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# Rhetoric, Rights, and Pragmatism in the Germanies: Enlightenment Reform in Eighteenth-Century Prussia and Bavaria

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RHETORIC, RIGHTS, AND PRAGMATISM IN THE GERMANIES:  
ENLIGHTENMENT REFORM IN EIGHTEENTH-CENTURY PRUSSIA AND  
BAVARIA

A Capstone Experience/Thesis Project

Presented in Partial Fulfillment of the Requirements for

The Degree Bachelor of Arts with

Honors College Graduate Distinction at Western Kentucky University

By

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2014

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## ABSTRACT

This project highlights the nature of Enlightenment reform in 18<sup>th</sup>-century Germany, particularly in the Kingdom of Prussia and the Electorate of Bavaria under Frederick II and Maximilian III Joseph. Both of these rulers launch similar reforms under the guise of enlightened absolutism and enlightenment rhetoric with very different results, each catering to the specific needs of their respective principalities. Reform is offered along the lines of compulsory education, codification, humanitarian legal reform, and religious toleration, all in the spirit of the Enlightenment. However, when the extent and details of these reforms are examined, it can be demonstrated that they fail to put forth a progressive definition of rights in their respective states, instead serving to solidify state authority and further the absolutist control of the monarch through careful alienation and control over the nobility, clergy, and the lowest classes.

Keywords: Enlightenment; Maximilian III Joseph; Frederick II; Germany; Rights Reform

Dedicated to Logan Thompson, for being a constant friend and companion

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## CHAPTER ONE

### INTRODUCTION

The Enlightenment is characterized in popular history by a focus on reason and a coherent break from the more superstitious beliefs that mired the preceding centuries. During this age, the intellectual *philosophe* served as the high mark of popular culture, with men such as Voltaire, Hume, and Diderot publishing broadly acclaimed literature that shaped both social and political discussion throughout eighteenth-century Europe. Often a bold and convenient line is drawn through the varying ideals professed by Enlightenment thinkers, stretching from the political rhetoric of the American and French Revolutions to the modern conception of human rights and egalitarianism.

This line tends to ignore the political, social, and cultural context of the era, especially in regards to those themes that do not fit into a compartmentalized and progressive conception of history. It is where these lines between rhetoric and reality cross and blur that provide for stimulating insight into the realities of the eighteenth-century and the ideals professed by the Enlightenment. Such a muddled intersection can be observed in the legal fiction of enlightened absolutism, two terms that many today would hold to be mutually exclusive: the upholding of rights through the investment of sole power in the state. This paradoxical theme flourished in varying degrees among the competing states of the Holy Roman Empire, facilitated by the marked dogmatic,

hierarchical, and confessional diversity that thrived in the Germanies during the Enlightenment.

The research presented here will examine the realization of rights-reform under enlightened absolutism in two German states that exhibit the heterogeneity of the Germanies during the era: that of the Protestant and politically eminent Kingdom of Prussia under Frederick II von Hohenzollern, and the less dominant Catholic Duchy of Bavaria under Maximilian III Joseph von Wittelsbach. An examination of the nature of reform in these two states, it can be shown that the various reform programs launched by both rulers supposedly informed by Enlightenment ideology in truth offered little break from the existing status quo at the time of their ascension. Instead these reforms served a pragmatic as opposed to a progressive function that sought to enhance state stability based on the political, social, and religious realities within the state. Despite the manner in which many histories remember Enlightenment reform within the Germanies, the manner, scope, and potency of reform existed in direct correlation to those policies which served to alienate the power of any institutional opposition to that of the monarchy. Rulers were able to thereby solidify absolutist control within the state under the guise of progressive and popular Enlightenment ideals while offering no progress within the realm of rights reform.

## CHAPTER TWO

### RIGHTS THEORY AND THE LEGAL FICTION OF ENLIGHTENED ABSOLUTISM

In order to discuss the varying degree of enlightenment reform under Frederick II and Maximilian III, it is important to understand how rights were conceptualized during the eighteenth-century. The conception of rights in the twenty-first century is the result of over three-hundred years of fluctuating breaks from and reattachments to the status quo, a shifting trend of reform and reaction that cannot be traced in a linear, upward march. Much of the foundation of rights theory emerging during the Enlightenment broke from the perceived dogmatic superstition or reliance on classical authority that seemed to characterize the preceding era. The explosion of a reading culture among popular circles allowed for the emergence of an early definition of rights, and the academic and literary atmosphere helped formulate and develop this concept among the elite philosophical societies of the era.

It is difficult to pinpoint from where this notion of individual “rights” arose, certainly a number of trends within European popular culture of the era offer empirical links to the formation of this theory. One such trend is the rise of a reading culture that encompassed more than just the upper tiers of society; this trend pervaded all levels of society, yet not all individuals. Reading became integral to society in both the public and private sphere. Enlightenment Germany was no exception to this trend, as Historian Jane

Curran argues, “reading, the principal tool Enlightenment, first became a private matter, but there are many indications of reading as a persistent, regular social activity continuing throughout the period.”<sup>1</sup> The growth of reading societies and the increasing popularity of the novel drastically changed the manner in which people viewed the concept of personhood, as it subconsciously catered empathy within the reader for the human situation. Novels such as Samuel Richardson’s *Pamela* (1740) and *Clarissa* (1747-48) or Jean-Jacques Rousseau’s *Julie, or the New Héloïse* (1761) invoked a heavy conception of emotion and empathy, forcing the reader to envision themselves as the character through emotional involvement. Lynn Hunt argues that people became “fundamentally similar because of their inner feelings, [creating] a sense of equality and empathy through passionate involvement in the narrative.”<sup>2</sup> This invocation of both emotion and empathy saw a drastic change in how the individual person grounded themselves in relation to society as a whole.

Hunt also argues that the rise in popularity of the portrait helped cultivate the sense of the individual within European culture, and had similar psychological and social ramifications among the population. The increasing demand for portraits began with a focus on “representations of types or on allegories of virtues or wealth,” but clients at the later-half of the century desired “more natural-looking renderings of psychological or physiognomical individuality,” the proliferation of which helped instill the concept of what historian Lynn Hunt states as the “single, separate, distinctive, and original”

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<sup>1</sup> Jane V. Curran, “Oral Reading, Print Culture, and the German Enlightenment,” *Modern Language Review* 100:3 (2005): 695-708.

<sup>2</sup> Lynn Hunt, *Inventing Human Rights*, (New York: W.W. Norton & Company, 2007): 35-69.

individual.<sup>3</sup> There were other threads pervading Enlightenment culture that affirmed this sense of the “self-contained person”: a continued decline in the practice of public defecation, urination, or spitting, a shifting conception of the manner in which the individual experienced music and theater, and, above all, a growing focus on reason, sensibility, and the inner-human.<sup>4</sup> All of these diverse themes served to alter the perception of individual personhood, and thus the manner in which people viewed themselves and their interactions with others. It was this emergence of the self-contained person that allowed people to detach from the self and invoke the empathetic element, enabling a heightened sense of both feeling and understanding between individuals that had clear implications on European society as whole.

This shifting perception of individual personhood not only changed the manner in which humans viewed themselves in relation to one another, but more importantly, it changed the manner in which the individual conceptualized their relationship to society and the institution that governed it. The blind authority and rigidity of dynastic absolutism was questioned intensely during the Enlightenment, with social contract theory and natural law providing a foundation for government that went further than the will of the sovereign; in essence, the legal fiction had to shift to accommodate these new theories lest the compact between society and the government be shattered.

The legal fiction of the era was altered to accommodate this shifting trend towards empathy and reason, and from this we see the emergence of enlightened absolutism among many of the great powers during the eighteenth-century. Dynastic absolutism

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<sup>3</sup> Hunt, 70-112.

<sup>4</sup> Hunt, 82-83.

conceived statehood in the body of the ruler and the ruler alone, with very little consideration to the individual geographical and cultural norms that were slowly rising towards the surface of popular consciousness. Absolutist monarchy and enlightenment culture were not mutually exclusive, particularly in the German states. While the political models and policies in France proved less congruent with more radical popular Enlightenment culture, the unique political and confessional composition of the Germanies allowed for a very unique and distinct expression of the growing trends of the Enlightenment in Europe. Historian H.M. Scott best explains the distinct nature of the German *Aufklärung*:

Germany's *Aufklärer*, publicists, and government officials generally concurred in advocating only limited, evolutionary change without seriously disrupting the status quo. Instead, Enlightenment ideas that operated as a destructive voice west of the Rhine were readily integrated into the established matrix of ideas, values and institutions.<sup>5</sup>

In Germany, limited enlightenment, or perhaps “benevolent reform” integrated well into the existing social structures among the disparate states, and thus helped cushion the more radical effects of revolution that wracked France towards the end of the eighteenth century, and also allowed for the flourishing of a unique legal fiction well-suited to accommodate the Enlightenment *Zeitgeist*.

