The Baldy Center for Law & Social Policy
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Podcast transcript begins

[Azalia]: Hi everyone this is the podcast of the Baldy Center for Law & Social Policy produced at the University at Buffalo. I am your host and producer Azalia Muchransyah. This episode I have Sarah Ludin on the phone with me. Sarah is a social legal historian of the early modern German speaking lands who is also a postdoctoral fellow in interdisciplinary legal studies at the Baldy Center for Law and Social Policy at UB. Today she is going to talk to us about her upcoming book project with the working title *The Reformation Cases: Jurisdiction Peace Property and the Politics of Religion in a German Imperial Court 1521-1555*. Sarah can you tell us what your book is about?

[Sarah]: The book is about the socio-legal history of the early reformation in Germany. So the early reformation is the period right after Martin Luther was declared an outlaw in 1521 and it ends in 1555 when Lutheranism was declared a legal confession. The sources that I use are court records of civil litigation particularly cases that appeared in the imperial chamber court which was considered the highest court of the Holy Roman Empire. So just a little bit of background to place into context what the significance of those court records are; so when Luther was declared a heretic and outlaw in 1521, in the years that followed dozens of city councils and princes all over the empire took measures to reform their domains in the Lutheran manner which meant many different things to many different people at that time. But what was interesting is that because the German-speaking lands was so diverse and fragmented politically that meant that each of these governing authorities sort of had a level of sovereignty unto themselves so city councils and principalities were operating independently, they decided they wanted to reform they would reform. This was complicated though because they were all situated within this in theory a kind of feudal pyramid where the emperor is at the top and there were some cities and princes who were directly subject to the emperor and others who were subject to them on and on and on, but in fact so there's this sort of feudal pyramid that they were working against so they weren't pure sovereigns unto themselves but then also this political geography was complicated by informal regional networks and historical you know sort of legacy contractual relations between different polities and other kinds of formations like leagues that stood outside of this feudal hierarchy. In addition, there was the church organization, the division of the empire into bishoprics and dioceses and this meant that when a prince said okay in my principality, I want to introduce the reformation in these ways doing so violated all kinds of laws. So it could violate imperial law, civil law, canon law, local customary law, contracts, etc. So it was these disputes that I'm studying this is these kinds of legal violations brought about civil litigation that had to do with violations of the peace, property disputes, and jurisdictional seizures so those are the primary kinds of disputes I looked at were peace, property, and jurisdiction cases. And this really is about having a legal history of the

reformation that is not about these kind of big moments of legal declaration like a papal bull or an imperial edict rather it's about careful and close readings of these case files that's attentive to quotidian aspects of legal practice, that lower level historical actors like litigants and lawyers and judges would have done.

[Azalia]: What draws you into this topic?

[Sarah]: I got into it because I was trying to understand the status of the reformation in the historiography of secularism. So I was really interested in the study of secularism and there's a lot of critical theory work and a lot of contemporary and especially like in anthropology a lot of work in on secularism, secularity studies. I was curious about the status of the reformation in these stories because it's seen as a headwaters of forms of political legal arrangement that would recognize internal Christian difference and eventually an ever-expanding circle so there's a lot of different ways in which the reformation is identified or a lot of different like features of that period that make the reformation productive for people thinking about secularism but one of the things is something I mentioned earlier which is that you know in 1521 Lutheranism was outlawed as a heresy which was standard practice for the church to you know maintain its orthodoxy was there was a kind of, difference was either integrated into orthodoxy or it was declared a heresy outside of orthodoxy. But then by 1555 Lutheranism was recognized as a legal confession in the Augsburg peace and so I was really curious about how they got from 1521 to 1555 this like major shift that's sort of identified as one of the moments of the origins of modern secularism. But in studying that as I was sort of diving into that literature I kept coming across this repeated reference to a body of civil litigation in which Lutheran litigants argued that a dispute was a matter of religion and therefore didn't belong before the imperial chamber court which was a civil law court and what the historians would say when they would bring up this reference. they would say well unfortunately these litigants and lawyers and judges were really imprecise about how they defined matter of religion. It was left undefined therefore, the jurisprudence here was really meaningless and this was an example of the instrumentalization of the court. The court was either you know successfully challenging these potentially explosive religio-political disputes, that sort of a thing but no one was really going into the meat of these arguments what were these people arguing when they said that this was a matter of religion? I discovered that this wasn't a pre-existing jurisdictional category. It wasn't a term that was recognized even though religion had a legal history in Roman law, I found that it was not being used. They weren't leaning on Roman law texts, when they were citing this category. The proto-protestant litigants who were using that term, “matter of religion,” were really experimenting. It was a kind of legal experimentation like a strategic experimentation of this term. Like I got into the project because I was really curious about that argument and what they were saying there and that's how I kind of got into it.

