Paul II’s language of rights in his social moral teaching. In this, he followed Roman Catholic teaching from before *Rerum Novarum* to the present. He emphasized the continuity of this tradition even (or especially) when he was developing the tradition. For example, *Rerum*

⁸⁸⁰ Hollenbach, *Claims in Conflict*, 49. John Paul II’s encyclical on women, for example, ties equality to human nature as given by God and described in terms of rights. Any loss of that equality is a disturbance caused by—and a sign of—human sin. “... the violation of this equality, which is both a gift and a right deriving from God the Creator, involves an element to the disadvantage of the woman, at the same time it also diminishes the true dignity of the man.” John Paul II, *Mulieris Dignitatem* (1988), paragraph 10.

⁸⁸¹ *Centesimus Annus*, 46-48.

⁸⁸² Hollenbach, *Claims in Conflict*, 49.

Novarum, (1891) described the private property right as “sacred.”⁸⁸³ Yet John Paul II stressed in *Centesimus Annus* (1991) that Leo XIII was “well aware that private property is not an absolute value, nor does he fail to proclaim the necessary complementary principles.”⁸⁸⁴ It is a correction by affirmation: he maintained the rights language, but distanced himself from the problematic implications of the encyclical’s liberal-sounding language. John Paul II was well aware of the contentious history of social teaching and the theoretical pitfalls of using rights language, yet that awareness makes it all the more remarkable that his actual articulation of rights was nevertheless rather free of qualifications. He did not, for example, continually pair ‘duty’ terminology with rights. Nor did he dwell upon the dangers of individualism inherent in such language.⁸⁸⁵ Like *Rerum Novarum*, *Centesimus Annus* mentions the dangers of Enlightenment rationalism, but it does not link that rationalism to the use of rights. The assessment of the century-old *Rerum Novarum* and its use of rights is essentially very positive:

The Encyclical and the related social teaching of the Church had far-reaching influence in the years bridging the nineteenth and twentieth centuries. This influence is evident in the numerous reforms which were introduced in the areas of social security, pensions, health insurance and compensation in the case of accidents, within the framework of greater respect for the rights of

⁸⁸³ *Rerum Novarum*, (1891), paragraph 65. Ernest Fortin argues that this notion of private property as ‘sacred’ was the unfortunate contribution of Luigi Taparelli d’Azeglio, the rector of the Roman College during Leo XIII’s tenure there as a student. The ‘sacred’-ness of property, and thus its inviolability, was not based upon Thomistic natural law, but upon Christian Wolff’s brand of Lockean liberalism. Fortin, “Sacred and Inviolable: *Rerum Novarum* and Natural Rights,” 196-197.

⁸⁸⁴ *Centesimus Annus* (1 May 1991), 6; Chapter IV (#30), “Private Property and the Universal Destination of Material Goods” deals more specifically with private property as a limited human right.

⁸⁸⁵ This is a development even from the VCII’s *Gaudium et Spes* (1965) #41, which located rights fully within a framework of qualified human freedom. This does not contradict John Paul II, but it is a very different rhetorical emphasis.

workers.⁸⁸⁶

Just as *Rerum Novarum* had appealed to rights at a time of social and political struggle, John Paul II's *Centesimus Annus* affirmed the importance of rights after communism had been dismantled in Eastern Europe and new political forms were emerging in its place. John Paul II's arguments reflect his personal experience of injustice and his abhorrence of regimes lacking rights as much as they are theoretical arguments for a foundation of rights in the natural law. When he spoke about totalitarianism, for example, it was as one who knew the arbitrary use of state power. Following the example of *Rerum Novarum*, he analyzed the contribution of "the Church's commitment to defend and promote human rights"⁸⁸⁷ as a means of bringing forth justice in actual situations of oppression. The church's advocacy of human rights demonstrates the relevance of its social teaching and its concern for the material well-being of human beings in its encounter with Soviet Marxism ending in 1989.

Three elements of the natural law's practical reason that were essential for Ketteler and for Leo XIII in *Rerum Novarum* remained essential in 1989: 1) the understanding of social principles such as the dignity of the human person and the inviolability of certain rights; 2) the recognition that those principles are being violated in the world; and 3) the courage to articulate violations and act for change in a way consistent with the church's original principles.

In the face of serious forms of social and economic injustice and political corruption affecting entire peoples and nations, there is a growing reaction of indignation on the part of very many people whose fundamental human rights

⁸⁸⁶ *Centesimus Annus*, (1 May 1991), #15.