What emerged in the place of radical reform was the more conservative and digestible notion of the philosopher-prince: the benevolent ruler, the servant of the state, the avid intellectual, the accomplished musician, and overall, a woman or man of the

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<sup>5</sup> H.M. Scott, *Enlightened Absolutism: Reform and Reformers in Later Eighteenth-Century Europe*, (Ann Arbor, MI: University of Michigan Press, 1990): 221-244.

Enlightenment. Even the *philosophes* believed that all the identities of the monarch, however, were wrapped in absolute authority. Voltaire argued in his 1750 *Voice of the Sage and the People*, that “government cannot be good, if it does not have sole power.”<sup>6</sup> Enlightenment philosophers largely affirmed this conception of the philosopher-prince as the most effective means of promoting the emerging theories of the era, and the Germanies served the perfect breeding ground for this strange paradox of both enlightened principle and absolute authority. Dr. Charles Ingrao has argued that:

The acceptance of absolutism was common to virtually all German political theorists; once a monarch had accepted the limits and responsibilities of natural law, all of the most prominent *Aufklärer*- from Pufendorf and Leibniz through Thomasius and Wolff to the young Kant- recognized the primacy of the central authority without allowing for any significant checks.<sup>7</sup>

In clear contrast to many of the popular and slightly more egalitarian theories that would pervade France and Great Britain at the close of the era, enlightened absolutism emerged as a well-vetted facet of the German Enlightenment, and was even lauded by many titans of the Enlightenment from Western Europe, none so more than Voltaire.

However, there were clear trends that separated the legal fiction of enlightened absolutism from that of dynastic absolutism. The enlightened absolutist was named the first servant of the state, with the forefront of “the sovereign’s policy placed at the service of his or her subjects’ well-being, and was no longer directed one-sidedly towards the

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<sup>6</sup> Roger Wines, *Enlightened Despotism: Reform or Reaction*, (Topeka, KA: D.C. Heath & Company, 1967): 18.

<sup>7</sup> Charles Ingrao, “The Problem of ‘Enlightened Absolutism’ and the German States,” *The Journal of Modern History* 58(1986): S166.

interests and reputation of the sovereign and the dynasty.”<sup>8</sup> In addition, Lesaffer argues that the enlightened absolutist was held captive to a higher power, not necessarily that of God or the church, but instead to the shackles of reason and natural law. A strong aspect of a ruler’s legitimacy was derived from his conception as a servant to the state and a servant to reason, and as such, monarchical government played a heavy role in cultivating the arts, trade and industry, academics and schooling, and instituting religious toleration. Despite the supposedly benevolent and “enlightened” nature of many of these reforms, they served a more coherent means in promoting the welfare and taxability of the state and its citizenry, alienating the power of the nobility and clergy from interference in government action, and the consolidation and methodization of state administration to allow for streamlined military, social, and economic mobilization in times of crisis and war.

The careful integration of Enlightenment thought and political necessity within eighteenth-century Germany allowed for the flourishing of enlightened absolutism as the most prominent legal fiction of the era. However, to what degree were increasingly popular notions of rights actualized under the rhetoric of enlightened absolutism and the philosopher-prince in Prussia under Frederick II and Bavaria under Maximilian III Joseph? History hails the Enlightenment for its focus on reason and skepticism as opposed to the supposed dogmatic superstition of the past, and it is as both an instrument and facilitator of reason that the theory of the philosopher-prince is founded. Flowing from this intellectual cornerstone were various state reforms, most notably the active

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<sup>8</sup> Randall Lesaffer, *European Legal History: A Cultural and Political Perspective*, (Cambridge, UK: Cambridge University Press, 2009): 399.

cultivation of Enlightenment thought through centralized state effort, the establishment of accessible and state-mandated education, the institution of comprehensive legal reform programmes through codification, and the extension of religious toleration to confessional minorities within the state. It is these four criteria that serve as the best manner of measuring the true nature of reform within the state, determining to degree the reality of enlightenment reform meets with the popular intellectual trends of the era handed down by Frederick II and Maximilian III Joseph.

## CHAPTER THREE

### STATE-SPONSORED INTELLECTUAL CULTIVATION IN PRUSSIA AND BAVARIA

Compulsory education did not witness its origins during the Enlightenment, but instead built on the educational expansion began during the Reformation. School systems were instituted on a limited scale for children of the nobility or wealthy landowners well before the 18<sup>th</sup> century. Mostly, educational policy in both Catholic and Protestant areas consisted of vernacular religious schools for the common learner and more rigorous and lengthy Latin grammar schools for members of the nobility or those entering civil service. For the common man, little education was needed; John Locke advocated that “The knowledge of the Bible and the business of his own calling is enough for the ordinary man; a Gentleman ought to go further.”<sup>9</sup> Lay-education preceding the Enlightenment served a very limited and basic function, and was deeply religious in its foundation, administration, and perceived purpose.

The emergence of sense-realism, a linear descendent of humanist thought from the late Renaissance and early Reformation, resulted in the first “modern schools” of the late seventeenth- and early eighteenth-centuries: the *Realschule*. The *Realschule*, or “real schools” were founded largely in Germany under the reforming efforts of Halle-Pietism

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<sup>9</sup> Ellwood P. Cubberly, *The History of Education: Educational Practice and Progress Considered as a Phase of the Development and Spread of Western Civilization*, (Cambridge, MA: The Riverside Press, 1920): 435.

under the work of Augustus Hermann Francke.<sup>10</sup> These schools administered a wide and practical variety of subjects, such as history, geography, reading, writing, science, language, among a large number of other curricula. More classicist schools were formed, known as the *gymnasia*, incorporating pieces of *Realschule* reform in addition to a regimen of Greek language and culture.<sup>11</sup> With the growing access to education, it began to be included on the list of those rights that belonged to “every man”, cited by Pierre-Samuel du Pont de Nemours, among others.<sup>12</sup>

The system of public schooling in Brandenburg-Prussia was established under the reforming efforts of Frederick II’s father, Frederick William I (1688-1740). Heavily-influenced by the Halle-Pietism, he thus instituted reorganization along a limited interpretation of the *Realschule* movement. Frederick William placed great importance on overhauling the Prussian administrative class, and reformation in education served to bring about a new generation of magistrates and bureaucrats who were more capable in their leadership and knowledge-base, and served to consolidate and streamline the daily workings of Prussian government.<sup>13</sup> The need for vast bureaucratic reform to govern the disparate and geographically detached states and duchies of Brandenburg-Prussia made the promotion of such limited schools a direct benefit to the policies of Frederick William I.

One area Frederick II was lauded by his contemporaries for his Enlightenment reforming effort within the state was is expansion and reform of compulsory education.

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<sup>10</sup> Cubberly, 468.

<sup>11</sup> Cubberly, 462.

<sup>12</sup> Hunt, 125.

<sup>13</sup> Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia 1600-1947* (Cambridge, MA: Harvard University Press, 2006): 246.

In 1763, Frederick II instituted the *Königlich Preußische Generallandschulreglement*, establishing compulsory state-controlled schools throughout the Kingdom of Prussia and its territories both in and outside the domains of the Holy Roman Empire. The stated purpose of the schools was to educate those who did not have the means to do so themselves, thereby “preventing harmful and indecent ignorance in order to make a more skillful and brighter people from the time the schools can begin educating.”<sup>14</sup> Schooling was made available to all strata of society from the ages of four to thirteen. Funding coming from state programs or local gift from magistrates or parishioners, setting the foundation for the continued development of the Prussian general schooling system that would be emulated as the model for state schooling.

The model of *Schulpflicht*, or compulsory education, as established by the *Königlich Preußische Generallandschulreglement* was incredibly inclusionary for the era. Both boys and girls who were no younger than five years of age and had received to other form of education would be kept “until the thirteenth year, and will be kept in the school until they have achieved not only the basic necessities of Christianity, reading, and writing, but also that they can read and answer what should be taught from out prescribed and proper textbooks.”<sup>15</sup> The *Landschule* offered a base education encompassing literacy and both secular and spiritual themes to the general population, incorporating those who had no other alternative to attend, much less pay for, any form of primary educational institution.

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<sup>14</sup> August Schorn, et al., *Geschichte der Pädagogik in Vorbildern und Bildern* (Leipzig: Dürrschen Buchhandlung, 1906): 204-213.

<sup>15</sup> Schorn, et al., 204-213.

