Marriage Law and the Reformation

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If a German couple wanted to get married today, they would have to consult the German Civil Code, the *Bürgerliches Gesetzbuch* or BGB, for information on how to do so.[1] From the BGB, they would learn that—provided that they are competent, more than 18 years of age, not related in a direct line or (half-) siblings, and not currently married[2]—they can get married before the *Standesbeamter* or civil registrar.[3] They would also learn that should they want a divorce in the future, any proceedings would have to be brought in the family court, which is a special

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1. I will keep things simple by assuming that there is no cross-border element, which might call into play complex issues of private international law.

2. *Bürgerliches Gesetzbuch* §§ 1303 (marriageable age; the *desideratum* is for both parties to be more than 18 years of age, but the family court may permit a marriage to proceed in which only one partner is older than 18, provided that the other is at least 16), 1304 (incapacity), 1306 (existing marriage), 1307 (blood relationship).

3. *Bürgerliches Gesetzbuch* § 1310.

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division within the German civil courts of first instance,[4] and that the judge hearing their case would be required to consider whether their marriage has "failed": a state of affairs that that judge would be legally compelled to presume if one or both of them wanted the divorce (and they had lived apart for a prescribed number of years).[5]

There are two features to note. First, entering and terminating their marriage brings a couple into close contact with the *state*, as the framer of the applicable law and the legal entity behind the person (registrar/judge) who oversees the beginning and end of their marriage. Second, the law gives wide latitude to the partners' (or even the individual partner's) private choice. Provided that the parties comply with some formalities, there are few restrictions on whether they can get married and to whom; and divorce—if they are prepared to wait—is, basically, on unilateral demand.

A look at the marriage laws of other countries in the Western world would reveal formation and dissolution rules somewhat different from the German ones. If this couple were English, for example, they would be eligible to marry if they were both more than 16 years of age, not currently married, and not (step-[6]) parent–child, grandparent–grandchild, brother–sister, uncle–niece, or aunt–nephew to each other.[7] However, the differences, as the foregoing example shows, would be largely[8] in the details. The big picture would not change: that of *state-authored and -administered* rules, informed by *secular principles*, in particular the individualistic tenet that it is best for everyone concerned that a marriage in which at least one partner has emotionally outgrown the other partner be—more or less freely—dissoluble.

4. *Gerichtsverfassungsgesetz* (Judicature Act) §§ 23a s. 1, 23b s. 1.

5. *Bürgerliches Gesetzbuch* §§ 1565, 1566.

6. A step-parent can marry the child of a former spouse only if both parties are more than 21 years of age and the step-parent has never acted in a parental role toward the step-child. See Marriage (Prohibited Degrees of Relationship) Act, 1986, c. 16, s. 1.

7. Matrimonial Causes Act 1973, s. 11; Marriage Act 1949, schedule 1. Unlike their German counterparts, English couples also have a choice of five possible marriage ceremonies (i.e., civil marriage, marriage according to a non-Anglican religious ceremony, marriage according to the rites of the Church of England, Quaker marriage, and Jewish marriage). See Stephen Cretney and Judith M. Masson, *Principles of Family Law*, 6th ed. (London: Sweet & Maxwell, 1997), 11–37. To obtain a divorce, they would have to show the family court that their marriage has irretrievably broken down and that the breakdown was caused by at least one of five factors. These factors include consent plus 2 years' separation, and even unilateral separation as long as it had lasted for at least 5 years. Matrimonial Causes Act 1973, s. 1.

8. The most significant difference between the regimes for present purposes is that English couples can still marry before a church rather than a state authority (see note 7).

Given this state of affairs, it is easy to forget that things were once different. If this couple had gotten married 500 years ago, in 1516 instead of 2016, they would have found that marriage was considered a sacrament and that, as a consequence, all matters that essentially concerned the existence of the *marriage bond*, such as formation, impediments, and dissolution (but not the more mundane legal consequences of marriage, in particular the property and inheritance rights arising from it[9]) were, legislatively and jurisdictionally, within the exclusive competence of the Catholic Church. They would also have found that the substantive content of (not all, but some of) the church's rules was derived from the vision of marriage contained in the Christian Bible.

This article examines what role the Reformation played in moving the law of marriage formation and dissolution from its early sixteenth century state (of church-authored and -administered rules, informed at least in part by the Bible) to the state that it is in today. This article is part of a larger project exploring the changes in the legal regulation of the marriage bond between the sixteenth and the late nineteenth century. In its broad outlines, this larger story is a story of *secularization*, a term with many levels of meaning.[10] Etymologically, the term derives from the Latin *saeculum*, which can mean a generation, age, or great span of time (e.g., *in saecula saeculorum*, 1 Timothy 1:17), but which can also mean, especially in ecclesiastical Latin, the secular "world" or "worldliness" (e.g. *et nolite conformari huic saeculo*, Romans 12:2).[11] Since the late nineteenth century,

9. Secular law and secular courts might not allow full legal rights to flow from a canonically valid marriage unless further requirements, complementary to those of the church, were satisfied. In England, for example, a marriage not solemnized *in facie ecclesiae* carried with it no rights in land. See Eric Josef Carlson, *Marriage and the English Reformation* (Oxford: Blackwell Publishers, 1994), 29. Unlike the law of marriage formation and dissolution, which was a substantially unified ecclesiastical law in the later Middle Ages, the secular law of marital property and succession continued to be marked by considerable regional variation.

10. Larry Shiner noted back in 1967 that in "both the empirical and interpretive work on secularization today, the lack of agreement on what secularization is and how to measure it stands out above everything else." Larry Shiner, "The Concept of Secularization in Empirical Research," *Journal for the Scientific Study of Religion* 6 (1967): 208. C. John Sommerville has also noted that the discussion of secularization is hampered by several ambiguities. C. John Sommerville, "Secular Society/Religious Population: Our Tacit Rules for Using the Term 'Secularization,'" *Journal for the Scientific Study of Religion* 37 (1998): 249–53. For book-length discussions of the history of the concept, see Martin Stallmann, *Was ist Säkularisierung?* (Tübingen: J. C. B. Mohr, 1960) and Hermann Lübbe, *Säkularisierung: Geschichte eines ideenpolitischen Begriffs*, 2nd ed. (Munich: Karl Alber, 1965).

11. See, for example, Charlton Thomas Lewis and Charles Short, *A Latin Dictionary* (Oxford: Clarendon Press, 1879), 1613–14.

the term has been used as a descriptive and analytical tool in the social sciences.[12] There it has come to designate such a vast range of different processes and phenomena[13] that its usefulness as a concept can only be maintained if "everyone who employs [... the term states] carefully his intended meaning."[14]

For the purposes of this article, I define secularization (in a fairly classic way) as the separation of the *legal rules* under which a society operates from the influence of religious institutions and religious values and norms.[15] This, to be clear, is something quite different from the development of a secular outlook among *individuals*.[16] Even in a legal regime that stands apart from church institutions and religiously motivated substantive norms, individuals might still be influenced by their religious faith, and this can have an effect on whether they are willing to use the law of divorce, for example.[17]

12. This process is frequently associated with Max Weber (1864–1920), although Weber rarely used the term and usually turned to concepts such as *disenchantment, rationalization*, and *intellectualization*. See Michael W. Hughey, "The Idea of Secularization in the Works of Max Weber: A Theoretical Outline," *Qualitative Sociology* 2 (1979): 85–111.

13. The term might refer to the separation of different spheres of social activity (most obviously the state, but also the economy, science, law, the family) from religious institutions and norms (this is the core component of the classic theories of secularization); to the privatization of religion; to the nonconfessional realization of central Christian ideals; to changes in the conditions of belief; and, in its most recent, but by now most widespread usage, particularly among American sociologists, to a decline in religiosity; that is, the disappearance of religious beliefs and practices among individuals. See José Casanova, "Rethinking Secularization: A Global Comparative Perspective," *Hedgehog Review* 8 (2006): 7; William H. Swatos Jr., ed. *Encyclopedia of Religion and Society* (Walnut Creek, CA: AltaMira Press, 1998), s.v. "secularization;" Neil J. Smelser and Paul B. Baltes, eds. *International Encyclopedia of the Social & Behavioral Sciences* (Oxford: Elsevier, 2001), 13,787; and Luigi Lombardi Vallauri and Gerhard Dilcher, eds., *Christentum, Säkularisation und Modernes Recht*, 2 vols. (Milan: Giuffrè, 1981). Mark Chaves has suggested that one should direct "attention away from the decline (or resurgence) of religion as such and toward the decreasing (or increasing) scope of religious authority" on three different dimensions (societal, organizational, and individual). See Mark Chaves, "Secularization as Declining Religious Authority," *Social Forces* 72 (1994): 752.

14. Shiner, "Concept of Secularization," 219.

15. For the classic definition of secularization as the separation of the different spheres of social activity (e.g., law) from religious influences, see Casanova, "Rethinking Secularization," 7.

16. As C. John Sommerville has pointed out, "we can quite properly speak of a secular society which contains an entirely religious population. That would mean that the rules under which such a society operates are recognized as being of a different character from the religious beliefs held by the population." Sommerville, "Secular Society/Religious Population," 251.

17. In fact, researchers postulate a relationship between individual religiosity and marital stability. See, for example, Vaughn R. A. Call and Tim B. Heaton, "Religious Influence on Marital Stability," *Journal for the Scientific Study of Religion* 36 (1997): 382–92; Charles

The concept of secularization comprises two elements: first, a *formal or institutional* one, relating to the (declining) influence of religious institutions; and, second, a *substantive* one, relating to the (declining) influence of religious values and norms, both measured at the societal-legal rather than the individual level. On the *institutional side*, the important questions are: Do church or state institutions have legislative and jurisdictional competence over marriage,[18] and why do they have that competence?[19] On the *substantive side*, the key point is: Where does the formally competent authority derive its legislative vision for marriage from? In other words, are the rules of marriage formation and dissolution grounded in appeals to the Bible and "Christian" values? Or are they motivated by secular (utilitarian, traditionalist) considerations?

The basic question asked by this article—what did the Reformation do for the secularization of marriage?—may not seem particularly novel. It has been asked before. However, it has elicited surprisingly different, even contradictory answers. At one end of the scholarly spectrum, the answer has been that the Reformation led to a far-reaching secularization of marriage in the territories in which the new faith was received.[20] At the opposite end of the spectrum, the answer has been that the Reformation changed next to nothing.[21] This article seeks to refine existing

E. Stokes and Christopher G. Ellison, "Religion and Attitudes toward Divorce Laws among U.S. Adults," *Journal of Family Issues* 31 (2010): 1279–1304.

18. For these questions, see Helmut Coing, "Die Auseinandersetzung um kirchliches und staatliches Eherecht im Deutschland des 19. Jahrhunderts," in *Christentum und modernes Recht: Beiträge zum Problem der Säkularisation*, ed. Gerhard Dilcher and Ilse Staff (Frankfurt: Suhrkamp, 1984), 360.

19. For example, the church might be competent because marriage is regarded as a sacrament. Alternatively, it might be competent because the state has delegated legislative and jurisdictional authority to it for reasons of administrative convenience. At first sight, both systems rate equally low on the formal secularization scale. On closer inspection, however, one ought to give the second model a higher formal secularity score because the church's competence is not grounded in a religious principle.

20. John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville: Westminster John Knox Press, 2007), 6–7; Carlson, *Marriage and the English Reformation*, 3 (Continental Reformation brought about a "dramatic transformation of the status of marriage, the laws which regulated it, and the courts which enforced those laws"); Dirk Blasius, *Ehescheidung in Deutschland 1794–1945: Scheidung und Scheidungsrecht in historischer Perspektive* (Göttingen: Vandenhoeck & Ruprecht, 1987), 24 (describing the Reformation as a "Schwungrad in einem. . .Prozeß, der letztlich den Staat die Herrschaft über das gesamte Eherecht. . .erlangen ließ").