⁸⁸⁷ *Centesimus Annus*, #22.

have been trampled upon and held in contempt, as well as an ever more widespread and acute sense of ‘the need for a radical’ personal and social ‘renewal’ capable of ensuring justice, solidarity, honesty and openness.⁸⁸⁸

For John Paul II, rights were essential to the process of applying theological truths to the practical world. Rights are never, however, sufficient indicators of full human flourishing. They are simply necessary elements along with the many principles of social teaching. Thus the concerns of society’s “individualistic mentality”⁸⁸⁹ and the “dangers of liberalism”⁸⁹⁰ are valid but separate concerns from those raised by the use of rights language and rights language’s theoretical foundation.

By locating rights in the realm of practical action (*praxis*) it is possible to cooperate in the public realm with people who do not share fundamental philosophical principles and even demand human rights for peoples who do not share Christian beliefs or Western political presuppositions. The 1975 Vatican document, “The Church And Human Rights,” makes brief mention of the past theoretical clashes with anti-religious forms of liberalism, but it focuses mostly upon the positive potential for “a more open treatment of fundamental human rights.”⁸⁹¹ It outlines a coherent position on human rights which is consistent with the Catholic tradition and lists a whole range of possible areas of collaboration with the wider world from work on poverty to resolution of military conflicts. Pope John Paul II adopted this strategy very early in his pontificate. For example, when addressing the question of religious freedom and the freedom of

⁸⁸⁸ *Veritatis Splendor* 1993, #98.

⁸⁸⁹ *Centesimus Annus*, #49.

⁸⁹⁰ *Centesimus Annus*, #60, referring to Leo XIII’s concern with liberalism and Marxism.

⁸⁹¹ “The Church And Human Rights,” Working paper no. 1 by the Pontifical Commission “*Justitia et Pax*,” First Printing 1974, #18, 20.

conscience, he stated: “This principle is not only contained in the list of human rights admitted by everyone, but it has a key position on it. It is a question, in fact, of respect for a fundamental right of the human spirit, in which man expresses himself most deeply, perhaps, as man.”⁸⁹² The agreement on lists of human rights has proven a necessary but woefully insufficient condition for human flourishing, however. The church’s use of rights language is, in itself, only one element of its comprehensive social teaching.

9.4. Ketteler’s Semantic Competence Sublates The Apparent Conflict Between ‘Modern’ And ‘Classical’ Natural Law Systems—The Hermeneutic Relevance Of The Historical School Of Jurisprudence (*Geschichtsjurisprudenz*):

Ernest Fortin’s radical dichotomy between the ancients and the moderns succeeds in demonstrating that there was indeed a historical conflict between two distinct conceptual systems, but it neglects to appreciate that both were (and are!) genuine systems of goods. “It is wrong to think that we have to choose between two readings of history, as progress or decline, fulfillment or loss. The plausible view seems to be that it contains elements of both... conflict doesn’t invalidate or relativize the goods that clash, but on the contrary presupposes their validity.”⁸⁹³ Ketteler’s own sublation of the opposition (*Aufhebung* or synthesis), though not free from problems, reveals the rational capacity of natural law (classically conceived) to incorporate the modern premises of universal human dignity, equality, and that all humans have certain basic non-negotiable material needs.

⁸⁹² John Paul II, “Toward a Philosophy of Praxis” 1981, (130).

⁸⁹³ Charles Taylor, “Comparison, History, Truth,” in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1997), 162-163.

Ketteler's example of using rights is as revelatory as the reasons he gives for using them. The analysis of his 'performance' of using rights reveals both his faithfulness to the rationality of Catholic natural law principles and his openness to positive political developments as a political practitioner. This point is crucial. "The philosopher *tells* citizens which rights they should acknowledge mutually if they are legitimately to regulate their living together by means of positive law."⁸⁹⁴ The practitioner, however, uses rights in context while assuming some principles of consensus. Where consensus is lacking, reasonable arguments must be put forward to defend the specific positions. This is key because if consensus exists there may be no need to defend the position because people are already convinced of it. Thus a 'negative analysis' of the rights discourse, i.e., what the arguments do not dispute, reveals possible areas of consensus. A 'positive analysis' of the rights arguments obviously reveals areas where there is conflict. More importantly, however, a performative analysis reveals the arguments' location, mode, and implicit criteria for success. It is critically important, for example, to examine where, how and to whom Roman Catholic Church figures were making arguments about rights.