Under Frederick II, compulsory education was extended not only to the Protestant majority, but to Catholic inhabitants of Brandenburg-Prussia as well. With the annexation of Silesia and the large Catholic population that inhabited it, Frederick II mandated compulsory education regardless of denomination in the *Königlich Preußische General Landschule Reglement für die Romisch-Katholischen*.<sup>16</sup> This idea was furthered with the publishing of the codified legal code in Prussia in 1794, which stated that “All public schools and educational institutions are under the supervision of the State, and the trials and visitations to the same subject at all times. No one should be denied access in public schools because of difference of creed.”<sup>17</sup> Compulsory education within the Prussian state extended to boys and girls, whether Protestant or Catholic.

Taken at face value, these reforms instituted by the *Generallandschulreglement* and *Generallandschulereglement für die Romisch-Katholischen* certainly exhibit the spirit of the philosopher-prince. These rules served to promote the growing conception of individual rights per the intellectual theme of the Enlightenment. However, aside from its demographic breadth, the furthering of primary schools within the Prussian state did not offer any significant break in purpose or quality from those previous schools established under the reforming efforts of Halle-Pietism. The establishment of these schools instead served the primary yet unstated function of enlightened absolutism that lay just under the legal fiction, that is, to solidify absolute control over all portions of the state under the cloak of Enlightenment rhetoric.

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<sup>16</sup> Frederick II von Hohenzollern, *Königlich Preussische General Landschule Reglement für die Romisch-Katholischen*, (manuscript, Bayerische Staatsbibliothek, 1765), OPAC Plus.

<sup>17</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, Title 12 (1796).

These schools offered little in terms of expanded curriculum, where the primary activity of students remained exercises in reading and writing. Even though the intellectual movements within the Enlightenment were largely accomplished on a seemingly secular plane and offered a clear divorce from the last remnants of scholasticism and Latin-based religious schools, the reality was quite different. Education within the compulsory primary schools focused almost exclusively on the reading and memorization of scripture. The Enlightenment was very much a movement of the intellectual elite. Any sort of dissemination to the masses was seen as utterly futile by the grand majority of those shaping intellectual and political trends during the eighteenth-century. Compulsory schooling was not established within the Kingdom of Prussia to offer the Enlightenment to those who were previously denied access, but instead as a means to control the population and ease the mild alienation of the traditional aristocracy from exclusive control over bureaucratic functions within the emerging notion of the state. Through the establishment of schools and the extension of compulsory education to all levels of society, both Protestants and Catholics, allowed for the institution of state values that greatly solidified state authority over the masses. This affirmed the growing conception of statehood and identity into the general population, and helped socialize state authority over those that authority extended over, almost as an early model of pseudo-nationalism that helped further the growing bureaucracy within the Prussian state.

Compulsory education and pedagogical reform also took hold in the Electorate of Bavaria under Maximilian III Joseph. In 1774, Maximilian III instituted the *Schulordnung* within the Electorate, creating compulsory, state-managed primary schools

for the general population. Students were not only introduced to reading, writing, and canon verses, but an array of varying subjects in addition to Latin and a focus on the German vernacular.<sup>18</sup> Schools were funded in a similar manner to those established in Prussia under Frederick II, with state-funding being supplemented by church donation and personal endowment.

Though the reform itself was very progressive, its institution was ineffective and deeply flawed, seeing little real change in the educational composition of the Electorate. The schools mirrored almost consistently those existing in the preceding era, focusing almost exclusively on scripture as a means of attempted literacy, yet often falling short in even this manner. One traveler through the Electorate following the institution of the *Schulordnung* stated that “in the rural districts there are either no schoolmasters at all or miserable wretches that could scarcely read and write and were paid but fifty to one hundred florins yearly – poorer pay than was given to day laborers.”<sup>19</sup> The schools that were established fell drastically short of their intended purpose, riddled with all sorts of problems stemming from underfunding to lack of reliable schoolmasters. The ineffectiveness of this reform, even despite its seemingly progressive nature, is highlighted most notably in the drastic call for school reform that emerged under the leadership of Montgelas during the modernization of Bavarian social and domestic policy following the Napoleonic era.

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<sup>18</sup> Maximilian III Joseph von Wittelsbach, *Schulordnung*, manuscript, (Munich: Bayerische Staatsbibliothek, 1772).

<sup>19</sup> Chester Penn Higby, *The Religious Policy of the Bavarian Government During the Napoleonic Period*, (New York: Columbia University Press, 1918): 26.

The purpose of these schools mirrored that of educational reform in Prussia. The schools established by Maximilian III Joseph largely served to formulate a conception of state-identity within the general population and, particularly within Bavaria, reinforcing religious norms in the predominantly Catholic Electorate. This was achieved both in the curriculum and the establishment of the schools themselves, which served as a visible and ever-present arm of state authority that worked towards the perceived benefit of the public. The use of scripture as a means of achieving literacy helped affirm the institution of the Catholic Church within the Duchy of Bavaria, an institution that was paramount in the historical narrative of Wittelsbach authority. In addition, compulsory education helped undermine to a lesser degree the monopoly the noble class had on education and thus the bureaucratic and administrative offices, undermining the power of that traditional enemy of monarchical authority.

## CHAPTER FOUR

### LEGAL REFORM AND THE EVOLUTION OF CODIFICATION

One of the most significant implementations of Enlightenment thought can be seen in the broad array of legal consolidation and reform undertaken by the enlightened absolutist monarchs of the eighteenth century. Enlightenment focus on reason and rationality prompted bureaucratic reorganization and legal reform by many European rulers, in order to break from the disparate feudal regulations that governed the dynastic age and thereby make the state a more efficient and well-regulated entity. Social contract theory advocated by John Locke and Jean-Jacques Rousseau popularized a limited conception of human liberty in subordination to the compacted state and the general will, or *volonté générale*, of the community as a whole.<sup>20</sup> Enlightened absolutism molded from previous dynastic theories to fit the spirit of its time in that the ruler, if professing to be enlightened, had a duty of upholding the general will through his social, political, and military policy.

Legal consolidation and reform often proved in the best interest of the ruler as well as his or her subjects, in that it created a sense of coherence before the law, reduced the power and discretion of noble lawyers and judges, streamlining the administrative

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<sup>20</sup> Lesaffer, 391.

capability of the state. The relationship between these theories is best argued by European legal historian Randall Lesaffer:

rational organization of government and law called for by the Enlightenment could only enhance the administrative efficiency of the central government. The erosion of the traditional privileges of the estates would subject every citizen equally to the prince's authority. The desire for equality translated itself into a policy of national unification of government and law. The Enlightenment offered the sovereigns a progressive programme for realising an old dream, that of putting an end to the traditional, historic rights and privileges of their most powerful subjects.<sup>21</sup>

Legal reform instituted along a rights conception of "equality" served as a useful tool to solidify absolutist central authority, and was jumped upon by many enlightened absolutists of the era in order to capitalize on the opportunity of alienating the power of the nobility within the government. The pragmatism of this manner of reform was of particular necessity within the political climate of the Germanies, where for too long the varying monarchies had proved incapable of dismantling the pervasive influence of the nobility in the manner of many Western absolutists, seen most clearly in the example of France under Louis XVI in the seventeenth-century.

Out of this theme came the early European movements towards codification. Stemming from the growing shift towards natural law theory and the principles of government, a great desire formulated among many European reformers to replace existing law with new statutory compilations based on Enlightenment theory and rationalism. Feudal law and Roman law proved incapable of managing the needs of the

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<sup>21</sup> Lesaffer, 399.

expanding nation-state, and left a broad measure of discretion to local judges and magistrates, often resulting in abuse and corruption. Such *philosophes* as Charles-Louis de Secondat, Baron de Montesquieu advocated for a clear-cut system of legal rules drawn from a single source that was both certain and comprehensible, “grafting itself onto the emergent sovereign state, in which it found a natural ally.”<sup>22</sup> Throughout the second half of the eighteenth-century, many states began to overhaul their legal systems along these guidelines, ever mindful of the powerful ability of codification to undermine the influence of the nobility within the courts. More often than not, these codes failed to promulgate any definition of rights that aligned with the rhetoric of the enlightenment, but instead served as a reinforcement of the status quo and a further legitimization of enlightened despotism despite its failure to promulgate Enlightenment principles.

Codification in Enlightenment Germany reached a high point under Frederick II, as the Prussian legal code promulgated served as a model for many other smaller states within the loosely-confederated Empire. Previous attempts at codification were instituted by Frederick’s father Frederick William I, aided by legal theorist Christian Thomasius of the University at Halle. Codification attempts were drafted in 1714 and 1738 along both natural law and Roman law principles, but these attempts proved fruitless in their endeavor to create a clear and concise legal code within Prussian holdings.<sup>23</sup> Frederick II took up the mantle of legal reform in conjunction with Justice Minister Samuel von Cocceji, attempting to formulate what was known as the *Corpus Juris Fredericianum* between 1749 and 1751, but was recalled due to a perceived lack of utility, in addition to

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<sup>22</sup> Lesaffer, 453.