21. Carlson, *Marriage and the English Reformation*, 3 (noting the failure of the English Reformation to share in the transformation of marriage that characterized the Reformation elsewhere); and Richard H. Helmholz, *Roman Canon Law in Reformation England*

knowledge by considering which of these two quite different answers (or perhaps both) is correct. Its point of departure is the realization that the "Reformation" and its effects were not the same everywhere, and that different countries might have had quite different experiences of marital secularization. However, to date, the impact of the Reformation on the development of marriage law in Protestant territories has not usually been studied comparatively. Such a comparative study is likely to be fruitful. It might reveal that both the "virtually everything" and the "virtually nothing" positions are correct, and that the apparent contradiction in previous scholarly accounts is simply the product of different national objects of study.

To test this hypothesis, this article charts the effect of the Reformation on the development of marriage law in two different localities, namely Protestant Germany (I mainly use Brandenburg-Prussia as my case in point) and England. This involves a look at what went before; that is, at the Catholic Church's canon law of marriage, which formed a *ius commune* of marriage formation and dissolution immediately before the Reformation (Section I). The impact of the Lutheran and English Reformations on this body of rules is then examined separately to see how these movements were different, both in their motives and in their effects (Sections II and III). The article concludes with my own assessment of what the Lutheran and English Reformations achieved for the secularization of marriage (Section IV). I argue that both the "virtually nothing" and the "virtually everything" positions are, to some extent, correct. However, I do not base this conclusion on a differentiation between different localities. Rather, I distinguish between short-term and longer-term effects. I argue that the Reformation did not have the *immediate* effect of doing *much* toward secularizing marriage *in either country*; but that its *longer-term* consequences *in both*, particularly in the realm of ideas, were quite profound. The Lutheran and English Reformations were not the proximate causes of the secularization of German and English marriage law; however, they were an important step in the causal chain of events. Although they did not secularize marriage law in and of themselves, they helped to create an environment in which, with some contributory streams, secular marriage law theories and, ultimately, more secular marriage law systems could develop.

(Cambridge: Cambridge University Press, 1990), 36, 69 (noting the absence of real reform during the English Reformation).

I. Marriage Law Before the Reformation: The Cannon Law of Marriage of the Roman Catholic Church

On the eve of the Reformation, the common law of marriage in the West—in all matters that essentially concerned the existence of the *marriage bond*, such as formation, impediments, and dissolution—was the canon law of the Roman Catholic Church, which was enforced by a hierarchy of ecclesiastical tribunals with the Roman curia at its apex.[22] That all matters concerning the formation and dissolution of marriage should have been within the exclusive legislative and jurisdictional competence of the church in the early sixteenth century (as they had been since the high Middle Ages) was the result of two protracted[23] and almost certainly interlocking[24] developments, both of which came to a climax in the twelfth century (and did not come in for serious challenge until the early sixteenth). First, the church's distillation, fuelled by the Gregorian reform movement of the eleventh century and the revival of Roman- and canon-law studies in the early

22. Local churches might have had a degree of independence from the papacy even before the Reformation. However, the fundamental components of the church's marriage law were the same everywhere. Such variations as occurred only added detail or altered the accidental elements of marriage (e.g., the personal extent of the impediment of spiritual affinity). See R. H. Helmholz, *Canon Law and the Law of England* (London: Hambledon Press, 1987), 145; and James A. Brundage, "*E Pluribus Unum*: Custom, the Professionalization of Medieval Law, and Regional Variations in Marriage Formation," in *Regional Variations in Matrimonial Law and Custom in Europe, 1150–1600*, ed. Mia Korpiola (Leiden: Brill, 2011), 36–39.

23. For an account of the expanding influence of Christianity on marriage in the West from the early Christian Church until the emergence of a systematized canon law in the twelfth and thirteenth centuries, see Adhémar Esmein, *Le mariage en droit canonique*, 2nd ed., vol. 1 (Paris: Recueil Sirey, 1929), 1–31.

24. There is widespread consensus that the notion of marriage as a sacrament and the Roman Church's legislative and jurisdictional claims are related. See, for example, Hartwig Dieterich, *Das protestantische Eherecht in Deutschland bis zur Mitte des 17. Jahrhunderts* (Munich: Claudius Verlag, 1970), 21; Dieter Giesen, *Grundlagen und Entwicklung des englischen Eherechts in der Neuzeit bis zum Beginn des 19. Jahrhunderts* (Bielefeld: Verlag Ernst und Werner Gieseking, 1973), 39; and Dieter Schwab, *Grundlagen und Gestalt der staatlichen Ehegesetzgebung in der Neuzeit bis zum Beginn des 19. Jahrhunderts* (Bielefeld: Verlag Ernst und Werner Gieseking, 1967), 20–21. There is less consensus on whether the sacramentality of marriage determined the *content* of the chief canon law rules (i.e., formation by present consent alone; indissolubility of a marriage validly contracted). For an argument that it did so, see Witte, *From Sacrament to Contract*, esp. at 94–95. Charles Donahue, by contrast, is doubtful that "the sacramentality of marriage provides a full explanation for these doctrines." See Charles Donahue Jr., "What Difference Does It Make If Marriage Is a Sacrament? An Historical Approach," in *Jurisprudence of Marriage and Other Intimate Relationships*, ed. Scott FitzGibbon, Lynn D. Wardle, and A. Scott Loveless (Buffalo: William S. Hein, 2010), 27.

twelfth century, of an integrated system of canon law (including a comprehensive canon law of marriage) from a welter of diversified authorities of biblical, Roman, customary, and church origin, culminating in Gratian's *Concordance of Discordant Canons* (1140),[25] Gregory IX's *Decretales* (1234),[26] and, ultimately, the *Corpus Iuris Canonici* (ca. 1586);[27] and, second, the articulation, usually associated with Peter Lombard's *Sentences* (ca. 1155–58),[28] of a full sacramental theology of marriage as a union symbolizing the eternal union between Christ and the church and a channel of sanctifying grace. These twin developments supplied the later medieval church with both a sophisticated law of marriage (including a transnational hierarchy of tribunals), and a powerful ideological justification for regarding the marital bond, its legal regulation, and its adjudication as central concerns for the church to the exclusion of secular rivals.

In addition to gaining legislative and jurisdictional competence over marriage, the church began to impose its—religiously influenced—vision on the substance of marriage law. It did this by invoking the sacramental character of marriage and the concept of a *ius divinum*, or divine law.[29] The *ius divinum* was a higher-order law, intimately connected with the Bible,[30] which made some biblically based precepts binding on human marriage legislation. The church's marriage law—the canon law—did

25. *Decretum Magistri Gratiani*, in *Corpus Iuris Canonici*, 2nd ed., vol. 1, ed. Emil Friedberg (Leipzig: Bernhard Tauchnitz, 1879).

26. Gregory IX, *Decretalium Collectiones*, in *Corpus Iuris Canonici*, ed. Emil Friedberg, 2nd ed., vol. 2 (Leipzig: Bernhard Tauchnitz, 1881).

27. On the development, see Stephan G. Kuttner, *Harmony from Dissonance: An Interpretation of Medieval Canon Law* (Latrobe, PA: Archabbey Press, 1960).

28. Peter Lombard (trans. Guilio Silano), *The Sentences*, vol. 4, *On the Doctrine of Signs*, (Toronto: Pontifical Institute of Mediaeval Studies, 2010), dist. 26–42. The sacramental model derives from Ephesians 5:21–33 and was experimented with by church fathers such as Augustine of Hippo in the fifth century. Unlike Peter Lombard, however, Augustine did not regard marriage as a sacrament like baptism and the Eucharist. Lombard's *Sentences*, which unequivocally classed marriage as a sacrament, exerted a persuasive influence throughout the Middle Ages and into the early modern period. The notion was accepted as Catholic dogma at the Council of Trent (1545–63) and represents the Catholic position to this day.

29. Schwab, *Grundlagen und Gestalt*, 17–20; Philip Lyndon Reynolds, *Marriage in the Western Church: The Christianization of Marriage during the Patristic and Early Medieval Periods* (Leiden: E. J. Brill, 1994), xxix ("the notion of a divine law. . .was central to the Christianization of marriage in the West").

30. Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München: Max Hueber Verlag, 1967), 121–259. From the thirteenth century, the *ius divinum* was distinguished into (divine) natural and divine positive law; however, both kinds of divine law remained intimately related with the Bible. See Richard H. Helmholz, "The Bible in the Service of Canon Law," *Chicago-Kent Law Review* 70 (1994–95): 1564.

not just contain the (supra-positive) divine law of marriage. It also contained much of "purely human" manufacture, as there were many matters about which divine law was lacking or considered indifferent.

The distinction between divine and merely ecclesiastical law was firmly established in principle; however, the line of demarcation was not always easy to draw.[31] For example, there was considerable uncertainty as to what extent the Old Testament incest prohibitions—which the canon law preserved and added to—were binding divine laws.[32] The only generally recognized restrictions[33] imposed by the divine law related to the monogamous nature and the indissoluble character of marriage.[34] Both structural principles were powerfully reinforced by sacramental theology, which made the image of the eternal union between Christ and the one church (Ephesians 5:32) definitional for human marriage relationships.[35]

The substantive canon law of marriage administered by the church and its courts, as one of its leading historians states, was "complicated;" however, its basic principles were "deceptively simple."[36] Here I will briefly outline the rules as they existed from the early thirteenth until the early sixteenth century (whereas these centuries saw some development of the rules, the changes were slight, and, for present purposes, irrelevant[37]).

Formation

Sacramental Christian marriage was between a man and a woman to the exclusion of all others—that is, heterosexual and monogamous—and its formation was ruled by the consent of the parties. According to Pope

31. For a summary of the difficulties, see Esmein, *Le mariage en droit canonique*, 2:367, 377–97.

32. This turned on the extent to which the prohibitions set out in Leviticus were classed as moral rather than ceremonial or judicial precepts, because the latter precepts were thought to have been abrogated by the coming of Christ.

33. Marriage was also a consensual union as a matter of divine law; however, this only meant that (free) consent was of the essence of marriage and that the vices of consent (e.g. force, fear) were marital impediments resting on divine law. It did not mean—as became clear at Trent—that the church was prevented from requiring *more* than consent for a valid marriage (e.g., a solemnity).

34. Esmein, *Le mariage en droit canonique*, 1:72–73; 2:379–80.

35. This is perhaps best expressed by Aquinas in his *Summa contra Gentiles*, book 4, *Salvation*, trans. Charles J. O'Neil (reprinted Notre Dame: University of Notre Dame Press, 1975), ch. 78.

36. Charles Donahue Jr., *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts* (Cambridge: Cambridge University Press, 2007), 1.

37. Ibid., 14 (noting that the only significant developments occurred in the law of separation from bed and board).

Alexander III's (1159–81) twelfth century rules,[38] absent impediments, words of present consent (*per verba de praesenti*) that were freely exchanged created a canonically valid marriage,[39] as did words of future consent (*per verba de futuro*) if followed by intercourse (which later doctrinal development interpreted as creating an irrebuttable presumption of present consent). Nothing else—neither *copula*, parental consent, publicity, nor church solemnization—was required for the marriage to be *valid*, although church councils, particularly the Fourth Lateran Council of 1215,[40] strongly encouraged the couple to draw upon witnesses and publicize through banns,[41] and indeed punished those who failed to comply.[42]

Impediments

The church's "astonishingly individualistic"[43] stance on formation seems to place marriage squarely within the economy of contract. It is hardly surprising, therefore, that the late medieval canon law of marriage contained elements, not just of the modern law of marriage, but also of the modern law of contract. Therefore, the parties' consent would *not* create a valid marriage if it were affected by what Charles Donahue has termed "vices of consent;"[44] that is, if the parties were under age or if their reasoning were impaired by insanity, force, or fear or tainted by mistake (although the canon law would only accept mistakes of person and of status as vitiating

38. These rules were not changed until the Council of Trent's *Decree Tametsi* (1563)—after the Reformation—provided that matrimonial vows were valid only if exchanged before a priest and in the presence of at least two witnesses. The Council also institutionalized the use of marital registers. See Heinrich Denzinger (trans. Roy J. Deferrari), *The Sources of Catholic Dogma* (Fitzwilliam, NH: Loreto Publications, 2002), 295–98.