The semantic fact that both liberals and conservatives used the language of rights in nineteenth-century German political arguments assumes an already significant degree of common meaning. It is true that the attempt to catalogue those rights in the Frankfurt Parliament (1848) was a response to a uniquely liberal goal. Yet many conservatives, such as the Romantics, had great respect for constitutions and constitutional principles, including those that limited states and monarchs. Further, Catholics and other opponents

⁸⁹⁴ Habermas, *Between Facts and Norms*, 126. (ital in original)

of liberal political philosophy did not understand themselves to be yielding their basic political principles by participating in the debate over specific rights. The analysis above points to many arguments between Catholics and liberals on political questions, but more remarkable is their lack of an argument on the specific question regarding whether rights language could be used. On this question there was no argument because no argument was necessary; they were in agreement that rights language was potentially valid.⁸⁹⁵

Further, the performative analysis of the political discourse reveals a creative dynamic in the natural law. The ongoing conflict with German liberalism played out in the emerging ‘public sphere’ pushed Catholics to continually examine the rationality of their own positions. More than being merely defensive, Ketteler’s political arguments show his growing appreciation for democratic principles and for some of the liberals’ social and constitutional goals. Rights were seen as ‘goods’ with benefits for the Catholic minority in German lands, and he recognized the beneficial aspects of Catholic representatives in government. He rejected liberal attempts to posit a catalogue of rights (and rights discourse in general) on the basis of merely abstract principles.⁸⁹⁶ But in doing so, Ketteler was put in a position of having to provide a richer philosophical foundation for rights—one drawn from the political traditions at-hand. Thus, even as they were making their argument in terms of natural law, Ketteler and his Catholic colleagues were performatively acknowledging the validity of the public sphere, that their ‘public’ deserved rational arguments. Their public arguments in newspapers, journals, and

⁸⁹⁵ This is the famous “no barking dog” argument—thanks due to Fritz Bauerschmidt.

⁸⁹⁶ Habermas outlines the liberal understanding of rights catalogues in: Habermas, *Between Facts and Norms*, 128-129.

polemical broadsheets were also acknowledging that their audience included the general population, the citizens of the land, and not just political and religious leaders.

Ketteler's discursive performance is most creative when he is in fact making rights claims based upon the acceptance of the 'facts' of democracy and a religiously pluralistic society. Fortin is correct in his claim that something new is happening here, yet the new thing is a development of the tradition which is true to the best elements of the tradition. Here is where the Romantic philosophy of Ketteler's contemporaries, incorporated into *Geschichtsjurisprudenz*, is particularly helpful. Romantics like Savigny were passionate about two related things: recovering the ancient texts of the tradition and documenting the semantic roots of their language. Both were part of a single intention to understand their organic present by studying the sources of their culture. Savigny shared the conviction that law, science, and culture in general developed through 'conflict' or dialectic such that positive growth depended upon the context and resources for the conflict to be properly directed. For law, the presence of the ancient texts is critical, but more important is the subtle method of interpretation—a method which requires a moral mind to balance the complexities of relevant textual sources, juristic relations, and facts. All this is necessary because as law is the reflection of a people, the jurist judges and thus preserves a culture's highest values.⁸⁹⁷

The law is a reflection of the people's 'spirit' and therefore has no origin prior to the origin of the people. This 'invisible' origin of the law—as coexistent with the development of the people—makes any legal text a reflection of a law already existing

⁸⁹⁷ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, ix-x.

and not a foundation upon which a society can be formed. Savigny uses the analogy of language to support this conception of the law.

Indeed the individual nature of a particular people is determined and recognized solely by those common directions and activities of which speech as the most evident obtains the first place.

The form however in which law lives in the common consciousness of a people is not that of abstract rules but as the living intuition of the institutions of law in their organic connection, so that whenever the necessity arises for the rule to be conceived in its logical form, this must be first formed by a scientific procedure from that total intuition... [Law has an establishing force] Moreover law will develop itself by use and what originally was present as a mere germ will by practice assume a definite shape to the consciousness. However in this way the changing of law is also generated.⁸⁹⁸

This establishing force of the law is analogous to the development of language. As such, the law develops only gradually and from within the structural dynamic of the already existing ‘spoken word’ of lived law. New developments are warranted if they adequately express the consciousness of the people—especially because that Western legal consciousness includes strong ideals of justice and rationality as public goods. Yet Savigny is careful to maintain the law’s analogy to speech such that the actor of concept formation is the collectivity of the people, and not the individual definer. As such, the definer is really a ‘finder of language usage’ as opposed to a creator of language. Analogously, *Webster’s Dictionary* does not make the words; it only recognizes them, studies them, and then defines them according to their already existing use. That said, dictionaries, legislatures, constitutions, and compilations of legal texts play an important role in handing down the culture from generation to generation, but they do not invent laws.