<sup>23</sup> Lesaffer, 454.

the growing preoccupation with the political maneuvering and escalation leading up the Seven Years' War.<sup>24</sup>

Frederick fully realized the necessity of comprehensive legal reform in solidifying absolutist authority over the state, and after years of work in concurrence with Prussian legal theorists Johann Heinrich von Carmer and Carl Gottlieb Suarez, the *Allgemeines Landrecht für die Preußischen Staaten* (1794) encompassed public law, criminal law, commercial law, ecclesiastical law and elements of feudal law.<sup>25</sup> Though it was published after his death, Schulze considers the *Allgemeines Landrecht für die Preußischen Staaten*, or *ALR*, as the culmination of Frederick II's efforts at reforming the legal system of Prussia, and can be "regarded as the characteristic expression of his entire government and legal opinion," and therefore can be used as an accurate measure of both his thoughts and his efforts regarding humanity's relation to the law.<sup>26</sup>

The *ALR* applied enlightenment themes of natural law and natural jurisprudence, even delineating the foundation of rights within the Prussian state, maintaining that "the general rights of men are founded in their natural liberty to pursue their own interest without, however, any encroachment upon the rights of other men."<sup>27</sup> This conception of rights was exhibited within the legal code as a characteristic of individual, defining the concept of personhood as one who enjoys "certain rights within civil society."<sup>28</sup>

However, many of Frederick II's reforming goals fell short of the Enlightenment idealism and natural law rhetoric that rights theory was built on during the eighteenth-

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<sup>24</sup> Clark, 164.

<sup>25</sup> Lesaffer, 454.

<sup>26</sup> Hermann Schulze, *Das Preussische Staatsrecht* (Leipzig: Breitkopf & Härtel, 1888): 73-74.

<sup>27</sup> Lesaffer, 454.

<sup>28</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part I, Title 1, §1.

century. Most notable is seen in the class structuring of society, which was instituted and justified legally under the *ALR*. Most evident of these failings were the subjective manner in which rights were possessed by various class stations within the Kingdom of Prussia. The *ALR* explicitly states this to avoid any confusion or appearance that rights are possessed equally and unilaterally among the Prussian citizenry, stating that “Men’s rights are determined by their birth, class, actions and events to which the legislation has attached certain effects.”<sup>29</sup> This solidified rights not as universal or inherent, but as subjective to varying criteria, most notably birth and class. Egalitarianism was not something that was compatible with the legal fiction of enlightened absolutism, and many of the prominent *philosophes* of the era were staunchly against the concept of egalitarianism as an effective model for governance.

The *ALR* solidified the status of the peasantry within the Kingdom of Prussia, simply codifying those practices of holding the lowest class within its station. Under Part II, Title Seven, the rights of the peasantry were laid out in such a manner that tied them to their land and station. Under statutes §3 and §4, members of the peasantry were barred from pursuing any sort of business, commercial or civic venture that would reduce their efficiency in the much-needed agricultural sector, with very limited exceptions permitted under expanded portions of Title Seven.<sup>30</sup> However, the *ALR* affirmed that even these exceptions did not change the bonded status of the peasantry, stating that “by permission to participate in a civic sector, the farmer has not changed his standing and personal

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<sup>29</sup> Lesaffer, 454.

<sup>30</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, Title 7, §1-2.

relationships.”<sup>31</sup> Peasants were also drafted into work-groups to expand the infrastructure of the state, being “particularly committed to the state manual and team services.”<sup>32</sup>

These laws served the explicit purpose of regulating agricultural production, necessary within the Prussian state to feed an army that made up almost one-third of the state. No sacrifice could be made in the name of Enlightenment that threatened the derivation of Prussian state authority. This trend is affirmed throughout the *ALR*, stating that the cultivation of land is the primary purpose of the Prussian peasantry, and that those who show negligence in this task can either be coerced by the state or even have their property seized and passed on to another.<sup>33</sup> In cases of extreme necessity, most notably when food stores were needed to fuel the Prussian war machine in times of crisis, peasants surpluses could be seized without compensation.<sup>34</sup> Essentially, the rights of the peasantry existed exactly as they did before the institution of the *ALR*, which only served to solidify their unfortunate status within the Prussian hierarchy. While offering progress in regards to humanitarian reform and legal predictability, the law itself was subjective in regards to class and the influence it had on personhood, thereby offering both a break from and a reinforcement of the status quo in Europe at the time.

Overall the legal reform under Maximilian III Joseph in Bavaria proved to have a similar effect to that of Frederick II in Prussia, in that it did not offer a substantial break from existing social structure during the eighteenth- century. Maximilian III did experience much greater success in instituting comprehensive legal reform and

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<sup>31</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, Title 7, §4.

<sup>32</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, Title 7, §13.

<sup>33</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, Title 7, §8-9.

<sup>34</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, Title 7, §11.

codification within Bavaria, pushing through a successful and coherent legal code in 1756 with the aid of legal theorist Wiguläus von Kreittmayr. This codified system of law, known as the *Codex Maximilianeus Bavaricus Civilis*, was much more fluid and comprehensible than that of the *ALR*, deferring to Roman law in absence of statutory guidelines per the new code.<sup>35</sup> It offered a grant of rights in a similar utilitarian perspective, citing the source of law not from divine mandate but instead originating from the “common good.”<sup>36</sup> The legal compendium offered reliability within the courts and an expectation in the rule of law, and was also intended to be made accessible to the public. The *Codex* was written and promulgated in Bavarian as opposed to the more formal Latin, an attempt to fulfill its mission of accessibility, though literacy obviously served as a requirement. This intention was explicitly stated under Part I, Chapter 1, §6, that “the law must be made publicly known so that all may have the right to know and learn it.”<sup>37</sup>

The *Codex* appeared to derive its legitimacy from popular Enlightenment thought, particularly that of social compact theory and natural law theory. The legal compendium even offered a definition of natural law and its relation to the state and its citizens:

The natural law, or *Juris Naturae*, is law which is founded by God in human nature, and allows humanity to recognize the ultimate purpose and inward nature that man may only understand through reason: firstly duty to God, then oneself, and finally a common desire to meet the needs and conveniences of his fellow-men.<sup>38</sup>

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<sup>35</sup> Ulrich Eisenhardt, *Deutsche Rechtsgeschichte*, (Munich: C.H. Beck München, 2008): 199.

<sup>36</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 1, §3.

<sup>37</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 1, §6.

<sup>38</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 1, §4.

What the *Codex* set forth was essentially a restatement of natural law that was inherent to humanity, yet derived from God and thus ingrained in human nature through creation and encompassing universal moral principles. This stood in clear contrast to what the *Codex* set forth as human law, or *Juris Humanum*. This was defined as a separate branch of law that was not inherent to the human condition, instead coming from solely from “that which is prescribed indiscriminately by human legislators.”<sup>39</sup> The *Codex* also stated that the state formed not from any divine origin, but instead through “nature and human arrangement,” thereby appealing to social compact theory as a basis for its legitimacy in the administration of the law.<sup>40</sup> The peasant class was said to be broken from the tradition of Roman law; they were required to give “certain offerings and services, yet retains, as any man, his liberty.”<sup>41</sup>

However, the *Codex* seemingly used these legitimizing theories of social compact theory and natural law in name only, affixing the new legal compendium with a veritable Enlightenment “stamp of approval” only to affirm the existing social and religious structure within the Electorate of Bavaria. In almost identical fashion to the *ALR* in the Kingdom of Prussia, the *Codex* did little more to further the Enlightenment than codify and solidify the existing status quo at the time its promulgation. Class differentiation was affirmed within the Bavarian legal code, in addition to conceptions of male-domination of the family unit and the nobility.<sup>42</sup> Those who were born serfs enjoyed a differing definition of rights, and were completely bound within their station under the legal

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<sup>39</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 1, §3.

<sup>40</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 3, §3.

<sup>41</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 8, §1.

<sup>42</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapters 3-4.

environment of the *Codex*.<sup>43</sup> Affirmation of this social structure was given through religious arguments and the upholding of tradition, all of which affirmed the presence of a different class with different rights.

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<sup>43</sup> *Codex Maximilianeus Bavaricus Civilis*, Part I, Chapter 3, §3

## CHAPTER FIVE

### HUMANITARIAN REFORM WITHIN THE NEW LEGAL STRUCTURES

With the push towards codification and legal predictability during the Age of Enlightenment, there was also a growing current among the *philosophes* that called for a reexamination of criminal law, especially the institution of torture. Very likely a direct result of the shifting notion of the self as argued predominantly by Hunt, the move towards humanitarian legal reform solidified itself within the courts of Europe and became a topic of popular discourse for the era. While not the first to discuss the need for penal reform that aligned more closely with the idea of rights and Enlightenment virtue, the most notable voice for this reform came from the Milanese Marquis Cesare Beccaria.