39. The one escape hatch, prior to consummation, was to enter religious life. See Donahue, *Law, Marriage, and Society*, 16.

40. Canon 51 was particularly concerned with publicity. The aim was for marriages to be published in the churches so that, if marital impediments existed, they would become known.

41. Witte, *From Sacrament to Contract*, 91.

42. Donahue, *Law, Marriage, and Society*, 32. Rudolph Sohm, *Das Recht der Eheschließung aus dem deutschen und kanonischen Recht geschichtlich entwickelt: Eine Antwort auf die Frage nach dem Verhältnis der kirchlichen Trauung zur Zivilehe* (1875; reprinted, Aalen: Scientia Verlag, 1966), 92, has aptly stated that the present-consent contract only gave rise to the exclusionary consequences of marriage—that is, the mutual obligation of fidelity, with intercourse/marriage with a third party being treated as adulterous and bigamous respectively—and that it was the church ceremony that triggered the positive consequences of marriage, in particular the right to cohabit.

43. Michael M. Sheehan (ed. James K. Farge), *Marriage, Family, and Law in Medieval Europe: Collected Studies* (Toronto: University of Toronto Press, 1996), 76.

44. Donahue, *Law, Marriage, and Society*, 19.

consent),[45] or if one party were already married (*impedimentum ligaminis* or pre-contract), because Christian marriage, as has been mentioned, was by definition exclusive. The canons recognized that sometimes an absent spouse could be presumed dead, but by the thirteenth century, canonists insisted on absolute proof of death for remarriage to occur.[46]

The contractual dimension did not, however, exhaust the church's view of marriage. In addition to being a consensual union, marriage, to the church, was a natural and sacramental entity,[47] and accordingly, the contractually based vices of consent were supplemented by a battery of physical and religious bars, which made the contracting of a canonically valid marriage harder than the lax formation rules may have led one to suppose.

As a natural union directed toward the procreation of offspring (*proles*) and the avoidance of fornication (*fides*), marriage was not open to those physically incapable of sexual intercourse,[48] or to those related by blood (consanguinity) or marriage (affinity)[49] up to the fourth degree,[50] by a legal or spiritual relationship (legal affinity, created by adoption, and spiritual affinity, existing in particular between godparent and godchild), or even by an (as yet unconsummated) contract to marry (public honesty).[51] Only a few of these impediments had a biblical warrant in the Mosaic Law, and, certainly by the late sixteenth century, it was questionable to what extent even those mentioned in Leviticus had the status of a binding divine law.[52] To the extent that the prohibition of intermarriage was a matter of human, rather than divine law, parties could be dispensed to marry (but papal dispensations came at a price).[53] The canon law also erected a number of religious or spiritual impediments,[54] annulling marriages between Christians and non-Christians (disparity of cult), by those in holy orders

45. Ibid., 19–23.

46. Those who remarried without such proof risked charges of polygamy. John Witte Jr., *The Western Case for Monogamy over Polygamy* (Cambridge: Cambridge University Press, 2015), 183.

47. Witte, *From Sacrament to Contract*, 81–96.

48. Gregory IX, *Decretalium Collectiones*, book 4, tit. 15.

49. The impediment of affinity, grounded in the *una-caro*-doctrine of the church, would arise not only from marriage, but also illicit sexual intercourse (*affinitas per copulam illicitam*). Donahue, *Law, Marriage, and Society*, 29–30.

50. This was per the rules of the Fourth Lateran Council (1215), canon 50. Earlier canon laws had been even more restrictive.

51. Donahue, *Law, Marriage, and Society*, 27–31.

52. See note 32.

53. Ludwig Schmugge, *Ehen vor Gericht: Paare der Renaissance vor dem Papst* (Berlin: Berlin University Press, 2008).

54. For an argument that these can be related to the church's sacramental view, see Witte, *From Sacrament to Contract*, esp. at 149.

or under solemn vows of chastity (orders/vows),[55] and, in certain aggravated cases of adultery, marriages between an adulterer and his or her partner in crime (crime).[56] These impediments (or at least the sanction of nullity attaching to them) also did not have the status of divine law. They were, at least in theory, dispensable.[57]

Divorce

Although it may not have been easy to contract a canonically valid marriage, it was even harder, in fact impossible, to end one during the lifetime of both spouses.[58] The canon law of marriage, basing itself on a plausible reading of a saying of Jesus about divorce in the synoptic gospels and on the sacramental quality of marriage,[59] allowed full "divorce"—that is, with a permission to remarry—only in a situation in which there was a (diriment) impediment to the marriage, in other words, in which the marriage was void *ab initio*. Although misleadingly termed *divortium quoad vinculum*, this remedy corresponded to what today we call an "annulment."[60] Only *divortium quoad thorum*—what in modern terms we would call a judicial separation—was available on limited grounds, namely for adultery and heresy under classical canon law, to which cruelty was added by practice. A *divortium quoad thorum* allowed the couple to separate from bed and board, but it did not allow them to remarry. Moreover, the level of discord that had to be shown to warrant a separation and the standard of proof to which couples were held were quite high. As a result, separations do not seem to have been obtained on a large scale.[61]

55. Clerical marriage was formally banned by the Lateran Councils of 1123 and 1139.

56. Donahue, *Law, Marriage, and Society*, 24–27.

57. Esmein, *Le mariage en droit canonique*, 2:378–79, 384–87, 394.

58. An unconsummated present-consent marriage might, however, be dissolved by papal dispensation. Innocent III confined the grounds to entry into religious life. The situation became more permissive in the fifteenth century, although the papal curia was not publicizing the fact that these dissolutions were happening. Donahue, *Law, Marriage, and Society*, 16–17.

59. Because the union of Christ and the church was indissoluble, "matrimony as a sacrament of the Church [. . . must be] a union of one man to one woman to be held indivisibly." See Aquinas, *Summa contra Gentiles*, book 4, ch. 78.

60. Although such annulments did happen, they did not provide "a common or an easy exit from an unhappy or inconvenient marriage." Richard H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004), 542.

61. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction*, 554–56. They were certainly far outnumbered by causes to establish the existence of a marriage (540).

This, in brief, was the state of marriage law as the reformers found it. How was it impacted by the Reformation?

II. Marriage Law and the Lutheran Reformation

Luther's impact promised to be profound. He attacked both the sacramental theology and the Catholic Church's canon law of marriage. In 1520, he unequivocally denounced the view that marriage was a sacrament in his *Babylonian Captivity of the Church*, arguing that the Catholic Church had misread Ephesians 5:32 and had turned what the author had intended as a mere "outward allegory" into a sacrament conferring sanctifying grace.[62] Instead, Luther famously described marriage as "an external, worldly matter, like clothing and food, house and property"[63] and, within his two-kingdoms theory, which distinguishes between an earthly kingdom of creation governed by the state and its civil law and a heavenly kingdom of redemption governed by the Gospel,[64] he assigned marriage a place in the earthly kingdom, thus turning its regulation and adjudication over to the exclusive competence of the temporal prince, his officials, and his courts: "marriage is outside the church, is a civil matter, and therefore should belong to the government."[65]

The role of the church in marriage matters, according to Luther, was limited to pastoral counseling and the spreading of God's word and will for marriage and the family. All legal activity respecting marriage—lawmaking and court cases—was to be left to lawyers.[66] Luther was also sharply

62. As late as 1519, in his *Sermon on the Estate of Marriage,* Luther thought that marriage was a sacrament. See Emil Friedberg, *Das Recht der Eheschließung in seiner geschichtlichen Entwicklung* (reprinted, Aalen: Scientia Verlag, 1965), 157. In 1520, however, Luther denied that marriage met the criteria for a sacrament. It was not divinely instituted as a sacrament; did not impart grace; and was not necessary for salvation. See Martin Luther (ed. Jaroslav Pelikan and Helmut T. Lehmann), *Luther's Works*, vol. 36, *Word and Sacrament II*, ed. Abdel Ross Wentz (Philadelphia: Fortress Press, 1959), 92–96, quotation at 95.

63. *Luther's Works*, vol. 46, *The Christian in Society III*, ed. Robert C. Schulz (Philadelphia: Fortress Press, 1967), 265.

64. On Lutheran two-kingdoms theory, see Dieterich, *Das protestantische Eherecht*, 26–29; and Johannes Heckel, *Lex Charitatis: Eine juristische Untersuchung über das Recht in der Theologie Martin Luthers*, 2nd ed. (Köln: Böhlau Verlag, 1973), esp. at 32–67

65. *Luther's Works*, vol. 54, *Table Talk*, ed. and trans. Theodore C. Tappert (Philadelphia: Fortress Press, 1967), 363.

66. *Luther's Works*, 54:66. Luther, proceeding from his doctrine of justification by faith alone, withdrew from the church its character as a sword-wielding entity. See Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Belknap Press of Harvard University Press, 2003), 40–41.

critical of the canon law of marriage ("the accursed papal law"[67]), denouncing its distinction between *de praesenti* and *de futuro* promises ("pure tomfoolery with verbs"[68]), its toleration of secret unions entered into without parental permission or witnesses ("this unseemly law concerning secret betrothals"[69]), its luxuriant growth of impediments prefigured in neither natural law nor Scripture ("figments rather than impediments"[70]), and its denial of full divorce, which he claimed was both unbiblical and productive of all manner of sexual sin.[71] Luther believed that divorce for adultery was sanctioned by the Bible, arguing that because death dissolved a marriage and because adultery carried a death sentence in the Law of Moses (Deuteronomy 22:22-24), it was "certain that adultery also [. . . dissolved] a marriage." Moreover, as Luther saw it, Jesus had expressly exempted adultery when he forbade married people to divorce each other in Matthew 19:9. Hence, for Luther, it was clear that even a pious Christian could obtain a divorce and marry another if his spouse committed adultery.[72]

However, Luther arguably went even further.[73] The Catholic Church, as has been mentioned, through its concept of a divine law and its sacramental theology of marriage, had sought to implement Jesus's teachings about marriage in the world and its legal order. Luther broke with this theocratic ideal.[74] Whereas contemporaneous Catholic thought treated the New

67. *Luther's Works*, vol. 45, *The Christian in Society II*, ed. Walther I. Brandt (Philadelphia: Fortress Press, 1962), 17.

68. *Luther's Works*, 46:273. For analysis, see Sohm, *Recht der Eheschließung*, 138–39. Luther claimed that the distinction could not be drawn in German, because verbs such as *will* and *sollst*, although commonly understood to be in the present tense, could also be interpreted as future verbs.

69. *Luther's Works*, 46:273. Luther devoted a special treatise to parental consent entitled *That Parents Should Neither Compel Nor Hinder the Marriage of Their Children and That Children Should Not Become Engaged without Their Parents' Consent*. See *Luther's Works*, 45:379–93.

70. *Luther's Works*, 36:102.

71. *Luther's Works*, 45:30–31. In his *Babylonian Captivity of the Church*, Luther had still refused to decide the issue ("whether [. . . divorce] is allowable, I do not venture to decide"). See *Luther's Works*, 36:105.

72. *Luther's Works*, 46:311. For Luther, this was confirmed by Matthew 1:19. Joseph wanted to leave Mary because he considered her an adulteress. Still, Joseph was praised by the evangelist as a pious man. According to Luther, Joseph "certainly would not be a pious man if he wanted to leave Mary unless he had the power and right to do so."

73. Luther lived a long life and the statements he made at different times were not always consistent. Later interpretations of his thought have differed accordingly.

74. Luther broke "with the theocratic ideal and [. . . accorded] to temporal authority its own authentic role." John Tonkin, *The Church and the Secular Order in Reformation Thought* (New York: Columbia University Press, 1971), 55.