⁸⁹⁸ *Ibid.*, 13.

The role of the state in this system is a critical one, to “make the idea of law dominant in the visible world.”⁸⁹⁹ This notion raises the critical question regarding the specter of Hegel’s ‘state as god.’ If the state makes the law, the law could be seen as a tool of the state with no jurisdiction over it. This is an especially reasonable objection given the later historical failure of German jurists to object to manipulation and abuse of Germany’s constitutions. Jurists, the high priests of Savigny’s system, were limited to a role of refining the rough anomalies of law and by influencing the legislators with learned treatises on the legal sources which elucidate the essential logic and coherence of the law and clarify its limits. Here, the dynamism of law formation, given structure and stability by the state, continues to reflect the true spirit of the people. For Ketteler, the state was a servant of the people and never immune from the constraints of legitimate law. He had benefited from Savigny’s conceptualization, but was hostile to Hegel’s deification of the state, to Bismarck’s abuse of the constitution, as well as to Savigny’s distance from the political relevance of legal principles. Ketteler’s opposition to Germany’s absolutist policies offer a ‘performative’ argument for his resistance to the abuse of power by the state. Nevertheless, that resistance never took a form that dismissed the principles and value of the law, including the law embodied in rights.

Subjective rights cannot be self-evident—they are not like pieces of quartz glittering in a block of social granite, or even a more fluid social matrix. They are not ‘things,’ but rather ‘relations’ in that they describe the specific rational human interactions consistent with social objectives. Liberal philosophers like Hobbes and Locke attempted to establish

⁸⁹⁹ *Ibid.*, 21.

universally valid systems of rights in their hypothetical 'states of nature.' Whereas their 'logics' of rights were derived in abstraction, Savigny stressed the importance of understanding the rights of individuals as the powers of subjective persons within the complexities of juristic relations in actual societies. He looked to rights not in abstraction, but in the historical record of Western European nations, and he argued for the continuing legitimacy of certain enduring subjective rights. These rights reflect the historical relation of individuals to each other and individuals to the state. The relations are embedded in countless other juristic relations and are meaningless in abstraction from them. Society, rather than the state, is the fundamental matrix of social relations within which rights have legitimacy, though the state is a necessary element.

This social matrix is an organic reality, rather than a static body or a logical necessity. Further, though the law reflects the spirit of a particular people, the expression of a particular law is a participation in universal law in a particular way. Subjective rights are thus not purely 'subjective,' but have real or objective existence if not in a final or perfect sense. In a process of historical and philosophical induction, the Romantics discovered legal first principles as they studied the similarities and analogies between the legal systems of great civilizations. Where Savigny's system was most seriously flawed, however, was that it did not spell out the relation of individual freedoms within the social matrix to the state, such that rights could protect the integrity of the social spheres from the intrusions of the state. This had serious consequences for the second half of the nineteenth century and later, but it was a flaw that Ketteler clearly saw.

This philosophical process is much more akin to Aristotle's *Politics* than to Plato's *Republic*. This point is relevant because it demonstrates how Fortin's critique of rights as necessarily liberal (abstract, universal and depersonalized) applies neither to the structure of Savigny's thought, nor, by extension, to Ketteler's. Subjective rights have an important function in society, but these rights are only negatively conceived in abstraction from the complex web of juristic relations applying to every person, with 'person' here understood as a constituent member in the organic social fabric. Freedom for the Romantics is fostered and defended by legal rights, but the juridical process is secondary to the development of virtue and freedom in society. Using the language analogy of law, the development of new 'concepts' is not only possible, it is necessary for the expression of the people's spirit.

9.5. Romantic Semantic Principles Substantiate The Potential Validity Of Emerging Subjective Rights Language As Legitimate Developments Within The Natural Law

Charles Taylor, arguing along lines similar to Savigny, demonstrates the power that language has to influence the way we think and therefore the relevance of semantic structures for politics.⁹⁰⁰ Taylor builds upon Heidegger as a philosopher squarely in the tradition of language theory of the Romantics, who rejected the rationalistic and instrumental classical language theories influenced by Descartes, Hobbes, Locke and Condillac. The Romantics, beginning with Herder, proposed what Taylor calls an expressive-constitutive theory of language which rejects the idea that language is simply

⁹⁰⁰ Charles Taylor, "Heidegger, Language, and Ecology," in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1997), 100-126.

an aligning of words with things. For Herder and those influenced by him, language involves much more than description of a ‘thing.’