Humanitarian legal reform was the hallmark of Beccaria's 1764 *On Crimes and Punishments*, serving as a capstone to the growing recognition of human rights within the context of the eighteenth-century. Beccaria begins by laying out the well-established arguments for social compact theory as the origin of society and the legitimizing substance of existing government. In social compact theory, the acceptance of entry in a society means the acceptance of a government and its right to punish those who deviate from social norms. However, Beccaria warns against the oft-abused nature of punishment, quoting Montesquieu in that "Every punishment, which does not arise out of

absolute necessity, is tyrannical.”<sup>44</sup> Beccaria argued against the objective nature of torture, summarizing its flawed logic:

No man can be judged a criminal until he be proved guilty; nor can society take from him the public protection, until it have been proved that he has violated the conditions on which it was granted. What right then, but that of power, can authorize the punishment of a citizen, so long as there remains any doubt of his guilt? If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent: for in the eye of the law, every man is innocent, whose crime has not been proved. Besides, it is confounding all relations that a man should both be both the accuser and accused; and that pain should be the test of truth, as if truth resided in the muscles and fibers of a wretch in torture.<sup>45</sup>

Beccaria laid out an expansive definition of the rights of the accused, relying on logic as opposed to traditional practice to outline the flawed nature that served as the foundation of the practice of torture.

In Voltaire’s forward to Beccaria’s *On Crimes and Punishments* (1764), he authors a heavy criticism of the nature of the prison system in Europe, penning the following:

Surely, the groans of the weak, sacrificed to the cruel ignorance, and indolence of the powerful; the barbarous torments lavished, and multiplied with useless severity, for crimes wither not proved, or in their nature impossible; the filth and horrors of a prison, increased by the most cruel tormentor of the miserable, uncertainty, ought to have roused the attention of those whose business is to direct the opinions of mankind.<sup>46</sup>

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<sup>44</sup> Cesare Beccaria, *On Crimes and Punishments* (London: F. Newberry, 1819): 20.

<sup>45</sup> Beccaria, 43.

<sup>46</sup> Voltaire, “Introduction,” *On Crimes and Punishments*, auth. Cesare Beccaria (London: F. Newberry, 1819): 15.

Various acknowledgements of this trend took shape within the codes set forth by both Frederick II and Maximilian III Joseph, each shaped to the degree that could both accommodate the legal fiction of enlightened absolutism while also meeting the very specific yet very different needs of the Electorates of Prussia and Bavaria.

Frederick II abolished this practice upon his ascension to the throne in 1740, well before Beccaria's famous work, citing its unsound reasoning and stating that, "I hope I need make no apology for condemning the use of torture, for preferring to take the part of humanity against a practice so shameful to Christians, and to all civilized nations; and, if I may venture to add, a practice as useless as cruel."<sup>47</sup> The process of codification under the *ALR* solidified this humanitarian reform, as torture was not introduced as a judicial measure under the criminal code provided.

However, this served to further solidify the legal fiction of absolutism, and served to highlight the perceived lack of utility of judicial torture in a state that was financially viable, with a streamlined bureaucracy and court system that upheld the law within the militaristic society. The financial and domestic success of his predecessors were seen on a societal level, with criminals being forced into conscription and pushing forth the military arm of the state, and thereby furthering state interests.

In contrast, the legal reforms laid out by Maximilian III Joseph offered a break from the *Allgemeines Landrecht für die Preußischen Staaten* in one significant theme, in that judicial torture was upheld in Bavaria as a means of interrogation, punishment for

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<sup>47</sup> Frederick II von Hohenzollern, "A Dissertation on the Reasons for the Enacting and Repealing of Laws," *Memoirs of the House of Brandenburg: From the Earliest Accounts, to the Death of Frederick I. King of Prussia* (London: J. Nourse, 1751): 22-66.

crime, and deterrent for future criminals.<sup>48</sup> Maximilian III issued his proclamation regarding torture just seven years after Frederick II's abolition of the same, upholding judicial torture due to a continues perception of its benefits in regards to the established legal system, and preferring any change in this practice to come at the distraction of the lower court officials.

Torture served as direct reflection of the nature of crime within the Electorate, catering directly to the needs of the Bavarian state. Compared to the financial viability of the Prussian state due to its military success and bureaucratic reform, Bavaria existed within a state of financial panic and stress for the entirety of the reign of Maximilian III Joseph. Huge indemnities were placed on the Bavarian Elector by Habsburg Austria following Bavaria's capitulation in the War of Austrian Succession, a direct result of Karl Albrecht's foreign policy and brief stint as Emperor in violation of the Pragmatic Sanction, a feat made possible with French funding and through Prussian military prowess and political backing.<sup>49</sup> With this financial ruin, poverty and famine rose in a drastic manner within the Electorate, resulting in a sharp rise in crime. Baron Johann Kaspar Riesbeck in his *Travels Through Germany* noted this point, citing the desperate situation in Bavaria, where Austrian troops had "plundered the archives, robbed the nobility, laid waste to the country, and carried the peasants into captivity."<sup>50</sup> Even barring the ramifications of Austrian occupation, Bavaria had little to offer in terms of a vibrant economy to promote stability. Bavaria during the mid-eighteenth-century held an annual

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<sup>48</sup> Maximilian III Joseph von Wittelsbach, *Tortur* (Munich, 1747). [BSB 2 Bavar. 960 XI, 83]

<sup>49</sup> Browning, 196-204.

<sup>50</sup> Johann Kaspar Riesbeck, *Travels Through Germany*, trans. Paul Henry Maty (London: T. Cadell, 1787): 6.

revenue of 7,500 German florins and fielded an army of 30,000 men, compared to Prussian and Austrian incomes of 35,000 and 200,000 German florins, respectively, and both fielding armies of 180,000.<sup>51</sup> Riesbeck notes the effect of this financial strain on the population, stating that there was “little vestige of industry in either town or country, with brewers, bakers, and innkeepers being the only rich tradesmen.”<sup>52</sup> In short, Bavaria during the reign of Maximilian III Joseph was exhibiting a period of financial ruin, a ruin that had wide effect on the population and thus on the levels of crime within the Electorate.

This widespread rise in crime due to poverty was seen in the vast amount of beggars and vagrants who, with no other economic outlet to prevent starvation, resorted to crime. Signs depicting various scenes of torture under the law were erected on the borders of all local districts, or *Pfleggerichte*, within the Electorate to serve as a deterrent for the vast amount of fluid population.<sup>53</sup> In a state that was emerging from the ruin of Austrian occupation and a disastrous set of wars, any seemingly effective means to control time and assert state authority couldn't be sacrificed to uphold Enlightenment idealism. This use of judicial torture to deter crime and stop the spread of vagrancy within the state is highlighted under the *Codex Juris Bavaricus Criminalis*, exhibiting punishments ranging from hanging to breaking upon the wheel.<sup>54</sup> However, those court officials deemed to have applied torture in excess or for lesser offenses were subject to judicial action, and the manner in which torture was applied was very prescriptive and

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<sup>51</sup> Frederick II von Hohenzollern, *Memoirs of Frederick II, King of Prussia* (London: Hinton, 1757): 189-190.

<sup>52</sup> Higby, 24.

<sup>53</sup> Higby, 25.

<sup>54</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 11.

restrained for crimes that posed a direct threat to state stability, particularly within the realm of treason, vagrancy, and religious subversion.<sup>55</sup> While humanitarian reform was not exhibited in the degree that was capable with the social realities experienced by Prussia during the Enlightenment, there is still a traceable degree of influence. This demonstrated the clear and direct nature of pragmatism in the application of Enlightenment thinking to judicial reform; in short, reform could only extend so far in alignment with the realities of the state.

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<sup>55</sup> *Codex Juris Bavaricus Criminalis*. Part I, Chapter 11.

## CHAPTER SIX

### THE STATUS OF RELIGIOUS TOLERATION WITHIN PRUSSIA AND BAVARIA

One of the most prominent shifts in political culture following the Peace of Westphalia was the manner in which state confessional identity transitioned from the forefront of European power-politics to a less prevalent social sphere. The fracture of the Protestant and Calvinist faiths from the Catholic Church served as the impetus for wide-scale political and social upheaval during the sixteenth and seventeenth centuries, culminating in the Thirty Years War in 1618. This prolonged period of warfare effectively broke the centralizing efforts of the Holy Roman Emperor, but saw mass depopulation and famine wrought among the varying German states due to the lack of troop discipline, in addition to the methods of self-finance and *bellum se ipsum alet* logistics that sustained the armies of the era. With the growing reliance on reason as opposed to dogma as the impetus for action in the Enlightenment era, religion ceased to operate as a legitimate and well-recognized *cassus belli* among the great powers of Europe. Religious identity still served as an important facet of state identity, influencing the manner in which European powers conducted domestic affairs and related with other states.