Testament passages on the indissoluble character of marriage as divine laws that were binding on the human legislator,[75] Luther insisted that Jesus had not come as a legislator, but as an instructor of consciences, teaching an inward morality for all those who wanted to live as true Christians.[76] However, Luther did not think that the human legislator was absolved from all higher laws. He subordinated human laws to the inviolable creation order of God ("oeconomia. . ., e Deo creata in paradiso"), an institutional natural law that was written on the hearts of people.[77] Although Jesus's teachings might have contained aspects of this institutional natural law (and as such been binding on the human legislator), it does not seem[78] that Luther believed this to be the case with His teachings (in Matthew 5:31–32) restraining divorce.

In his exegetical sermon on *The Fifth Chapter of St. Matthew*, Luther restricted the application of Jesus's exhortation not to divorce except for adultery to those "who lay claim to the name 'Christian,'" pointing out that "Christ is not functioning here as a lawyer or governor, to set down or prescribe any regulations for outward conduct; but He is functioning as a preacher, to instruct consciences about using the divorce law properly, rather than wickedly and capriciously, contrary to God's commandment." And Luther expressly gave the secular legislator—who, as Luther well knew, ruled over good and bad Christians alike—the freedom to set a significantly lower (legal) standard. Because "people are as evil as they are,"

75. In Catholic theology, the law of the New Testament bound externally as regards the sacraments (of which marriage was one) and as regards moral precepts that had a necessary connection with virtue. See Thomas Aquinas (trans. Fathers of the English Dominican Province), *Summa Theologica*, 1st complete American ed. (New York: Benziger Bros., 1947–48), I-II, qu. 108, art. 2; and Schwab, *Grundlagen und Gestalt*, 147.

76. On Luther's conception of the *lex Christi* as a *lex spiritualis*, see Heckel, *Lex Charitatis*, esp. at 50, 97, 118.

77. Franz Xaver Arnold, *Zur Frage des Naturrechts bei Martin Luther: Ein Beitrag zum Problem der natürlichen Theologie auf reformatorischer Grundlage* (Munich: Max Hueber, 1936), esp. at 68, 88, 98, 124–26 (quotation at 68). Luther at first used the concept of an inviolable creation order to attack the canon law of impediments. *Luther's Works*, 36:99: ("marriage itself, *being a divine institution*, is incomparably superior to any laws, so that marriage should not be annulled for the sake of the law, rather the laws should be broken for the sake of marriage" [emphasis added]). However, he later became rather accepting of the canonical impediments. See *Luther's Works*, 46:316 ("What degrees or persons are forbidden in the temporal law, . . .I will leave to the jurists and those learned in the law to teach; I am writing more for the sake of consciences than for the sake of laws.").

78. For this view, see, for example, Schwab, *Grundlagen und Gestalt*, 159–60. Schwab's interpretation does not stand unopposed. Writers such as Johannes Heckel (*Lex Charitatis*, 103–5) believe that Luther regarded Matthew 5:31–32 as a (binding) elaboration of the institutional natural law. This view seems hard to square with Luther's exegesis of Matthew 5:32 in *Luther's Works*, 21:93–94, from which I cite in the text.

he remarked, "any other way of governing is impossible. Frequently something must be tolerated even though it is not a good thing to do, to prevent something even worse from happening."[79] In short, Luther separated Christ's teachings on divorce from human laws, treating the former as a spiritual *lex perfectionis*, binding on the true Christian in the internal forum, and the latter as a rudimentary external order that might depart from God's word to prevent greater evil. Lutheran thought would, therefore, seem to imply an institutionally and substantively thoroughly secular system, with both marriage legislation and marriage adjudication in the hands of state authorities who were largely free to rule not by the Gospel, but by reason and common sense.

However, the Lutheran position was complicated by the fact that Luther, at the same time that he denied its sacramental quality, wanted to raise marriage from the "awful disrepute"[80] into which it had fallen under the Catholic Church's celibate ideal, that is, the church's distinct preference, going back to the church fathers and ultimately Saint Paul, for a life of solitary spiritual contemplation over marriage. This celibate ideal had assumed tangible form in the requirement—enforced through the impediments of orders and vows—that ordained servants of God forego marriage as a condition of ecclesiastical service.[81] It was also reflected in the church's disapproval of all second marriages, even those that occurred after the death of one's spouse.[82]

Luther did not accept this Catholic hierarchy, which placed celibacy at the top, forbade marriage to the clergy, and discouraged remarriage. He wanted to affirm the good of marriage against the patristic and medieval teaching. Therefore, Luther (probably motivated, in part, by his acceptance of clerical marriage[83]) eulogized marriage as "a divine institution,"[84] a sacred calling instituted by God as the foundation of the family, the noblest and most essential of the three estates (household, church, and state) that

79. See *Luther's Works*, 21:93–94. According to Luther, adopting the Old Testament laws about divorce "might even be advisable nowadays, if the secular government prescribed it." *Luther's Works*, 21:94.

80. *Luther's Works*, 45:36.

81. John Witte Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge: Cambridge University Press, 2009), 77.

82. Remarriages by widow(er)s were regarded as falling short of the Christian ideal. Although such "successive polygamy" was not absolutely prohibited, the preference was for widow(er)s to remain single. The medieval church became increasingly strict in forbidding the clergy to bless remarriages. On successive polygamy in the Catholic Church, see Witte, *The Western Case for Monogamy*, esp. at 67, 80, 120, 136.

83. This connection has been made by Friedberg, *Recht der Eheschließung*, 167 and Schwab, *Grundlagen und Gestalt*, 107.

84. *Luther's Works*, 54:222.

God had ordained for the governance of the earthly kingdom.[85] Although, as Dieter Schwab has pointed out, this spiritual language, for Luther, carried no legal implications and was irrelevant to the attribution of legal authority over marriage,[86] it was open to misreading by jurists trained in the canon law and accustomed to treating *spiritual* and *temporal* as terms with legal significance.[87] Early reformers, such as the jurist-theologian Philipp Melanchthon (1497–1560), still shared Luther's vision.[88] However, later Protestant jurisprudence began to neglect the Lutheran distinction between marriage as a temporal concern and as a spiritual estate, and to accord to temporal, earthly marriage a spiritual character.[89] In the seventeenth century, the conception of marriage as a *causa mixta*, a part civil, part ecclesiastical entity, became dominant.[90]

Luther's denial of the church's jurisdictional competence, his—at least at first[91]—wholesale rejection of the canon law (he famously staged a public bonfire into which he heaved papal-law books[92]), and his almost equally dim view of Roman law, led to a legal vacuum, which made the creation of a new court system and a new law of marriage a matter of urgency. The need to avert impending chaos (in particular, the need to stop the growing practice of self-divorce[93]) combined with Luther's equivocal stress on the spiritual dimensions of marriage to favor a (partial) continuation of the old order and blunted Luther's reformist purpose.

85. Berman, *Law and Revolution II*, 184.

86. Schwab, *Grundlagen und Gestalt*, 107–8.

87. Ibid., 109–10.

88. Karl Gottlieb Bretschneider and Heinrich Ernst Bindseil, eds., *Corpus Reformatorum: Philippi Melanthonis opera quae supersunt omnia*, vol. 21 (Braunschweig: Schwetschke, 1854), 1068: "Etsi autem aliqui reiiciunt hanc legem et contendunt eam ab Evangelio dissentire, tamen hi non recte intelligunt discrimen Legis et Evangelii." Melanchthon concluded that the secular legislator might adopt the Roman law of divorce.

89. Schwab, *Grundlagen und Gestalt*, 109.

90. A leading influence was Benedict Carpzov, *Iurisprudentia ecclesiastica seu consistorialis* (Leipzig: Ritzschius, 1673), lib. 1, tit. 1, definitio 7; lib. 2, tit. 1, definitio 1.

91. In his early years, he was certainly dismissive of both canon and Roman law. However, James Whitman has argued persuasively that, appalled by the Peasants' War, the Lutheran leadership began to support the learned legal tradition. According to Whitman, from 1530 or thereabouts, Luther embraced not only Roman law, but "the entire ius commune, including Canon law, of which he was careful, in his marriage-law essay, to speak well—something he had never done before this year of political crisis." See James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton: Princeton University Press, 1990), 24.

92. Carlson, *Marriage and the English Reformation*, 5.

93. Hans Gert Hesse, *Evangelisches Ehescheidungsrecht in Deutschland* (Bonn: Bouvier, 1960), 48.

Marriage Jurisdiction

Luther's idea had been to adjudicate matrimonial causes in the civil courts: "[c]ontroversies and court cases [respecting marriage] we leave to lawyers."[94] Practice (and theory after Luther[95]), however, took a different turn. In the early stages of the Reformation, priests were pressed into service, not only as Lutheran counselors, but in a blatantly judicial function.[96] When this stopgap measure was replaced by a more permanent solution, the choice fell on the establishment of consistories; that is, special courts for matrimonial and other ecclesiastical causes that were part of the state judicial system, but—as a visible manifestation of the growing conception of marriage as a *causa mixta*—composed of a mixed staff of theologians and jurists.[97] The Mark Brandenburg provides a typical example. Its *Kirchenordnung* of 1540, enacted by the elector and margrave Joachim II (1505–71), enjoins priests to refer matrimonial causes to the "*ordentlichen consistoria*,"[98] and consistories, composed of lay and clerical officials, were certainly in operation at Cölln on the Spree and in Stendal (*Altmark*) by the mid-sixteenth century.[99]

94. *Luther's Works*, 54:363.

95. In particular, the Lutheran theologian Johann Gerhard (1582–1637) called for the cooperation of theologians and secular jurists in the adjudication of marriage. See his *Loci theologici cum pro adstruenda Veritate, tum pro destruenda quorumvis contradicentium Falsitate, per theses nervose, solide & copiose* explicatorum, vol. 7, *De coniugio, coelibatu & cognatis materiis* (Frankfurt: Hertelius, 1657), §§ 8, 692, pp. 4, 396.

96. Hesse, *Evangelisches Ehescheidungsrecht*, 53–54.

97. The first consistory was established in Wittenberg in 1539. Other Lutheran territories followed suit. For an outline of the development, see Hesse, *Evangelisches Ehescheidungsrecht*, 58–60. The legal classification of these courts is controversial. Dieterich (*Das protestantische Eherecht*, 117) opines that the difference to the Catholic solution boiled down to nothing more than staffing, a view that finds support in the fact that the range of matters within the consistories' jurisdiction corresponded to that of the earlier ecclesiastical courts (for a list of matters included, see, e.g., the *Brandenburgische Visitations- und Consistorialordnung* [1573], in *Die evangelischen Kirchenordnungen des sechszehnten Jahrhunderts: Urkunden und Regesten zur Geschichte des Rechts und der Verfassung der evangelischen Kirche in Deutschland,* ed. Aemilius Ludwig Richter [Weimar: Landes-Industriecomtoir, 1846], 2:380) and that they were frequently described as *geistliche*; that is, spiritual consistories. According to Emil Sehling (*Geschichte der protestantischen Kirchenverfassung* [Berlin: B. G. Teubner, 1913], 18), consistories were intended as organs of the church, but owed their existence, staffing, procedure, and applicable law to the temporal prince, and became more and more dependent on him.

98. *Kirchen-ordnung im churfurstenthum der marcken zu Brandenburg* (1540), in *Die evangelischen Kirchenordnungen des XVI. Jahrhunderts*, vol. 3, *Die Mark Brandenburg, die Markgrafenthümer Oberlausitz und Niederlausitz, Schlesien,* ed. Emil Sehling (Tübingen: Mohr, 1909), 82.