Language constitutes the semantic dimension, that is, possessing language enables us to relate to things in new ways, say as loci of features, and to have new motions, goals, or relationships, as well as being responsive to issues of strong value. We might say: language transforms our world, using this last word in a clearly Heidegger-derived sense. We are talking not about the cosmos out there, which preceded us and is in different to us, but about the world of our involvements, including all the things they incorporate in their meaning for us.⁹⁰¹

Referring back to rights, therefore, Ketteler’s ‘language’ of rights need not be seen as necessarily coming from somewhere like a bag of (maybe liberal) donor appendages grafted onto the body of classical natural law. This is inadequate first because there already existed a rights language within the classical natural law. And, second, the development of already existing rights language is an authentic development of principles central to the tradition of classical natural law itself. Within Savigny’s hermeneutical theory, a development of the tradition can potentially transform the public sphere by recognizing something authentic in a given people that requires identification. The finding of new meaning in the political process, if authentic, is both tied to the tradition and yet aware of the people’s developing aspirations. The semantic transformation of principles of justice to articulated subjective rights is potentially valid if those rights practically affirm what is truest and therefore most valid in the tradition itself.

It is important here to differentiate this organic process from an understanding of the practice of law and the application of subjective rights as merely the discernment of universal and unchanging principles which are then prudently applied to complex human

⁹⁰¹ Ibid., 107.

situations by a wise judge. That is rather a jurisprudence of the Enlightenment.

Habermas' *Between Facts and Norms*, for example, argues that "*the system of rights does not exist in transcendental purity.*"⁹⁰²

Ketteler, like Savigny, rejected constitutional attempts to impose a law constructed from abstract principles upon an existing community. That would be an 'alien grafting' representing a universalistic and mechanistic understanding of the law. Such an alien or unnatural grafting is a destructive disturbance of society's organic nature. Using Habermas' categories, the law is properly articulated (i.e., it is valid) if it reflects the will of its society (i.e., it is legitimate). This is like saying that grammar rules are appropriate if they reflect the way people in a location actually speak. The law's validity is dependent upon its local legitimacy and cannot be imposed according to abstract philosophical principles. The formation of grammar rules, however, can and does participate in the continuing development of the language. Similarly, the process of legislation is complex and always dependent upon local circumstances, but the laws are not merely reflective of society, but also play a role in shaping the way people live. Law, like language, both mirrors and creates in a dynamic and organic process.

Savigny and his historical school did not invent the notion of legal evolution. That concept already had a long tradition in European canon and Roman law.⁹⁰³ His contribution was in founding a movement to respect that tradition in the face of a colonizing Enlightenment rationalism and the nascent legal positivism of the nineteenth century. He argued that, like language, the law has an organic process of development.

⁹⁰² Habermas, *Between Facts and Norms*, 129. (Italics mine to show quotes in original.)

⁹⁰³ Berman, *Law and Revolution*, 203.

“But the people experiences in this natural process of development, not merely a change in general, but it experiences it in a settled, regular series of events and of these each has its peculiar relation to the expression of the spirit of the people in which the law is generated.”⁹⁰⁴ The individuals in society are unified in the tradition of the law which preserves the social freedoms and customs achieved through history.⁹⁰⁵

The law is passed down in traditions which evolve and emerge in different regions with both similarities as well as distinctive ‘dialects.’ As Latin spread throughout the Roman Empire it was adopted, or ‘received,’ differently by the emerging European languages (romance, German and Slavic), just as Roman law was received in varying degrees by the different European states. The German states, though open to the Roman legal heritage, were not as open as many other European states. ‘Germanic law’ was retained in the customs and some documents of local German communities together with significant elements of Roman law. This uniqueness was jealously guarded by the local jurists and respected by imperial juristic principles.⁹⁰⁶ Thus with reference specifically to rights, while the concept itself can be tied directly to the legal traditions going back to Roman law, the character of its reception is also important for understanding the concept’s present inner logic and force.

The actual validity and force of rights, and of laws in general, depend upon their continuing reception in society as judged by those (properly trained jurists) who are

⁹⁰⁴ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 14.