The interrelationship between religion and the emerging conception of the state was the focus of popular discussion among a great number of the *philosophes*. In stark contrast to the exclusionary religious policies of the preceding century, many

Enlightenment theorists offered up the concept of religious toleration on the state level. This theory of toleration emerged in force beginning in 1689, with the publication of *A Letter Concerning Toleration*, authored by John Locke. Locke argued that toleration, above all things, should be the most natural discourse flowing from the Christian faith. Locke argued that “the toleration of those that differ from others in matters of religion, is so agreeable to the gospel of Jesus Christ, and to the genuine reason of mankind; that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in a clear light.”<sup>56</sup> Toleration, according to Locke, was grounded not only in scripture, but in reason. Locke goes on to argue that civil government exists for the sole purpose of promoting the external welfare, and is incompatible in promoting the internal nature that lies within the realm of religion; therefore, there must be a separation between the state and the church. Locke reasoned that “churches have neither any jurisdiction in worldly matters, nor are fire and sword any proper instruments wherewith to convince men’s minds of error, and inform them of the truth.”<sup>57</sup> In direct contrast to the policies of the sixteenth and seventeenth centuries, Locke argued that the extension of toleration to religious dissenters actually served to enhance state stability and cohesion.

However, there were groups identified by Locke that did not fit into an Enlightenment conception of toleration. Those confessions that answer to a corporeal and supreme religious head, particularly that of the Roman Catholic Church or the Islamic faith, were unable to exist under toleration due to the perceived conflict regarding their loyalty to the state. As stated by Locke, “it is ridiculous for any one to profess himself to

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<sup>56</sup> John Locke, *A Letter Concerning Toleration*, ed. J. Concklin, (Halifax: Huddersfield, 1796): 9-10.

<sup>57</sup> Locke, 22.

be a Mahometan only in his religion, but in every thing else a faithful subject to a Christian magistrate, whilst at the same time he acknowledges himself bound to yield blind obedience to the Mufti of Constantinople, who himself is entirely obedient to the Ottoman Empire.”<sup>58</sup> Locke identified this string of diluted loyalties as subversive to state authority, stating that obedience to the Pope or the Grand Mufti was identical allowing subjects to serve another prince, and therefore could not be extended toleration. The second group which had no place under Locke’s theory of toleration was those who had no belief, as Locke argued that atheists had no moral or ethical grounding, and thus had no cause for upholding any sort of oath. Locke states that atheists had no place within the framework of state stability, as “promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist.”<sup>59</sup> While religious toleration within the state did extend to various sects and denominations of the Christian faith and even to Jews, there was still no method of conceptualizing atheists, followers of Islam, or Roman Catholics as anything but subversive within the state envisioned by Locke.

The argument for religious toleration was furthered by another great *philosophe* in Voltaire’s *Treatise on Toleration* in 1763. Voltaire argued that toleration was a necessity on a wide scale, famously quoting:

It does not require great art or studied elocution, to prove that Christians ought to tolerate each other. Nay, I shall go still farther, and say, that we ought to look upon all men as our brethren! How! Call a Turk, a Jew, and a Siamese, my

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<sup>58</sup> Locke, 55-56.

<sup>59</sup> Locke, 56.

brother? Yes, doubtless; for are we all not children of the same parent, and the creatures of the same creator?<sup>60</sup>

What Voltaire argued for in this passage was a call for relating as humans despite cultural and ethnic differences, offering a marked break from the stifling social policies that characterized the reactionary period following the Reformation, culminating in the Wars of Religion that wracked Europe until 1648. This is a clear allusion to the nature of the empathetic element and its pervasive effect in changing the manner in which rights were viewed in Enlightenment Europe, changing the relationships between individual and individual, as well as individual and society and the bodies that governed it.

Voltaire saw religion as, at best, a provisional and untested hypothesis, preferring instead the ambiguous and less dogmatic doctrines of Deism that many of the *philosophes* subscribed to. In this search for what Voltaire would deem an untestable and thus unknowable truth, Voltaire posits the rhetorical question:

After all, can we be supposed to be intimately acquainted with the ways of God, or to fathom the whole depth of his mercy? Is it not sufficient if we are faithful sons of the church, without every individual presuming to wrest the power out of the hand of God, and to determine, before him, the future destiny of our fellow creatures?<sup>61</sup>

Voltaire sought to promulgate the concept of religious toleration on the state level by appealing to Enlightenment skepticism and focus on reason, both of which served to strengthen his arguments for the benefit of tolerance in relation to the state.

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<sup>60</sup> Voltaire, "Treatise on Toleration," *The Works of M. de Voltaire*, ed. T. Smollett et al., (London: J. Newberry et al., 1764): 234.

<sup>61</sup> Voltaire, 238.

This emerging conception of religious toleration took hold in Prussia under Frederick II. Brandenburg-Prussia owed much of the success of its rise to power to both religious toleration and inclusion. The importance of religious identity and its legitimizing influence over monarchical government was a theme that pervaded European states throughout the post-Reformation world. Brandenburg-Prussia was an incredibly unique state for the time due to the confessional diversity within its borders, encompassing a Lutheran majority and prominent Catholic minority in Brandenburg and Pomerania.<sup>62</sup> This minority was expanded under John Sigismund, being granted the predominantly Catholic Ducal Prussia after swearing fealty to the Roman Catholic King of Poland in 1618, thereby realizing three prominent religiously diverse populations under his rule. To further complicate matters, John Sigismund converted to Calvinism under personal conviction in 1613. In this seemingly volatile religious environment, John Sigismund opted to pursue a policy of toleration rather than face dissent or resistance from Catholic nobles in Ducal Prussia or the Lutheran majority within Brandenburg proper, promulgating an edict of toleration in 1615 stating that “His Electoral Highness in no way arrogated to himself dominion over consciences and therefore does not wish to impose any suspect or unwelcome preachers on anyone, even in places where he enjoys the rights of patronage.”<sup>63</sup>

This idea of toleration through lack of forced conversion was expanded further under the reign of Frederick William, the Great Elector. In 1685, Frederick William issued the Edict of Potsdam, allowing admittance into Brandenburg-Prussia those French

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<sup>62</sup> Clark, 122.

<sup>63</sup> Clark, 118.

Huguenots who fled in mass exodus from Louis XIV's revocation of the Edict of Nantes, who were predominantly Calvinist.<sup>64</sup> As stated within the Edict of Potsdam, Frederick William highlighted his duty as a staunch Calvinist and member of the Protestant community to offer a safe-haven to those suffering from persecution, stating that "We now, out of the righteous sympathy which We must in justice feel toward these, Our co-religionists, who are oppressed and assailed for the sake of the Holy Gospel and its pure doctrine, have been moved graciously to offer them through this Edict signed by Our own hand a secure and free refuge in all Our Lands and Provinces, and further to announce to them what justice, liberties and prerogatives We are most graciously minded to concede to them."<sup>65</sup>

Frederick William expanded on this policy by later accepting nonconformist Protestants from the Kingdom of Poland who were being persecuted and marginalized under the predominantly Catholic population. In addition to the mainstream Christian sects, Frederick William also extended domicile and toleration in practice to many Jewish families, who throughout Europe were the target of ridicule and persecution on the state and local scale. In stark contrast to many other states within the German territories of the Holy Roman Empire and Europe as a whole, Frederick William's personal and political convictions were absent of the prevalent anti-Semitism of the time. Frederick William encouraged to creation of small Jewish communities of the outlying duchies of Kleve and Mark, and even encouraged the settlement of over fifty wealthy Jewish families within Brandenburg proper following the expulsion of all Jewish residents from Austria under

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<sup>64</sup> Clark, 123.

<sup>65</sup> Frederick William von Hohenzollern, "The Edict of Potsdam," *Documentary History of Western Civilization*, (New York: Harper and Rowe, 1970), 270-274.

the reign of the Holy Roman Emperor Leopold in 1671.<sup>66</sup> While the extension of religious toleration did offer a clear break from the more common policy of persecution and expulsion that was practiced on a pan-European scale, those individuals who were extended domicile under the law within Brandenburg-Prussia were more often than not the most wealthy and influential members of that particular group, alluding to toleration as more of a pragmatic policy than flowing from some idealistic egalitarian or humanitarian principle.