99. Sehling, *Kirchenordnungen*, 3:15.

Marriage Law

Lutheran thought made the temporal prince responsible for the substance of marriage law, and German princes who joined the Reformation rose to the challenge. However, the abiding conception of marriage as, at least in part, a "spiritual" matter, proved influential here as well. Whereas it did not so much affect *whether* the territorial prince took it upon himself to regulate marriage, it did affect *how and in what spirit* he did so.[100] Therefore, in 1540, Joachim II of Brandenburg was driven to justify his legislative activity with dilatoriness on the part of the emperor and Christian councils:[101] given their lack of progress, he felt called on, as a "*christlich churfurst*," charged with the spiritual welfare ("*heil, trost und seligkeit*") of his subjects, to step into the breach and, with the assistance of God-fearing prelates and councilors ("*gottforchtiger. . .prelate und rethe*") to promulgate a Christian church ordinance.[102] This, as Sehling has noted, established a link with the right to self-help already exercised by territorial princes *prior to* the Reformation, when those primarily responsible (pope or bishops) failed to act.[103]

Although later enactments were less apologetic about the assertion of legislative power that they implied,[104] territorial princes of the sixteenth and seventeenth centuries continued to regard themselves as God's vice-regents, charged with the task of enacting laws that conformed to God's will. When dealing with marriage matters, they typically chose the form of *Ehe-, Kirchen-* and *Konsistorialordnungen* in preference to the more "worldly" *Land-* and *Stadtrechte* and *Polizeiordnungen*,[105] and they relied on leading theologians at the drafting stage. The work on the *Visitations- und Consistorialordnung* enacted by Joachim II's successor, the Elector Johann Georg (1525–96), in 1573, for example, was performed by the

100. Schwab, *Grundlagen und Gestalt*, 124.

101. Sehling, *Kirchenordnungen*, 3:39 ("So wir aber itzt vermercken, . . .das der hohe und ernste, keis. Maiestat angewandter treuer fleiss. . .on frucht. . .ausgegangen, und ferrer, zu einem general oder gemeinen christlichen consilio. . .mehr geflohen denn fortgesetzt [wird])."

102. Sehling, *Kirchenordnungen*, 3:39–40.

103. Sehling, *Geschichte der protestantischen Kirchenverfassung*, 9, 11.

104. In 1561, Joachim II expressly asserted his right to legislate, not only in temporal, but also in spiritual matters, and to promulgate spiritual ordinances. See Richter, *Kirchenordnungen*, 2:359. In the *Brandenburgische Visitations- und Consistorialordnung* of 1573 (Richter, *Kirchenordnungen*, 2:358–86) that right already goes without saying.

105. *Landrechte, Stadtrechte* and *Polizeiordnungen* of the sixteenth and seventeenth centuries usually refrain from dealing with marriage matters. Police ordinances might deal with "wordly" matters, such as the wedding festivities. Schwab, *Grundlagen und Gestalt*, 224.

Lutheran theologians Andreas Musculus and Georg Coelestin (the latter chiefly known today as the editor of Luther's letters).

Moreover, in the later sixteenth and seventeenth centuries, Protestant jurists and theologians began to insist that human laws must not conflict with the Gospel.[106] This gradually led to the formation of a Protestant marriage law and legislation that was rooted in (the Protestant interpretation of) the Bible. In particular, in the area of divorce, there was a tendency to treat the New Testament passages on marriage and its dissolution as a binding guide for the human legislator. For example, The Lutheran dogmatician Johann Gerhard (1582–1637), whom his contemporaries regarded as the greatest theologian of his time,[107] insisted that the secular ruler neither could nor should allow divorce for other reasons than those that had been sanctioned by Christ.[108] According to Gerhard, Jesus's teachings were an authoritative interpretation of the *prima institutio* of marriage in Paradise,[109] a (binding) elaboration of the natural law. Gerhard's view was powerfully echoed by other seventeenth century Lutherans such as the theologian Michael Havemann (1597–1672) and the jurists Benedict Carpzov (1595–1666) and Johann Karl Naeve (1650–1714).[110] In the century after Luther, Protestant thought in Germany therefore drew near to a position that, as Dieter Schwab has argued,[111] seemed to be more in line with Calvinism, which places a special emphasis on the realization of Christian values *within* the world,[112] than with Luther's original purpose.

106. For an early exponent, see Basilius Monner, *De matrimonio brevis et methodica explicatio continens aliquot utiles quaestiones his temporibus frequentatas, et antea nunquam tractatas* (Frankfurt: Brubachius, 1561), 51.

107. Gerhard held leading positions in theological conventions, and to many princes he was an oracle on questions of all kinds. His *Loci theologici* have been characterized as "the consummation of Lutheran dogmatic theology as initiated by Melanchthon." *See New Schaff-Herzog Encyclopedia of Religious Knowledge*, vol. 4 (New York: Funk & Wagnalls, 1909), 462–63 (quotation at 463).

108. Gerhard, *Loci theologici*, vol. 7, § 605, p. 350.

109. Gerhard, *Loci theologici*, vol. 7, § 48, p. 32.

110. Michael Havemann, *Gamologia synoptica, istud est tractatus de iure connubiorum quatuor interstinctus libris* (Frankfurt: Naumann, 1672), lib. 3, tit. 6, p. 400 ("Hinc nemini licebit esse tam audaci, ut ex proprio cerebro plures fingat causas"); Carpzov, *Iurisprudentia ecclesiastica*, lib. 2, tit. 11, definitio 189, n. 8, p. 282 ("Etsi vero postea in Novo Testamento Christus Pharisaeos ad primam coniugii institutionem revocavit, & temeraria illa divortia plane abrogavit"); Johann Karl Naeve, *Ius Coniugum, Oder das Ehe-Recht* (Chemnitz, 1716), ch. 2, § 18, p. 54. See also Hesse, *Evangelisches Ehescheidungsrecht*, 108 (noting a tendency to "positivize" the scriptural passages and to subject them to legal treatment).

111. Schwab, *Grundlagen und Gestalt*, 164.

112. For the Calvinist emphasis on realizing the Christian order in the visible world, see Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, 2nd ed.

Sixteenth and seventeenth century Protestant territories and towns lacked the resources to provide a comprehensive codification of marriage. They usually confined themselves to settling the more hotly disputed points in areas where Protestant doctrine departed from Catholic doctrine. For example, Joachim II's *Kirchenordnung* of 1540[113] picks up on the points of controversy, although it fails to deal with them adequately. It contains an exhortation for children to obtain parental consent before marriage (but does not specify the consequences of noncompliance—nullity?—beyond a threat of divine retribution); a rudimentary law of impediments (it is only clear that the impediment of holy orders is gone); and an even more rudimentary law of divorce (consisting in a wholesale reference to the *ius divinum*). The *Visitations- und Consistorialordnung* of 1573,[114] which remained the chief enactment on marriage law in Brandenburg-Prussia[115] until the late seventeenth century,[116] contains a more satisfactory[117] treatment of consent and publicity requirements, impediments, and divorce. Some of its provisions will be discussed subsequently.

Still, inevitably, gaps remained. To fill these, jurists and judges could, theoretically, draw on two pre-existing bodies of law: Roman law, in particular in its Christianized Justinian version, or canon law (Germanic marriage law had not yet received much scholarly attention and was not a viable option). Despite Luther's attack on the canon law, Protestant jurists, in the main, became advocates for the restoration of the canon law in Protestant lands.[118] Professorial and court opinions of the sixteenth and seventeenth centuries drew heavily on canon-law sources.[119] The first

(Breslau: Verlag von M. & H. Marcus, 1902), 56; and Erik Wolf, "Theologie und Sozialordnung bei Calvin," in *Johannes Calvin: Neue Wege zur Forschung*, ed. Herman J. Selderhuis (Darmstadt: Wissenschaftliche Buchgesellschaft, 2010), 239, 243–45.

113. Richter, *Kirchenordnungen*, 1:323–34.

114. Ibid., 2:358–86.

115. After the death of the Prussian duke in 1618, the margrave of Brandenburg, as the duke's son-in-law, assumed the ducal title and the Mark Brandenburg became Brandenburg-Prussia.

116. It was slightly modified in 1694 by the *Renovirte Constitution von Verlöbnis und Ehesachen*. For this enactment, see Christian Otto Mylius, ed., *Corpus Constitutionum Marchicarum, Oder Königl. Preußis. und Churfürstl. Brandenburgische in der Chur- und Marck Brandenburg, auch incorporirten Landen publicirte und ergangene Ordnungen, Edicta, Mandata, Rescripta etc.* , 6 vols. (Berlin: Buchladen des Waysenhauses, 1737), pt. 1, s. 1, no. 58, pp. 117–22.

117. Margrave Johann Georg's own assessment of the comprehensiveness of his ordinance, however, was that he was only making a "nottürftige meldung" (Richter, *Kirchenordnungen*, 2:376).

118. Witte, *From Sacrament to Contract*, 157–58.

119. Cases collected in Joachim von Beust, *Tractatus de iure connubiorum et dotium ad praxin forensem accommodates* (Frankfurt: Spies, 1591) reveal citations to leading

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systematic work on marriage produced by Protestant jurisprudence, the *Tractatus Matrimonialium Causarum* by Melchior Kling (1504–71), a friend of Luther's and his colleague at Wittenberg, is essentially a canon-law textbook that discountenances all authorities for the resolution of marriage cases except the canon law and the New Testament.[120] (Indeed, the work uncomfortably opposed Kling to Luther as regarded marriage matters, a fact that made itself felt even during Luther's final days at Eisleben.[121])

Although clearly an adherent of the new faith, Kling states in his preface that he has based his text on the canon law ("*Sum autem in hoc scripto Ius Canonicum secutus*"[122]), and he also explains why. Although there might be other laws (he lists customary law before and after Moses, Mosaic Law, the New Testament, and Roman law[123]), these—except the New Testament—are wholly inappropriate for his day and age. First, they do not cover many cases (in particular, Mosaic Law does not have much to say about marriage beyond listing certain prohibited degrees); and, second and more importantly, they are wholly repugnant to the Bible, in particular Jesus's teachings on marriage in the New Testament. After all, customary law before and after Moses allowed marriage to one's own sister—a clear violation of Leviticus 18—and polygamy (even marriage to two sisters at once, another violation of Leviticus 18); and Mosaic Law had a liberal divorce law that Jesus expressly condemned in Matthew 19. Roman law, too, allowed many things inimical to the Gospel, such as concubinage, which Scripture considers a mortal sin, and divorce on liberal grounds.[124] Kling, therefore, preferred to start with the canon law, "which has been received and retained in the Empire to this day,"[125] and to amend and emend it as the New Testament and Protestant doctrine required (although, in the end, there was little he changed[126]).

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canonists, including Gratian, Hostiensis, and Panormitanus. Samuel Stryk's late seventeenth century work *Usus Modernus Pandectarum* is distinctly less reliant on canon-law sources (he does cite Sanchez and Innocentius III, however). See Samuel Stryk, *Continuatio tertia usus moderni pandectarum, a libro XXIII. usq. ad XXXVIII.*, 6th ed. (Halle: Orphanotrophium, 1737), book 23.

120. The work was first published in 1553, but I am using a later edition: Melchior Kling, *Tractatus Matrimonialium Causarum* (Frankfurt, 1577). Other Wittenberg professors such as von Beust and Schneidewin drew on the canon law in a similar fashion.

121. *Allgemeine Deutsche Biographie*, vol. 16 (Leipzig, 1882), 185–86.

122. Kling, *Tractatus Matrimonialium Causarum*, praefatio, A2.

123. Ibid.

124. Ibid., A2–A5.

125. Ibid., A5.

126. He made some minor alterations in the law of impediments, such as sanctioning clerical marriage. Ibid., A5.

Gap-filling by canon law was also the practice of choice of the church and consistorial ordinances of the period. Brandenburg's 1540 *Kirchenordnung*, for example, supplemented its skimpy regulation of marital impediments with a reference to the canon law, "pending further comparison."[127] And the *Visitations- und Konsistorialordnung* of 1573 enjoined the consistories to uphold the traditional canon laws used in matrimonial cases up until now, as modified by the ordinance.[128] Still, this general upholding of the canon law should not blind one to the fact that the *justification for its application* had changed. The canon laws persisted, not by papal authority, but as the laws received and retained ("*receptae & retentae*"[129]) as the laws of the land, anciently submitted to and re-enacted (in church ordinances) by temporal rulers, and adopted by legal scholars because of their innate force and quality,[130] superior to all the various sources (ancient customs, Mosaic Law, and Roman law) that had been processed and partially appropriated in their making. In other words, the continued application of the canon law rested on *consuetudo* and *usus*, temporal sanction, and scholarly reception. The canon law was a valuable and systematized "Christian and equitable"[131] source of law that had to be shorn of its papal excrescences, but could not simply be discarded.