⁹⁰⁵ *Ibid.*, 17.

⁹⁰⁶ *Ibid.*, 65. Guizot’s “History of the Origins of Representational Government” is a French parallel to Savigny whom Ketteler cites. Guizot’s Part II, especially lectures 10 and 18, outline his theory of government. François Pierre Guillaume Guizot, *Die Christliche Kirche Und Die Christliche Gesellschaft* (Leipzig: 1862).

deemed capable of discerning the spirit of the people.⁹⁰⁷ The law’s validity “arises from the convictions of the community, not from the wills of individuals... Habit and practice, that which we especially call custom is hence in substance, a medium of recognition, and not a ground of that law.”⁹⁰⁸

Savigny’s treatment of church law is an especially interesting example of how this Romantic jurisprudence worked. This legal hermeneutics, again, is relevant to the topic because it is an area of Ketteler’s specialty that he pursued in Munich directly after hearing Savigny’s lectures in Berlin. Ketteler used principles of Romantic jurisprudence to counter the arguments of secularizing politicians who tried to identify the church as merely one among many voluntary associations and thus subject to the law of the state *qua* voluntary and thus as a marginal institution. Savigny, a Protestant himself, held that the role of the church in European history does not allow such a subordination because the church’s history is integrated with European (Savigny uses the word ‘world’) history. Church law cannot be thought of as simply subordinate, and thus marginal, because the Christian theology behind church law pervades the worldview of European society—it is part of the “innermost nature of men.”⁹⁰⁹ “Then Christianity is not to be regarded merely as a rule of life for us but it has also in fact changed the world so that all our thoughts

⁹⁰⁷ The issue of who writes and judges the law in this idealist theory of law is an important, but separate issue. Savigny’s own preference was to have law professors do this in opinions called *Aktenversendung*. Whitman, *Roman Law in German Romantic Era*, 109.

⁹⁰⁸ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 66. Please note that Savigny does not use the terminology of validity and legitimacy. This terminology is used by Habermas to distinguish between positive law, i.e., written law, and its legitimacy. This distinction is especially important for diagnosing the problems in the later positivist tradition of jurisprudence. Savigny may have contributed to this development, but he himself cannot be labeled a positivist. Habermas, *Between Facts and Norms*.

⁹⁰⁹ Savigny, *System of the Modern Roman Law (Holloway 1867 Translation of 1840 Ed.)*, 22.

however strange and even hostile they may appear to it, are nevertheless governed and penetrated by it.”⁹¹⁰ Ethical principles, whether religious or not, are important for legislating because they reflect the reality of the society which law protects. The churches hold a privileged role in articulating and defending ethical principles, and rights language is often a valuable means of doing so.

9.6. Conclusion

Ketteler’s performative use of rights is important today because his successful negotiation of religious traditions, philosophical principles, political quagmires, and social needs reveals something about the political potential of rights in the public sphere.

His use of rights benefited from his legal and political background while being consistent with the tenets of his faith. His rights language did not jeopardize the basic principles of natural law, but instead revealed the relevance of those principles and the inherent strength of natural law’s rationality. He came to appreciate the compelling critique of social systems *qua* systems from the German liberals’ critiques of unjust political and economic structures. Later in his career, he recognized the validity of the socialists’ call to protect the workers amassing in the urban centers. In this way, he recognized that Catholics shared political goals and political principles with liberals, i.e., they shared teleological ends.⁹¹¹ On the other end of the political spectrum, he was deeply

⁹¹⁰ *Ibid.*, 43.

⁹¹¹ This point follows Taylor’s argument that the differentiation between conservatives and liberals as the teleological-ontologists vs the procedural-individualists is not philosophically necessary, nor does it adequately differentiate political theorists: Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1997), 162-163.

influenced by Romantic philosophy and by its conservative historical school of jurisprudence. Early on, he adopted principles and methods from his legal and theological training. Later, in his post-1860 writings, he continued to critically appropriate Prussian legal philosophy even as he distanced himself from the positivist direction that German jurisprudence had taken, as well as the Hegelian tendency to deify the state.⁹¹²

Ketteler did not simply choose liberal or conservative elements for his system like they were salad ingredients from a theoretical buffet table, being careful not to upset his natural law ‘constitution.’ That would be to mischaracterize both the nature of rights and the rational structure of (classical) natural law. By focusing on Ketteler’s practice of rights as practical (*phronesis*), I argue that his method was not an *ad hoc* utilization of expedient means for his own ends. That would denigrate political discourse as simply the location of achieving preconceived ends. Rather, his involvement with politics and his role in shaping the rights stressed the essential role of legitimate law in society, it dignified the political process, and it demonstrated the positive potential for religion in the public sphere.⁹¹³ The performance of his rights discourse is therefore as important as the actual rights for which he fought and the reasons he used to support those rights.