Frederick II was very much a product of certain circles of Enlightenment popular culture in regards to his conception of religion, and many Enlightenment historians have accepted Frederick II as a follower of deism. Deism offered a middle-ground between the traditional dogmatic principles of the era of the Reformation and the increasing atheistic skepticism of some of the more radical Enlightenment thinkers, and became the popular course of belief for such Enlightenment greats as John Locke, Voltaire, Montesquieu, and, to a lesser degree, Immanuel Kant. Frederick frequently spoke of religion in his private correspondence with a scathing cynicism, citing religion as enemy of progress and as the cause of much grief within the history of man. In a letter to Voltaire dated September 9<sup>th</sup>, 1736, Frederick II offers up his opinion of organized religions of all kinds, stating that “with respect to theologians, it appears that they generally resemble each other, be they of what nation or of what religion they may. Their design is to arrogate to themselves a despotic power over the conscience, and this is sufficient to render them the

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<sup>66</sup> Clark, 123.

zealous persecutors of all those who nobly dare to unveil truth.”<sup>67</sup> This cynicism towards both the Catholic and Protestant religions was exceedingly evident and deeply-pervasive in his writings to Voltaire. Frederick II speaks with cynicism of the indebtedness of those Protestant princes to “Luther and Calvin (poor creatures in other respects) who have freed them from the yoke of priests, and have very considerably increased their revenues, by the secularization of ecclesiastical estates. Their religion however is not purified from superstition and bigotry.”<sup>68</sup>

This shows the very derisive nature in which Frederick viewed religion within his personal life, but this did not manifest itself in an open manner within the state, as religion itself was ingrained within both Prussian and European culture in an inseparable way. Frederick II highlights this necessity in maintaining some visible confessional identity, writing to Voltaire that “a man who has the character of being destitute of religion, though he be the most worthy man on earth, is generally decried. Religion is the idol of the people, and whoever dares to touch it with hand profane, draws down their hatred, and is held in abomination by them.”<sup>69</sup> While Frederick II may have been a skeptic of religion and its influences, he was far from denouncing it on a state level.

Frederick II’s conception of religion can be seen to have an influence on his policy regarding confessional differences and their relation to the state, as seen through the programmes he enacted in favor of religious toleration. When examining the status of religion under the *Allgemeines Landrecht für die Preußischen Staaten*, Frederick II and

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<sup>67</sup> Frederick II von Hohenzollern, *Posthumous Works of Frederic II, King of Prussia: Correspondence, Letters between Frederic II and M. de Voltaire*, trans. Thomas Holcroft, (London: G.G.J. and J. Robinson, 1789), 20.

<sup>68</sup> *Ibid*, 111.

<sup>69</sup> *Ibid*, 133.

the Prussian jurists who compiled the statutory code offer what appears to be a very progressive legal definition in favor of religious toleration within the state. The majority of these statutes are grounded in Volume II, Title 11 of the *ALR*, under the section “Of the rights and obligations of churches and religious societies.” The first statute under this title states that within the Prussian state, “The population of the state, in terms of God and divine things, faith, and internal worship, cannot be the subject of coercive laws.”<sup>70</sup> This degree of non-interference offered a substantial break from existing norms regarding varying religious policies under absolutism, and found its source directly from Enlightenment discourse. These efforts were further affirmed within the Prussian legal code, stating under §3 of Title 11 that “No man is guilty to adopt his private matters of religion by state regulation.”<sup>71</sup> Under the *ALR*, subjects of the Prussian state were therefore free from forced-conversion or state-administered religion.

Religious toleration was not only set in the negative sense of being “free from coercion,” but also in a more positive right-granting sense, in that subjects were actually gifted the liberty of choice. This was codified under the *ALR*, stating under §2 of Title 11 that “each population in the state must be allowed a perfect liberty of religion and conscience,” which served as a very clear and inarguable grant of religious tolerance by the state.<sup>72</sup> However, this grant was not without exceptions that conflict with a 21<sup>st</sup> century conception of rights, and therefore one must be cognizant of the differences maintained between religious freedom and religious toleration. Citizens, when deemed necessary by the state, still were forced to identify themselves along confessional lines.

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<sup>70</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, XI, §1.

<sup>71</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, XI, §3.

<sup>72</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, XI, §2.

The *ALR* indicated under Title 11 §5 that “the State may require of a single subject a statement to which religious party the same may confess, only if the force and validity of certain civil actions depends on it.”<sup>73</sup> If the confessional identity of the subject was a threat to stability or order within the Prussian state, then this could serve as grounds for persecution on the individual level, as stated under Part 11 §6. While this did serve to identify and ostracize certain beliefs as unsavory to the state, it did so on the individual level with legal standing that did not apply to the religious group as a whole, and thus served as a mild barrier against persecution of the entire confessional party. Religious toleration therefore existed as a private right and free from forced conversion, but was by no means an extensive freedom granted to the Prussian citizenry, and therefore offered no substantive or progressive reform from the necessary emphasis on religious toleration carried forth throughout Prussian domestic policy during the seventeenth- and early eighteenth-centuries.

However, the origins of religious reform within the Prussian state were extended in a very pragmatic nature that met the realities of the religious composition of the state, as opposed to any real consideration of the growing Enlightenment conception of individual or community rights. As stated previously, the territories comprising the Kingdom of Prussia administered by Frederick II consisted of a wide array of strong religious minorities, often separated from Brandenburg proper by multiple German states and principalities, such as that of East Prussia, the duchies of Mark and Kleve, and conquered Silesia. The threat this posed to Prussian eminence within the Holy Roman

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<sup>73</sup> *Allgemeines Landrecht für die Preußischen Staaten*, Part II, XI, §5.

Empire is not only revealed in their domestic policy, but the in the consistent efforts by the Electors in Berlin to consolidate and link up these disparate territories through the acquisition of areas such as West Prussia and Hannover-Braunschweig. These policies can be clearly traced by examining the expansion of the Prussian state throughout the eighteenth- and nineteenth-centuries, as these many of these long-desired territories are absorbed in the ever-growing Prussian state that came to dominate late-nineteenth century German politics, eventually leading to the proclamation of the German Empire.

Because territorial consolidation through rapid conquest was not a viable option following the wresting of Silesia from Austria under Frederick II, religious toleration served as a pragmatic and essential means of solidifying state authority over more distant territories.

The status of religious toleration within the Electorate of Bavaria took on a very different face, yet one no less catered to meet the needs of the social and religious realities of the Electorate. While excess within the Catholic religion was curtailed by the efforts of Maximilian III Joseph, the Bavarian legal code still affirmed a heavy amount of punitive measures against blasphemy, heresy, witchcraft, and conversion. However, the focus of these laws did not target individuals directly for varying faith, and in fact protected a great number of minority Protestant and Calvinist communities within the Electorate. The goal of the Bavarian religious policy sought instead to curtail conversion of the Catholic majority through punitive manners.

Legal penalties are cited within the *Codex Juris Bavaricus Criminalis* for those that contradicted and challenged religious orthodoxy within the Catholic Electorate.

Under Part I, Chapter VII of the *Codex Juris Bavaricus Criminalis*, a wide array of religious crimes are cited, in addition to their respective punishments. The first statute under Chapter VII prohibited blasphemy against the Catholic creed, stating the following:

“Blasphemy, speaking insultingly of God himself, his divine attributes or his saints, particularly of the Virgin Mary or of the Catholic Creed, its articles and mysteries, the holy scriptures, divine worship, or of other things in the divine plan, incurs a penalty of arbitrary fine, imprisonment, public disgrace or heavier punishment for the first offence; banishment and beating with rods for the second offence; and death by the sword for the third offence.”<sup>74</sup>

Those who knowingly spread religious opinions contrary to the church, excluding protected communities of Protestants and Jews, were subject to fines and even death under the Bavarian legal code. Under Chapter VII, §5, those who were cited as obvious and consistent heretics and continued to uphold their unorthodox beliefs in spite of church instruction were “to banished from the country forever, or imprisoned, and to be kept up with little food until they recognize their mistakes, recant, and have been revoked.”<sup>75</sup>

Those who blasphemed through physical action such as desecrating or stealing church property or articles related to the Catholic sacrament faced harsh punitive measures. Under Chapter II of the *Codex Juris Bavaricus Criminalis*, §17 states that church thieves accused of taking “monstrance or ciborien, in which the Holy Communion

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<sup>74</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 7, §1.

<sup>75</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 7, §5.

wafers are also stolen, or dishonored, are punished with burning.”<sup>76</sup> This punitive approach to disrespect to church property or articles was prevalent within Maximilian III Joseph’s legal reforms. Under Chapter VII, §2 of the *Codex*, those who spat on, threw, or desecrated any effigy of Christ, the Saints, or any Holy image were subject to death by the sword.<sup>77</sup> Punishment was even more severe for those who desecrated the Host, or alter bread, which incurred a penalty of live-burning at the stake.<sup>78</sup> Under the Bavarian legal code, the sanctity of Catholic imagery and the Sacraments were the subject of severe judicial protection. This reinforced the stabilizing and unifying power that the church had in Bavaria under the Wittelsbachs.