When the dust of the Lutheran Reformation had settled, the substantive law of marriage in Brandenburg-Prussia had assumed the following form (and, as John Witte has remarked, the pattern was typical throughout Protestant Germany[132]).

Formation

Protestant marriage law retained consent (not *copula*) as the essence of marriage, but it did introduce some innovations. Luther's rejection of the canon-law distinction between future and present consent as semantically confusing and scripturally unwarranted and his proposal to regard any words of consent not expressly conditional as words of present consent

127. Sehling, *Kirchenordnungen*, 3:82 ("inhalt beschriebener recht bis auf ferner vergleichung").

128. Richter, *Kirchenordnungen*, 2:380.

129. Kling, *Tractatus Matrimonialium Causarum*, praefatio, A5.

130. Kling's balancing of the various bodies of rules available for Protestant practice shows that he did not regard himself bound to follow the canon law, but adopted it on its merits.

131. Witte, *From Sacrament to Contract*, 158.

132. Ibid., 217.

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constituting a binding marriage[133] became, after some resistance,[134] the general Protestant doctrine and practice.[135] Although this might have made it even easier to find oneself in an ill-considered match, Protestant marriage law's other innovations in this area acted as a curb on matrimonial rashness. The reformers' chief critique of the old formation rules was that they neglected the role of the family and the wider community in marriage formation and promoted clandestine unions, or, in the derogatory German term, *Winkelehen*. Because he regarded marriage as a divinely instituted public estate, Luther called for formation to be a public act, requiring the consent of father, mother, or those standing *in loco parentis,*[136] and the presence of two or three witnesses who could testify to the existence of the marriage.[137] For the requirement of parental consent, Luther found a clear mandate in Scripture (in the Fourth Commandment enjoining children to honor their parents),[138] but he also drew on natural law, the ancient canons, and Roman law as well as on reason and natural common sense for justification.[139] The need for witnesses was perhaps a little harder to justify from Scripture[140] (although making marriages more visible was clearly preferable from the point of view of social utility, by making it more difficult for a disaffected spouse to deny the existence of the marriage, to set up the impediment of precontract or to enter into a subsequent bigamous union).

The requirement of parental consent was almost uniformly accepted in sixteenth century Germany.[141] The Mark Brandenburg's *Visitations- und Consistorialordnung* of 1573, for example—invoking the Fourth

133. *Luther's Works*, 46:273–75.

134. Kling, for example, clings to the canon-law distinction (*Tractatus Matrimonialium Causarum*, 1), as does von Beust. The distinction can still be found in the practitioners of the *usus modernus*.

135. Sohm, *Recht der Eheschließung*, 200–201; Witte, *From Sacrament to Contract*, 139–40.

136. *Luther's Works*, 46:268.

137. Ibid.

138. Ibid., 46:277.

139. Ibid., 46:268–72. He also cited "the great danger and mischief that have so often resulted from such secret betrothals" (270).

140. For this view, see Siegfried Reicke, "Geschichtliche Grundlagen des Deutschen Eheschließungsrechts," in *Weltliche und kirchliche Eheschliessung: Beiträge zur Frage des Eheschliessungsrechtes*, ed. Hans Adolf Dombois and Friedrich Karl Schumann (Gladbeck: Freizeiten-Verlag, 1953), 42. Reicke's position is surprising, because a requirement of two witnesses can be found in both the Old and the New Testaments. Luther's biblical justification was that "God says, 'Every word should be confirmed by the evidence of two or three witnesses' (Matt 18:16)." See *Luther's Works*, 46:268.

141. Although for early jurists such as Kling, parental consent was commendable, but not a condition for validity, for later jurists, unconsented-to unions were void unless consummated. Witte, *From Sacrament to Contract*, 143.

Commandment, the quality of marriage as a public estate, and utility—required the consent of both parents[142] (in this respect following Scripture rather than the Roman law, which stipulated *paternal* consent alone) and, in the absence of parents, the consent of "next friends" and guardians, on pain of nullity.[143] The 1573 ordinance, like Roman law, limited the consent requirement to children in power ("*Personen, so unter ihrer Eltern Blutsfreunde oder Vormunden gehorsam unnd gewalt noch sein*"[144]). An amendment introduced in 1694 by the *Renovirte Constitution, von Verlöbniß und Ehe-Sachen*, however, adopted the unadulterated spirit of the Fourth Commandment, and applied the consent requirement to *all* children, irrespective of their age (with a limited exception for children who already maintained a separate establishment, in particular widows and widowers).[145] The 1694 ordinance also dropped the earlier rule that the lack of parental consent would be purged by *copula*.[146] Protestant marriage law was, however, far from sanctioning unlimited parental rule over the matrimonial choices of children: children clearly had a right of veto and they could challenge their parents' refusal to consent to an unexceptionable union in the consistories.[147]

The legal position on the issue of witnesses was far less clear (perhaps in part a reflection of the fact that there was no clear Scriptural warrant for requiring them[148]): church ordinances in the various German territories either required no witnesses at all, required witnesses only in default of parents, or required both parental consent and witnesses.[149] The 1573 Brandenburg ordinance, for example, required two or three honorable

142. Where the parents differed, the father's consent was determinative. Stryk, *Continuatio tertia usus moderni pandectarum*, book 23, tit. 1, § 15.

143. Richter, *Kirchenordnungen*, 2:376, 381. This was the general practice. See Stryk, *Continuatio tertia usus moderni pandectarum*, book. 23, tit. 1, § 15.

144. Richter, *Kirchenordnungen*, 2:381.

145. Mylius, *Corpus Constitutionum Marchicarum*, pt. 1, s. 2, no. 58, p. 119. The 1694 renovation also allowed parents to disinherit disobedient children of half their *legitime*, and gave consistories the right to impose financial and other penalties (121). On this enactment, see Stryk, *Continuatio tertia usus moderni pandectarum*, book 23, tit. 1, § 15. According to Stryk, the exception for second marriages was not the general rule.

146. Mylius, *Corpus Constitutionum Marchicarum*, pt. 1, s. 2, no. 58, p. 119. On the earlier rule that lack of parental consent would not invalidate a consummated union, see Sohm, *Recht der Eheschließung*, 207.

147. Richter, *Kirchenordnungen*, 2:376; and Mylius, *Corpus Constitutionum Marchicarum*, pt. 1, s. 2, no. 58, p. 118.

148. Stryk, *Continuatio tertia usus moderni pandectarum*, book 23, tit. 1, § 15 holds that, absent a legislative provision, witnesses are only required *de honestate*. He seems to ground himself in the fact that only reasons of utility (rather than a scriptural warrant) can be urged in favor of requiring witnesses.

149. Sohm, *Recht der Eheschließung*, 206.

witnesses on either side in default of parents or guardians, and attached the sanction of nullity.[150] According to Hartwig Dieterich, it was the only ordinance expressly to void unwitnessed spousals.[151]

Impediments

Because the reformers regarded marriage as a highly desirable estate and a necessary remedy against sexual sin (continence being considered a rare gift[152]), they believed that it should be widely available. Accordingly, although they retained the old vices of consent,[153] they swept away many of the traditional physical and spiritual impediments to marriage. Restrictions on those related by blood, family, legal, and spiritual ties were curtailed to what was clearly demanded by God and nature, leading to a more biblically based law of physical impediments. (Luther's repeated proposals for adopting only the slender group of impediments expressly laid down in Leviticus[154] did not win out, in no small measure because the Mosaic list, which did not even outlaw unions between father and daughter, was considered incomplete[155]). The impediment of permanent impotence was retained,[156] consanguinity and affinity were usually limited to the third or second degree (and made indispensable to the extent that they survived),[157] and the impediments of public honesty as well as legal and spiritual affinity were discarded.[158]

The reformers also relaxed the *impedimentum ligaminis,* in that they no longer insisted on absolute proof of death for a remarriage to occur. The 1573 Brandenburg ordinance, for example, allowed a spouse who had no certain knowledge of his or her missing partner's death to apply to the consistory after a 5-year waiting period. The consistory would publish an open edict requiring the missing spouse to return; if the spouse did not

150. Richter, *Kirchenordnungen*, 2:376.

151. Dieterich, *Das protestantische Eherecht*, 191.

152. *Luther's Works*, 45:18.

153. They slightly widened these by recognizing mistake as to the bride's virginity (*error qualitatis*) as vitiating consent. See, for example, Richter, *Kirchenordnungen*, 2:382; and, generally, Witte, *From Sacrament to Contract*, 147.

154. *Luther's Works*, 45:7–9.

155. Witte, *From Sacrament to Contract*, 148.

156. See, for example, Richter, *Kirchenordnungen*, 2:383.

157. Dieterich, *Das protestantische Eherecht*, 134–35, 158–62. The 1573 Brandenburg ordinance limits both consanguinity and affinity to the third degree (Richter, *Kirchenordnungen*, 2:376). The 1694 renovation relaxed the impediments further still, allowing marriage in the third degree of consanguinity and restricting affinity to the *primum genus affinitatis* (Mylius, *Corpus Constitutionum Marchicarum*, pt. 1, s. 2, no. 58, p. 122).

158. Dieterich, *Das protestantische Eherecht*, 136–37, 162.

return by a certain date, the applicant spouse would be granted permission to remarry.[159] The reformers also rejected the old spiritual impediments of order, vows, and disparity of cult, as these had been built on the Catholic Church's celibate ideal (orders/vows), and on its sacramental theology of marriage (disparity of cult).[160] The 1573 Brandenburg ordinance, for example, emphasized that the clergy were not excluded from marriage, because God approved of the married state, and it gave the wives and children of clerics the same legal rights as the families of lay persons.[161] Luther himself would also have done away with the impediment of crime,[162] but this position does not seem to have found a unanimous following in practice. Most jurists and court decisions seem to have clung to the canon law, in some cases even widening the scope of the *impedimentum criminis* to encompass simple (and not, as in canon law, only aggravated[163]) cases of adultery, thus drawing close to (what they took to be[164]) the Roman-law position.[165]

Divorce

Finally, Protestant marriage law rejected the Catholic Church's doctrine of divorce; that is, the view that the marriage bond once validly established could not be severed during the lifetime of both spouses, and that "divorce," accordingly, meant only separation from bed and board. Luther argued that the term *divortium*, as used in Scripture, meant dissolution of the marriage bond, not simply separation, and that Christ had sanctioned divorce in

159. Richter, *Kirchenordnungen*, 2:383.

160. The argument that these impediments were built on the sacramental view of marriage (in that only marriages between pure-spirited Christians could represent the union between Christ and his church) is well made by Witte, *From Sacrament to Contract*, 149.

161. Richter, *Kirchenordnungen*, 2:371, 376.

162. *Luther's Works*, 45:26.

163. The classical canon-law *impedimentum criminis* annulled marriages between an adulterer and his or her partner in crime if the couple had *knowingly* committed adultery and (1) one or both conspired in the death or participated in the killing of the spouse of either or both of them, or (2) the couple had pledged faith to each other that they would marry after their spouse(s) had died. See Donahue, *Law, Marriage, and Society*, 26.

164. Stryk, *Continuatio tertia usus moderni pandectarum*, book 23, tit. 2, § 15 cites Nov. 134, c. 12 in support of his contention that the Roman law imposed a general ban on marriage in cases of simple adultery, which may be somewhat stretching the meaning of the passage cited. It is clear, however, that Stryk thought he was restoring the Roman law.