This description of Ketteler’s willingness to discourse should not be misread as an attempt to paint him as a neutral ecumenist, nor should his realist credentials be doubted by his openness to frame natural law principles in a modern catalogue of rights. He was

⁹¹² Ketteler made numerous positive references to Julius Stahl, for example. He was the Protestant legal philosopher most closely identified with the late nineteenth-century Prussian government.

⁹¹³ In this sense, Ketteler demonstrated an “intellectual solidarity,” as described in David Hollenbach, *The Global Face of Public Faith: Politics, Human Rights, and Christian Ethics* (Washington, DC: Georgetown University Press, 2003), 13.

an enthusiastic denominationalist who believed that the fullness of truth was revealed in Jesus Christ and sustained uniquely in the Catholic Church. He argued that society suffered to the extent that this was obscured and it flourished to the extent that the truth revealed in Jesus Christ was made manifest in the church. He was also no relativist. He possessed, however, a fairly nuanced understanding of historical change in terms of organic development.

This understanding was achieved by studying with some of the greatest Catholic minds of the nineteenth century during a time when the Catholic Church in Germany was still suffering from the 1803 secularization of university faculties of theology and monastic centers of learning, from the earlier suppression of the Jesuits who had staffed the universities and many other schools, and from the expulsion of the teaching religious orders. In Tübingen first, and later in Munich, Catholic scholars emerged who were associated with the Romantic reaction to Enlightenment rationalist philosophy. Following Schelling's lead, and carried along by revived interest in all things ancient, the Romantics provided a bridge between traditional church thought and the scholarly sophistication of the academy. Schelling, though he was not Catholic, inspired Catholic scholars with his idealist philosophy that lifted up religion as the science of the absolute as revealed in history. Möhler and other Catholic theologians incorporated such ideas into an ecclesiology that lay at the heart of Ketteler's self-understanding. Ketteler, as a bishop, was a leader of the community of believers in Christ. "The visible Church, from the point of view here taken, is the Son of God himself, everlastingly manifesting himself among men in a human form, perpetually renovated, and eternally young—the permanent

incarnation of the same, as in Holy Writ.”⁹¹⁴ Through this visible church the ‘Divine Word’ continues to be incarnate.

Romantic theology and moral sciences looked beyond the Enlightenment’s static universal principles and reflected on issues such as mysticism, religious experience, and the inherent mystery of the incarnation at the heart of Christian belief. Idealist concepts provided philosophical categories and analogues for the Catholic Romantics. For example, aesthetic philosophy held that “the beautiful is only truth manifested and embodied.”⁹¹⁵ This idea, not unique to the nineteenth century, was found in patristic and other philosophical sources. But Schelling and the Romantics gave it a central place in their synthesis within a contemporary and defensible philosophical structure. It took Möhler to incorporate the insights of idealism into a properly balanced Catholic theology of the church. “The church is not an archive or a museum, but an organism that is not afraid of history and culture but lives from the Spirit and from the times. The gifts of the Spirit contribute to the integral life of this organism—the community.”⁹¹⁶ His integrated and exciting ecclesiology provided a lens by which scripture, patristic sources, liturgical practices, and the great philosophical minds of the medieval period were studied with new vigor and appreciation. The Romantics began to view the church as the preserve of tradition and thus truth, and not an obstacle to reason as the Enlightenment had cast it. Ketteler rode the crest of this new wave of Catholic intellectual fervor and was especially

⁹¹⁴ Möhler, *Symbolism (Himes Ed.)*, 259.

⁹¹⁵ *Ibid.*, 263.

⁹¹⁶ O'Meara, *Romantic Idealism and Roman Catholicism*, ?

inspired by Johann Adam Möhler's final articulation of his system in *Symbolik*.⁹¹⁷ With this book as his inspiration and model, Ketteler sought to achieve in the political sphere what that book had achieved in dogmatic theology.

Ketteler bristled at the Enlightenment's attempt to abstract social and moral principles as if they had no relation to the human history from which they emerged. Instead, Christ's incarnation as the revelation of God's truth in history was the archetype of all revelations of truth.