[Azalia]: Since there were so many types of courts in German lands at that time, do you see the imperial chamber court as the most influential in affecting legal transformation?

[Sarah]: So, for sure there have been a lot of people who've studied the imperial chamber court and it was the first court to attempt to be independent of the personal

justice of the emperor. Before it was the emperor's justice. This was the first time where a court was established by not only the emperor but also the estates who were the sort of powerful rulers in the empire. It had a stable location so it didn't travel with the emperor. The judges were appointed by both the emperor and the estates and it was the first court, first entity, really given the right to declare outlawry, which was previously only given to the emperor. So the court itself is seen as a milestone in German constitutional history because and it's often identified as sort of a turning point from the Middle Ages to the early modern era and it's the beginning of the idea of proto rule of law political entity rather than this kind of idea of an empire as bound together through feudal and personal bonds. So in that sense it's very important in the history of German constitutional law and at the time it was really important because it required the use of Roman law and also of local customary law as sources of law so especially in matters of civil procedure there was a radiating influence through practitioners who would be active in this court and then would bring that knowledge back to their own diverse jurisdictions. The other thing that's really significant about this court is that the first instance litigants so that is the people who could sue there in the first instance were primarily those directly subject to the emperor. So these were princes and cities and you know bishops and the highest level rulers. And so you know imagine it's a court basically where like rulers could sue each other, and so litigation had the character even though what was technically it had to do with things we would consider private law matters in many senses, it also had the character of public law as also in the way that it governed they would actually like litigate issues of peace violations. So like if someone attacked another polity they could sue each other in court. It had this character of public law and that you know as a way of sort of channeling issues of war and peace into a court which is really interesting and contributed to its significance. And then what makes the court really interesting for my purposes too is that the court became more stable and prestigious at the same time that the reformation was happening and so part of the project looks at this dynamic and productive relationship between these two processes on the one hand the establishment and rise of the court and the consolidation of Roman law and the German lands and on the other hand the reformation. So how are those two processes intertwined and other people have talked about this but that's sort of the theme kind of that runs through the book also but just to qualify what I said, one shouldn't really overstate the authority of the court because nothing was really jurisdictionally self-evident or total in the legal landscape of the Holy Roman Empire. There were many means and forums to resolve disputes. There were competing high courts and also rulers could get specific privileges and exemptions that could be negotiated in entirely different circumstances with the emperor, which restricted the court's jurisdiction over them. So there could be rulers who had an actual exemption from being sued in that court. So the other way in which the power of the court was really conditioned was that the primary litigants of the court were estates, you know these rulers who were directly subject to the emperor, but those were also the people and entities who were responsible for appointing its judges, for financing the court for creating laws about the court, and for evaluating the court through visitation. Nowadays we think of this as a huge conflict of interest, but that was one of the dynamics at play that sort of qualifies its influence at the time.

[Azalia]: What does the legal history of the reformation have to do with today?