165. Stryk, *Continuatio tertia usus moderni pandectarum*, book 23, tit. 2, § 15 reports that consistories usually follow the canon law in this regard, but also states that he would adopt a stricter view, because adultery is rarely committed without some secret pledge of faith or murder most foul, which may not always be detected.

some circumstances, as was clear from the "except" clauses in Matthew 5:32 and 19:9, and in Saint Paul's ruling in 1 Corinthians 7:15.[166]

Protestant jurists, theologians, and legislators alike unanimously accepted the Lutheran doctrine of "full" divorce (giving the innocent partner the right to remarry). However, as has been discussed, Protestant thought after Luther tended[167] to treat the Gospel passages as laws to be rigidly imposed and observed. Accordingly, most church ordinances, the 1573 Brandenburg ordinance among them,[168] only recognized adultery and malicious desertion as legitimate grounds for divorce,[169] and even these limited grounds were hedged around by further restrictions.

The 1573 Brandenburg ordinance provides a typical example. It treats divorce, even for adultery, as an (unpalatable) last resort, available only when the (distinctly preferable) reconciliation of the parties has failed; it sanctions divorce on the grounds of desertion only after "one or four years' absence"[170] without cause, after assiduous attempts by the deserted spouse to win back the deserter, with due notice, and on proof of good and continent conduct throughout by the abandoned party; and although it permits remarriage to the innocent spouse, it stipulates for such remarriages to be modest and quiet affairs, without banns or church ceremony,[171] and

166. Although Luther accepted desertion as a ground for divorce, he based this less on Corinthians than on the need to get on top of a great social evil. Therefore, he remarked of the malicious deserter that there was "no villain whom I would rather have hanged or beheaded than this scoundrel." *Luther's Works*, 46:313.

167. Historians of Protestant divorce law distinguish a strict from a lax view. The strict view generally accepted only adultery and malicious desertion as divorce grounds. The lax view, associated in particular with Ulrich Zwingli, either (1) interpreted the scriptural grounds expansively to cover marital misbehavior equally weighty as adultery and desertion ("quasi-desertion") and even some grounds not predicated on fault, or (2) openly went beyond the grounds listed in Scripture, a tendency more observable in the South than in the North of Germany. See, generally, Hesse, *Evangelisches Ehescheidungsrecht*, 22–26.

168. Richter, *Kirchenordnungen*, 2:382–84. Although cruelty was not an accepted ground for divorce, the ordinance points out that an abusive husband may be imprisoned and that attempts on a spouse's life can be dealt with by the criminal law (384). Aemilius Ludwig Richter (*Beiträge zur Geschichte des Ehescheidungsrechts in der evangelischen Kirche* [Berlin: Weigandt und Grieben, 1858], 46, 54–56) has argued that it was the strict criminal-law sanctions for "marital misdemeanor" (with the sword frequently supplying the divorce decree) that made the adoption of narrow divorce grounds practicable.

169. Richter, *Beiträge zur Geschichte des Ehescheidungsrechts*, 46.

170. This opaque provision clearly raised interpretive problems. From the later seventeenth century, legal practice adopted the more permissive reading that 1 year's absence was sufficient. See Emil Friedberg, "Beiträge zur Geschichte des Brandenburgisch-Preussischen Eherechts: Mittheilungen aus dem Königlichen Geheimen Staatsarchiv zu Berlin," *Zeitschrift für Kirchenrecht* 7 (1867): 63–64.

171. This did not preclude a priestly benediction. It simply meant that the wedding was to take place at home, rather than in church.

"without all the usual public pomp and circumstance, so that everyone may see that this is not a free, but a less-than-ideal solution to help the innocent partner."[172] Research on actual practice suggests that divorces in Protestant Germany were rare.[173]

III. Marriage Law and the English Reformation

England underwent its "Reformation" at approximately the same time as the German territories did, beginning with the sixteenth century Henrician Reformation (1529–36) and consolidating under Elizabeth I (1558–1603) and the early Stuarts at the beginning of the seventeenth century. The English Reformation was, however, very different from the Lutheran one, both in its motivation and in its effects.

The Lutheran Reformation was the product of theological convictions. It was catalyzed by a religious reformer's revolt against a visible hierarchical church and enthusiastically responded to by a number of German princes (who stood to gain from it in their struggle against the pope and the emperor). The English Reformation, on the other hand, was primarily a political movement, triggered by Henry VIII's (1509–47) desire to end his marriage with Catherine of Aragon.[174] There is little reason to suppose that without Henry's wish to be rid of Catherine (and free for Anne Boleyn) Tudor England would have followed in the wake of Protestant German territories and thrown off its allegiance to the Church of Rome. Although early sixteenth century England—no more than other European territories—was no stranger to smoldering anticlericalism and opposition to ecclesiastical abuses, the English popular reaction to Luther and his proposals was more muted than the response of the German nobility and peasantry.[175] More importantly, Lutheran thought failed to attract the support of the English secular ruler, Henry VIII, who, far from joining the Protestant bandwagon, penned a book in defense

172. Richter, *Kirchenordnungen*, 2:377, 382–83, quotation at 377.

173. Richter, *Beiträge zur Geschichte des Ehescheidungsrechts*, 80.

174. On the different motivation behind the reformations, see Berman, *Law and Revolution II*, 208–9. On the political and personal dimensions of the Henrician Reformation, see also Giesen, *Grundlagen und Entwicklung*, 206. The fact that Henry's motives were radically different from their own was not lost on the Lutheran reformers: Melanchthon remarked that Henry seemed exclusively concerned with his marital affairs rather than with reforming the church. See *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, vol. 8 (London: HMSO, 1885), no. 375.

175. Samuel Gregg, "Legal Revolution: St. Thomas More, Christopher St. German, and the Schism of King Henry VIII," *Ave Maria Law Review* 5 (2007): 173, 177; Preserved Smith, "English Opinion of Luther," *Harvard Theological Review* 10 (1917): 129–31.

of the seven sacraments, which refuted Luther's attack on Catholic sacramental theology (including the sacramental theology of marriage), and so pleased the pope that he issued a special bull that declared that the book had been written with the help of the Holy Spirit, granted an indulgence to everyone who would read it, and bestowed upon its author the title "Defender of the Faith."[176]

It was not until the later 1520s that matters were complicated by Henry's desire for a canon-law *divortium quoad vinculum*; that is, an annulment, of his marriage to Catherine, on the grounds that, as Catherine was the widow of Henry's deceased brother Arthur, Henry's marriage to her was in fact barred by the impediment of affinity. Legally, Henry's case for annulment was not a particularly strong one. The marriage had proceeded under a papal dispensation. A case could have been made that the wrong dispensation was issued (that is, one from the impediment of affinity, rather than from the impediment of public honesty, although the latter would have been the correct dispensation, if, as Catherine claimed, her marriage to Henry's brother had never been consummated). However, this potentially winning argument was not pursued.[177]

Instead, Henry tried to argue that the dispensation was invalid in that the prohibition on marrying one's dead brother's wife was a mandate of the *ius divinum* and, therefore, beyond the scope of the pope's dispensing power. However, as has been discussed, the Old Testament incest prohibitions were not generally regarded as possessing the character of binding divine laws, and there was ample canon-law precedent for the kind of dispensation that Henry had received. Moreover, even those canonists who agreed with Henry on the unwaivable nature of the prohibition exempted cases in which the brother had died without issue, citing Deuteronomy 25:5. Henry's case was squarely caught by that exception.[178] Henry's case for annulment was also not a particularly strong one politically, because Pope Clement VII had just surrendered to Catherine's nephew, the Holy Roman Emperor Charles V, who had sacked Rome and whom it would be injudicious for the pope to alienate by ill-treatment of the emperor's aunt.

In the end, nothing remained for Henry, determined as he was to shake off his conjugal bonds, but to shake off papal authority over the kings of England itself. Fortified by reformist tracts and a collection of ancient sources, which suggested that in the past English kings had known no

176. Gregg, "Legal Revolution" 178.

177. For a full discussion, see John Joseph Scarisbrick, *Henry VIII* (London: Eyre & Spottiswoode, 1968), 110–13.

178. Giesen, *Grundlagen und Entwicklung*, 119–31; and Scarisbrick, *Henry VIII*, 163–80.

earthly superior,[179] Henry came to regard himself as a ruler exercising supreme authority over both church and state in England. In a flurry of legislative activity, Henry and his Parliament declared Henry to be the supreme head of the English church; made the enactment of all future canons and constitutions of the church dependent on the king's assent and license; and provided for ecclesiastical cases, expressly including cases of matrimony and divorces, to be finally adjudicated in English courts, stopping all appeals to Rome.[180]

However, Henry was no reformer. As Melanchthon observed in 1535, Henry's concern was with his various marital affairs rather than with reforming the church (or even the canon law of marriage).[181] Henry believed in "Catholicism without the pope"[182] and hoped that he could have his reformation without changing one iota of Christian belief.[183] Accordingly, he tinkered with the canon law only where his matrimonial choices required.[184] And although the Act for the Submission of the

179. Henry was allegedly impressed with the English reformer William Tyndale's book *Obedience of a Christian Man* (Antwerp, 1528; London: Penguin Books, 2000), which stated that ecclesiastical legal matters could be placed under the king's authority. See Gregg, "Legal Revolution" 185. The collection of ancient sources in question was the *Collectanea satis copiosa*, B.L., Cotton MS, Cleopatra E. VI. fols. 16–135.

180. The chief enactments were the Act in Restraint of Appeals, 1533, 24 Henry 8, c. 12 (providing for all ecclesiastical causes to be finally adjudicated in the English ecclesiastical courts); the Act for the Submission of the Clergy, 1534, 25 Henry 8, c. 19 (depriving the Church of England of its power to formulate church laws without the king's license and assent); the Act concerning Peter-Pence and Dispensations, 1534, 25 Henry 8, c. 21 (making the king and his delegates the proper source of dispensations); and the Act of Supremacy, 1534, 26 Henry 8, c. 1 (declaring Henry to be the supreme head of the Church of England).

181. *Letters and Papers*, vol. 8, no. 375.

182. Kenneth O. Morgan, ed., *The Oxford Illustrated History of Britain* (Oxford: Oxford University Press, 1997), 247.

183. Even Arthur Geoffrey Dickens—who has suggested that in discussing the English Reformation "the development and spread of Protestantism should play a far more prominent rôle" (*The English Reformation*, 4th ed. [London: B. T. Batsford, 1968], v) and that a gradual infiltration into England of Protestant, especially Calvinist, concepts had begun before Henry's death (197)—acknowledges Henry's "doctrinal conservatism" (168) and "conventional mind" (173).

184. His tinkering concentrated on the law of impediments (he preferred annulling marriages he had emotionally outgrown to the more radical measure of reforming the law of divorce). Therefore, he legislated in 1534 (25 Henry 8, c. 22, s. 14) that the impediment of affinity required church solemnization in order to legitimate his marriage to Anne Boleyn (whose sister he had carnally known, but never married). When it suited him to get rid of Anne, he returned to the traditional canon-law position that the impediment of affinity would also arise *ex copula illicita* (26 Henry 8, c. 7, s. 10). And when he wanted to marry Catherine Howard, who had precontracted herself to another, he provided that all unconsummated marriages *per verba de praesenti* would be overridden by a later consummated marriage *in facie ecclesiae* (32 Henry 8, c. 38). This virtually abolished the

Clergy (1534)[185] gave the king authority to appoint a thirty-two member commission—composed of sixteen members of the upper and lower houses of Parliament and an equal number of representatives of the clergy—to examine and prune the existing canons and constitutions of the English church, nothing much was done,[186] a scenario that had been envisaged in the legislation. The same statute that provided for the reform commission specified that until the commission could act, the existing edifice of canon law was to remain in force, at least insofar as was consistent with the laws and customs of the realm and not prejudicial to the king's prerogative. In his final years, Henry might have come personally to a more Protestant stance under the influence of Archbishop Cranmer.[187] However, marriage had not officially ceased to be a sacrament in England even at the time of Henry's death.[188]

Following Henry's death in 1547, the pendulum swung back and forth under Henry's Protestant son, the child-king Edward VI (1547–53) and Henry's Catholic daughter Mary I (1553–58). Under Edward VI, Protestantism was established for the first time in England. In the early years of the English Reformation under Henry VIII, the people working for reform had still been looking to Wittenberg. However, during Edward's reign, Calvinistic ideas gained a large following in England.[189] Thomas Cranmer, the Archbishop of Canterbury, invited some leading Franco-Swiss Protestants, notably Peter Martyr and Martin Bucer (both from Strasbourg),[190] to come to England and join the English

impedimentum praecontractus. On Henry's very personal approach to statute-making, see Giesen, *Grundlagen und Entwicklung*, 209–13. Luther himself saw the connection between Henry's enactments and his personal wishes: "what 'Juncker Heintz' wills, must be an article of the faith." See *Letters and Papers*, vol. 16 (London: HMSO, 1898), no. 106.