Punishment was severe for those who broke away from the Catholic faith, as conversion was seen as a serious threat to the power and cohesion of the state. Under §4, it is stated that “Apostates or renegades who assume abandonment of the Christian Catholic faith to become heathen, Jewish, or Mahometan, without difference as to whether they previously held different religion, or not, will be punished with the sword and confiscation of goods.”<sup>79</sup> This fear of conversion as a subverting influence to state authority was affirmed under Chapter VII, §5 of the *Codex*. In addition to punishing those who failed to recant heresy as stated above, those who actively sought to spread their unorthodox beliefs were subject to punishment much stricter than banishment, imprisonment, or fines. Under §5, “if the heretical teachings are spread with diligence, others are seduced by, or perhaps even incited against the authorities; so should heretics

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<sup>76</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 2, §17.

<sup>77</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 7, §2.

<sup>78</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 7, §2.

<sup>79</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 7, §4.

or agitators reported be executed with the sword, and the dead corpse be burned at the stake.”<sup>80</sup> This shows the clear theme within the Bavarian legal compendium that the issue lay not within heretical belief itself, but the spreading of heresy. This points to the social and religious realities of the Bavarian state during the reign of Maximilian III: in a state comprised almost exclusively of Catholic subjects and in which much of the legitimizing forces came from confessional identity, large-scale movements away from the Catholic faith were a legitimate de-stabilizing force that could not be afforded in order to maintain state authority.

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<sup>80</sup> *Codex Juris Bavaricus Criminalis*, Part I, Chapter 7, §5.

## CHAPTER SEVEN

### CONCLUSION: HISTORY, MEMORY AND THE DELICATE TRADITION OF RIGHTS REFORM

The institution of enlightened absolutism that emerged in the eighteenth-century served as a unique platform from which reform can be viewed. This strange paradox of absolute authority under the will of the monarch, the hallmark of dynastic absolutism, coupled with the focus on reason and skepticism, the hallmark of the Enlightenment, served as an ideal legal fiction to solidify state authority over the subversive influences of the past centuries. Top-down reform was able to take hold within the Kingdom of Prussia and the Duchy of Bavaria that resulted in a variety of outcomes that fell along a wide spectrum: an increase in literacy and school accessibility at the cost of deep inculcation of state idealism and homogenization; the institution of broad and comprehensive legal reform that allowed for consistency when approaching the courts, yet solidified control state control over the nobility and affirmed class and patriarchal constructs that were oft the target of Enlightenment criticism on the eve of the American and French Revolutions; the institution of humanitarian legal reform that reduced the pervasiveness of torture, but on a limited scale and only when no real barrier existed to prevent its enactment; and lastly, the introduction of religious toleration in religiously plural areas, but still reinforced the norms of the confessional majority in areas that enjoyed a heavy degree of

unity. The nature of examining rights reform during the *Aufklärung* poses some very difficult questions. The first idea that must be wrestled with is the relationship between history and memory that characterizes the German historical tradition in a manner that is often overlooked. Objective history is an ideal that can never be obtained, as the eyes of the viewer are unable to free themselves from the epistemic qualities that bind them to their place and time, and neither German nor Enlightenment history can escape this truth. Historian Wolfgang J. Mommsen states this reality most eloquently:

We can no longer regard history as a sphere of reality in which we perceive the rippling of "God's cloak" in the winds of time. We can no longer see it as a continuum of historical developments whose inherent meaning - define that meaning as we will - we can decipher if we will only study historical events closely enough.<sup>81</sup>

The difficulty of examining the nature of reform in both Prussia and Bavaria comes from delicate nature of the German historical tradition and the historical narrative of rights reform as well, both of which fall prey this conception of a historical continuum.

There exists a strong amount of scholarship that offers a teleological view of history that traces the rise of Prussia in a manner that begs for unification under this wise and powerful defender of the German peoples. When examining the various reforms and political maneuvers taken by the Great Elector in the wake of the Thirty Years War to the establishment of a strong military and efficient bureaucracy under Frederick William I, it is often to a fault that their political failings and the limited nature of their reforming

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<sup>81</sup> Wolfgang J. Mommsen, "Social Conditioning and Social Relevance of Historical Judgments," *History and Theory* 17:4 (1978): 20.

efforts fall the wayside in favor of an argument that sets up Prussia on its course towards unification in 1871.

This pervasiveness of the Borussian historical tradition has a sweeping effect on the way the history of the German Enlightenment is viewed, and the theories put forth about the nature of such reform offer a counter against this. Prussia under Frederick II, ever the darling of the Enlightenment, is oft cited as possessing a deep and influential commitment to Enlightenment principles that spurred the developing state on its path towards unification, and just reward for its just policies. This historical trend completely ignores the nature of the reign of Frederick II, with such glaring contradictions as his expansionist foreign policy and use of bullying and rhetorical language to alienate Catholic Austria while garnering favor among the lower German princes.<sup>82</sup> This trend can also be highlighted in the manner in which Prussia, always the critic of the petty “mercenary-princes” of Hesse-Kassel, Württemberg, and Brunswick-Wolfenbüttel, among others, had a strong history of subsidy agreements to augment state funds that helped propel its rise as a regional power.<sup>83</sup> History, like many of the great reformers and reactionaries of the era, has mastered the use of language to change the character of events and policy throughout the Enlightenment.

However, what this research demonstrates most clearly is that Frederick II, above all, instituted reform to a degree that it matched both his needs on a domestic scale and his grand designs abroad. While it not my goal, and would be a very dangerous one

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<sup>82</sup> Peter H. Wilson, “Prussia and the Holy Roman Empire 1740-1786,” *The Historical Journal* 51:2 (2008): 337-371.

<sup>83</sup> Peter H. Wilson, “The German ‘Soldier Trade’ of the Seventeenth and Eighteenth Centuries: A Reassessment,” *The International History Review* 18:4 (1996): 757-792.

indeed, to attempt to dispel or assign a value to both Frederick II and Maximilian III Joseph's commitment to Enlightenment ideals, what can be certain is that these commitments matched perfectly with the very specific and, as demonstrated, very unique needs between the Kingdom of Prussia and the Duchy of Bavaria. This fact obliterates the notion of the Borussian historical tradition in that it helps bring out the reality of reform within Prussia: reform could only go so far as it suited the needs placed upon state authority, most certainly in a time where Prussian ascendance into the role of a European great power was yet unsolidified. It is because of this fact that one must use great caution when assigning differing value to the nature of reform in both Prussia and Bavaria.

In a similar theme, yet infinitely more difficult to wrestle with, is the true domestic and historical significance of the reforms put forth by both Frederick II and Maximilian III Joseph. What we know is that both the *Allgemeines Landrecht für die Preußischen Staaten* and the *Codex Maximilianeus Bavaricus Civilis* were both short lived in their original form; the *ALR* was rolled back in the wake of the Stein-Hardenberg Reforms in 1806, and the *CMBC* was upheld yet remodeled with the reforms instituted under Montgelas. The incomplete nature of the reforms taken by Frederick II and Maximilian III Joseph is most evident in their failure to survive the radical Enlightenment that erupted with the French Revolution. Bavaria took an active role in supporting French forces during the Napoleonic era, while Prussia was forced to integrate a more pervasive definition of Enlightenment reform in order to cope with the realities that came with capitulation to France under Napoleon's forces, as reforms along the French model were pressed upon the Germanies in a direct measure with the reorganization that came with

the Confederation of the Rhine.<sup>84</sup> The reforms instituted modeled those taken under the Revolution ideology, yet dealt with the same general social spheres: compulsory education, codified legal reform, humanitarian penal principles and expansive religious toleration. Ultimately, the established reform that simply restated and reinforced existing social structures within the two states was unable to maintain its conservative character in the face of French power and the liberalism that fueled its ideology.

What is most important to note is the essential nature of language within the realm of Enlightenment and rights reform. The language appealed to was both popular and progressive at the time, and the reforms set forth by both Frederick II and Maximilian III Joseph heavily appealed to it. Such phrases as the common good, natural law, personhood, and human rights pervaded both legal codes and served as a deep legitimizing influence for both their institution and their effectiveness in solidifying state control. But once the language is scraped away, it can be shown that they offered little in the terms of deep reform, even when removing any expectation of the egalitarianism that was so feared by the *philosophes* of the era. However, the history of rights reform still falls victim to the same fallacy as other branches when examined through the eye of the twenty-first century. The history of human rights cannot be viewed as a constant and consistent upward march, but rather as a difficult and tedious process of reform and reaction, with backsliding the rule rather than the exception. Even then, many of the same definitional issues that plagued both the *ALR* and the *CMBC* are still in play; namely, the use of language in the absence of substantial reform, and reform only the degree that

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<sup>84</sup> Jonathan Sperber, "Echoes of the French Revolution in the Rhineland, 1830-1849," *Central European History* 22:2 (1989): 200-217.

pragmatism allowed, that which was both convenient and practical in solidifying state authority.

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