[Sarah]: For me this project going back to what kind of got me interested in the project in the first place, one of the significances is that the project helps us to understand the definition of religion as a modern secular legal category. So today we know that the legal definition of religion matters in modern nation states and not only secular liberal democracies but also other kinds of state sovereign formations, because certain freedoms and protections and privileges and restrictions all kinds of things are tied to systems of belief and of corporate organization that are deemed religions or religious. So in the United States for instance, application of the disestablishment and free exercise clauses of the first amendment hinges on an interpretation of the meaning of religion. And likewise in Germany, a religious society, which is a technical term, *Religionsgesellschaft*, must meet standards of corporate organization under public law before accruing a set of privileges outlined in the basic law. So this question about what counts as religion has been a pressing question for decades and it has the kind of stakes of that question is different depending on the context whether you're talking about religious freedom jurisprudence and liberal democracy or the management of difference as an extension of imperial power in colonial and post-colonial contexts, the definition of religion matters. And so my project contributes to that understanding of this modern really hairy, really complicated, and slippery term by looking at this early modern political use, which most historians when they trace the origins of the religion legal category in the early modern period they go to 1555, which is the Augsburg religion piece, which you know as I mentioned before declared Lutheranism a legal confession. Here we see the emergence of religion as a pragmatic category invented by jurists so that they could describe difference without relying on the category of heresy. That's what religion is about. My project shows that that's not the full story because there's a prehistory to 1555 which is this litigation. These really experimental usages by proto-protestant litigants who are saying hey you know you're suing me for seizing church property, well this is a matter of religion, you know this case doesn't belong in this court. It belongs before a free Christian council. No extant jurisdiction of the empire can handle this except a council. That was a really extraordinary argument to be making and it was also something that was not legible legally to their interlocutors at the time. It was something that others recognized as really extreme and sort of really out there. What I track in my materials is like the debates they were having about it and the way that they were using it in different ways and the ways that they were trying to access how they could define it better but always failing and always sort of it was a moving target. And so my project shows that in 1555 you know we have to look at the pre-history so the 30 years before that, this term had this legal life before 1555. When 1555 comes around, it wasn't just jurists who were coming up with this pragmatic term, they were codifying all of that mixture and blend of all of the different associations that that term had come to accrue in this high-stakes litigation. That was all invested in that category and it was sort of a carrier for all of that messiness and it was a convenient way of sort of bracketing that messiness in a term so that every all of the disputes before 1555 that these proto-protestant litigants were arguing, was a matter of religion and therefore should have brought that case out of the jurisdiction of the court. Now the empire is saying “hey we hereby declare basically these peace, property, and jurisdiction disputes as matters of religion and therefore from henceforth we will handle these matters of religion cases in this way, in the imperial chamber court.” So it was a way of containing the category

keeping it within the bounds of imperial law, that was a new step and to say that that was the beginning of religion as a legal category misses that whole pre-history.

[Azalia]: What are the main takeaways of your project?

[Sarah]: So, I think there are two main takeaways. The first one is related to what I was just talking about this theoretical and genealogical contribution of how this sort of pre-history to the 1555 Peace and what that means for understanding what one scholar has called the peculiar order of difficulty that the religion category poses in secular modernity. So then the second takeaway is methodological, which has to do with the value and importance of looking at the details of case files and doing close readings of case files to understand the legal history of the reformation, because the bulk of the work that I do has to do with closely reading the details of procedural experimentation and legal litigative strategies in naming and classification and the use of performative legal speech acts. And so these details of civil litigation I argue operated as proxies for the most pressing constitutional questions that the reformation brought up about what does it mean to belong legally to the empire, about the relationship between law and conscience and authority, and about the future of constitutional and legal unity in the context of confessional division because the Holy Roman Empire was reliant on the myth of religious unity to organize itself constitutionally so that the question of how the empire would continue as a unit without confessional religious unity was a real real problem. And so this idea that looking closely at litigative strategy, procedural experimentation, the work of classification, you know legal speech acts, how all of that contributed to those bigger constitutional questions, so in other words constitutional history isn't just about these big declarations and these big acts. It's about these smaller low-level acts and I mean relatively low level right these were still rulers litigating here, but relatively low level. I would say that there are three primary audiences for this project. For legal historians, this will be useful for them to have a fuller understanding of law making in the Holy Roman Empire in legal culture and how legal culture shaped how the reformation unfolded in the German lands, and for reformation scholars, I think this offers a new approach to considering the rule of law in this period because often the tendency has been to focus on those big legal declarations or to look at the specifics of how Lutheran and Zwinglian rulers implemented the reformation in their domains or to look at what Luther said about law right but this kind of close reading of civil litigation reformation isn't really central to reformation legal history. And then for scholars who are interested in secularism, this offers a fresh scene in which religion gets reinvented and a detailed examination of the status of the reformation and producing the particular intractability of religion as we've inherited it in late modernity.

[Azalia]: That was Sarah Ludin and this has been the Baldy Center for Law & Social Policy podcast produced at the University at Buffalo. Please visit our website buffalo.edu/baldycenter for more episodes and follow our social media on Facebook and Twitter @baldycenter. Until next time, I’m your host and producer Azalia Muchransyah.