Truly to know something, to understand it, to grasp its reality, is to see its organic unfolding. And that is precisely what Möhler set out to do in *Symbolik*: to show how a fundamental religious insight into the relation of the divine and the human develops into a coherent doctrinal system—and how a fundamentally mistaken and inadequate religious insight of this sort inevitably leads to a destructive and irrational doctrinal system such as he believed the Protestant theology of this time to be.⁹¹⁸

God did not hand down a formula of abstract rules, but instead gave his son to the world. The son revealed God's love in his life, death, and resurrection. The son continues to reveal that love in his life which persists in the church as a living entity. The mystery of the Incarnation, i.e. the reality of God made real in this world, continues to inspire the church to engage the world with courage and love. Yet the descriptive distinction between Jesus Christ, as revealed in the scripture story, and 'the world' does not adequately express the Christian mystery of Incarnation.

⁹¹⁷ Möhler, Johann Adam. *Symbolism: Exposition of the Doctrinal Differences between Catholics and Protestants as Evidenced by Their Symbolical Writings [Symbolik, Oder, Darstellung Der Dogmatischen Gegensätze Katholiken Und Protestanten Nach Ihren Öffentlichen Bekenntnisschriften, 1833]*. Translated by James Burton Robertson. New York: Crossroad Pub., 1997. In his introduction to the 1997 edition, Michael Himes suggests that because Robertson's translation of 'Symbolik' into 'Symbolism' can be too easily misunderstood, the original German title should be used for the sake of clarity.

⁹¹⁸ Himes' introduction in: {Möhler, 1997 c1833, Symbolism (Himes)}@xvi}

In the Catholic system of doctrine, two elements—the Divine and the human, the natural and the supernatural, the mystical and the rational, or however else we may please to denominate them—move in uniform and harmonious combination; so that the rights of either appear adjusted in a manner that must certainly extort esteem and admiration from every reflecting mind... But of the contraries, which in the Church are so beautifully harmonized, the one or the other can easily, in the individual believer, obtain the preponderance. Yet this preponderance will remain innocuous, if the one-sided principle will not proceed to a total misapprehension of its opposite, ... and if the bonds of love, which unite the individual to the body of the Church, be maintained inviolate.⁹¹⁹

Though Möhler's *Symbolik* is a theological book of comparative doctrine, Ketteler applied its framework directly to concepts and terms of political relevance. Regarding rights, for example, Möhler's discussion on Christ the lawgiver is significant. The "legislative Jesus" as "a mere lawgiver... cannot exert a deep and powerful influence on man."⁹²⁰ Rather, what is needed is the 'Son of God' who "hath wrought the great moral renovation of the world."⁹²¹ Möhler is describing an ontology that is fundamentally mysterious and God-given; it is redeemed by Christ's saving action. The incarnation as revealed in Christian scripture is not something which merely adds to or informs the world.

The world is not something external to God's reality requiring a new fix or adjustment, like a clunky Chrysler needing an alignment to keep it on the road. Scripture, in Möhler's framework, is not "applied" to modern social situations to give it insights or lessons.⁹²² Rights and the elements of political order, to the extent which they reveal true

⁹¹⁹ Möhler, *Symbolism* (Himes Ed.), 478.

⁹²⁰ Ibid., 495.

⁹²¹ Ibid.

⁹²² George Lindbeck seems to be getting at this notion when he says: "Scripture creates its own domain of meaning and the task of interpretation is to extend this over the whole of reality." The

goods, participate in the fulfillment of God's will for Creation. As such they are not external to the reality of God's redeemed Creation. They are internal. As they reveal the reality of God's will for the world as contributing to peace and good order, the language of rights itself becomes a revelation of God's will that reveals a capacity not previously realized in the social context. On one level, the development of language sheds light on how new meaning is internal to the discourse itself, as Taylor has argued. The language of rights within the teleological political discourse opens up the capacity of religious principles to embrace new meaning. On another more profound level, this is a process analogous to Christ's incarnation, such that the new meaning revealed is not simply about some narrow aspect of human freedom, but about the victory of life over death accomplished in Christ's redemptive work. In light of this, the political project becomes a more explicitly sacred one, one in which the pursuit of justice in the form of rights is a participation in the redemptive work of Christ.

difference between Lindbeck and Möhler might be in the latter's denying that the world is a separate and distinct domain. Lindbeck quotation from Hollenbach, *Global Face of Public Faith*.

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