185. 25 Henry 8, c. 19.

186. The commission issued a report with a draft of a group of canons, but they were never adopted. Substantively, the draft canons were little more than a compilation of existing sources. They did not envisage important changes in the law of marriage. For a modern edition, see Gerald Bray, ed., *Tudor Church Reform: The Henrician Canons of 1535 and the* Reformatio Legum Ecclesiasticarum (Woodbridge, UK: Boydell Press, 2000), 1–144.

187. Dickens, *The English Reformation*, 182–89, seems to suggest this. However, he leaves open to what extent the king's support for the archbishop and his advanced reforms were the result of personal liking rather than theological conviction.

188. Although the Ten Articles of 1536, the first official doctrinal statement of the new dispensation, had tacitly dropped marriage from the list of sacraments, the later Articles of 1537 and 1543 again included marriage as a sacrament. See Giesen, *Grundlagen und Entwicklung*, 215; and Carlson, *Marriage and the English Reformation*, 43.

189. See Philip Schaff, *The Creeds of Christendom: With a History and Critical Notes*, 6th ed., vol. 1, *The History of Creeds* (Grand Rapids: Baker Book House, 1983), 604.

190. Calvin, Bucer, and Martyr had much in common theologically. See, for example, Willem van't Spijker, "Bucer's Influence on Calvin: Church and Community," in *Martin*

Reformation. Martyr and Bucer went on to hold positions as Regius professors of divinity at Oxford and Cambridge, respectively. They appear to have affected the views of Cranmer, and historians have shown that they exerted an influence on the reforms undertaken (or envisaged) during Edward's reign.[191]

Cranmer's (Calvinist) Books of Common Prayer (1549, 1552) introduced systematic liturgical reform. Edward's reign also envisaged doctrinal changes, in particular the abandonment of the sacramental character of marriage, in the Forty-Two Articles of Faith of 1552 (which were never put into action because of the king's untimely death). Although the canon law of marriage was not changed under Edward (beyond the introduction of clerical marriage in 1549[192]), there were proposals to reform it that would have been far reaching. The draft *Reformatio Legum Ecclesiasticarum* (1553),[193] although preserving ecclesiastical jurisdiction in marriage cases, would have recast the substance of marriage law along Continental reformist lines. It would have annulled clandestine unions, in particular those without parental consent, abolished *divortium quoad mensa et thoro*, and introduced full divorce on fairly expansive grounds (adultery, desertion,[194] deadly hostility, and prolonged ill-treatment). However, all hopes of passing the *Reformatio* died with Edward.[195] His half-sister Mary wished to be reconciled with Rome. Under her rule, the Henrician and Edwardian innovations were repealed,[196] and marriage in

Bucer: Reforming Church and Community, ed. David F. Wright (Cambridge: Cambridge University Press, 1994), 32–44. Modern scholars on Peter Martyr are still divided into those who believe that he betrayed Calvinistic theology for scholasticism, those who do not see much scholastic influence in his writings, and those who do not perceive any conflict between scholasticism and early Calvinistic theology. For an overview, see Frank A. James III, *Peter Martyr Vermigli and Predestination: The Augustinian Inheritance of an Italian Reformer* (Oxford: Clarendon Press, 1998), 12–17.

191. Martin Greschat (trans. Stephen E. Buckwalter), *Martin Bucer: A Reformer and His Times* (Louisville: Westminster John Knox Press, 2004), 227–50.

192. 2 & 3 Edward 6, c. 21. Henry, on the other hand, had defended clerical celibacy throughout his life.

193. For a modern edition, see Bray, *Tudor Church Reform*, 144–743.

194. The *Reformatio* even contemplated remarriage after the unduly protracted absence of a husband who had left for legitimate reasons (e.g., military service). However, there was a catch: if the husband returned, he could reclaim his partner on proving that it was not his fault that he had stayed away so long. Bray, *Tudor Church Reform*, 269–71.

195. Whether it would have made it into law had he lived longer is a matter of dispute. Because of its far-reaching proposals, Giesen believes that the *Reformatio* was chiefly influenced by foreign reformers and would not have found favor with Parliament. See Giesen, *Grundlagen und Entwicklung*, 250–60.

196. This was done through the first and second statute of repeal, 1 Mary sess. 2, c. 2 and 1 & 2 Philip and Mary, c. 8. The first statute abolished all religious legislation passed under

England was returned to the doctrinal, liturgical, and legal position that it had occupied in 1529.[197]

The pendulum finally came to rest in the center, with Henry's daughter Elizabeth I, who vowed to restore "religion as her father left it."[198] The Elizabethan settlement was a theologically Calvinist compromise that combined (a more moderate version of) the liturgical and doctrinal innovations of Edward VI's reign with an almost wholesale continuation of the traditional church system, jurisdiction, and canon law. The Uniformity Act (1559)[199] reintroduced a substantively Protestant Book of Common Prayer,[200] and the Thirty-Nine Articles of Religion (1563–71) denied the sacramental quality of marriage.[201] The Supremacy Act (1559),[202] however, which re-established royal supremacy over the English church independent of Parliament, re-enacted Henry's Act in Restraint of Appeals[203] and his Act for the Submission of the Clergy,[204] and in so doing, affirmed both ecclesiastical jurisdiction over marriage and a virtually unmodified canon law. Moreover, although the sacramental character of marriage was now denied, the Book of Common Prayer of 1559 continued to emphasize its character as "holy matrimony," which signified the mystical union between Christ and his church.[205] In fact, the matrimonial service in the Elizabethan prayer book, with some minor changes in wording, followed the Use[206] of Sarum, which had been the predominant form of liturgy in the pre-Reformation English church.[207]

Edward VI and the second statute built on it by abolishing all religious legislation passed against the papacy since 1529.

197. Giesen, *Grundlagen und Entwicklung*, 278.

198. Quotation in Giesen, *Grundlagen und Entwicklung*, 289.

199. 1 Elizabeth 1, c. 2.

200. Use of both Edwardian Prayer Books was discontinued by Mary. Elizabeth reintroduced a slightly modified version of the second Edwardian Prayer Book in 1559.

201. Edward Cardwell, ed., *Synodalia: A Collection of Articles of Religion, Canons, and Proceedings of Convocations in the Province of Canterbury, from the Year 1547 to the Year 1717* (1842; reprinted, Farnborough, UK: Gregg, 1966), 1:99. The articles were affirmed by James I's 1604 *Constitutions and Canons Ecclesiastical*, canon 5 in Cardwell, *Synodalia*, 1:250.

202. 1 Elizabeth 1, c. 1.

203. 24 Henry 8, c. 12.

204. 25 Henry 8, c. 19.

205. In its actual phraseology, the passage describes marriage as "holy matrimony, which is an honorable estate, instituted of God in paradise, . . .signifying unto us the mystical union, that is betwixt Christ and his Church." See John E. Booty, ed., *The Book of Common Prayer 1559: The Elizabethan Prayer Book* (Washington, DC: Folger Shakespeare Library, 1976), 290 (under the rubric "The Form of Solemnization of Matrimony").

206. Uses had been established by the right of the bishops in the medieval English church.

207. Daniel Evan, *The Prayer-Book: Its History, Language, and Contents*, 20th ed. (London: Wells Gardner, Darton & Co., 1901), 491–96.

After engineering this compromise, Elizabeth fought back all attempts by Parliament to encroach on her right, established by the Supremacy Act, to legislate for the church without Parliamentary intervention.[208] She was determined to maintain exclusive royal control over the church, and she evidently believed that the existing law (enforced by a domesticated bench of bishops) offered her a better chance of doing so than the plans mooted by Puritan reformers.[209] Elizabeth's politics of continuity were carried forward by her successor James I (1603–25), who, as James VI of Scotland, had experienced Presbyterian innovations at first hand and was understandably not keen on repeating the experiment in England.[210] He regarded the existing church system as the natural ally of an absolutist monarchy ("No Bishop, no King"[211]), and, accordingly, strove to preserve it.

The overall impact of the English Reformation on the church courts' marital jurisdiction and the traditional canon law of marriage can best be gauged by looking at the two chief documents on marriage dating from the Elizabethan and the Jacobean periods: *A Treatise of Spousals, or Matrimonial Contracts*, a standard textbook—roughly comparable to Melchior Kling's *Tractatus Matrimonialium Causarum*—written during Elizabeth's reign (but not published until a century later) by Henry Swinburne (1554–1624), an advocate (and ultimately a judge) in the ecclesiastical courts at York;[212] and the statements concerning marriage contained in the Jacobean *Constitutions and Canons Ecclesiastical* of 1604.[213] The Jacobean Canons provided the fullest statement of the English church's administrative and disciplinary regulations since the break with Rome (although such modifications as they introduced frequently had precursors in earlier Elizabethan canons). They would remain

208. All parliamentary endeavors to reform the canon law either did not make it into the Commons on instruction from the queen or failed in the Lords. John Ernest Neale, *Elizabeth I and Her Parliament, 1559–1581* (London: Jonathan Cape, 1953), 216–17.

209. Carlson, *Marriage and the English Reformation*, 87.

210. Giesen, *Grundlagen und Entwicklung*, 410.

211. William Barlow, *The Summe and Substance of the Conference, Which, It Pleased His Excellent Maiestie to Have with the Lords, Bishops, and Other of His Clergie … at Hampton Court, January 14, 1603* (London: John Windet and T. Creede for Matthew Law, 1604), 82. The 1604 *Constitutions and Canons Ecclesiastical,* canon 7 (Cardwell, *Synodalia*, 1:251) excommunicated everyone who impugned the government of the church by archbishops, bishops, and other officials.

212. Henry Swinburne, *A Treatise of Spousals, or Matrimonial Contracts: Wherein All the Questions relating to that Subject Are Ingeniously Debated and Resolved* (London: S. Roycroft for Robert Clavell, 1686).

213. The canons were approved by the convocations of Canterbury and York in 1604 and 1606, respectively.

the chief legislative pronouncement on marriage until Lord Hardwicke's Marriage Act of the mid-eighteenth century.

Marriage Jurisdiction

Jurisdictionally, in marriage cases, the English Reformation only removed the right to appeal to Rome. As the headship of the English church was transferred from pope to king, appeals, formerly to the pope's curia, would now lie to the king's High Court of Delegates (which was an ad hoc tribunal composed of ecclesiastical and temporal lawyers).[214] Marriage cases continued to be dealt with in the ecclesiastical tribunals,[215] as they had been prior to the Reformation, and secular courts, when faced with questions in which the validity of marriage was a preliminary issue (which might happen in property cases), would refer that matter to the ecclesiastical courts.[216] The only curtailment of ecclesiastical jurisdiction over marriage consisted in the fact that the common-law courts began to issue writs of prohibition, enjoining the proceedings in the ecclesiastical courts, where an annulment was sought after the death of one or both of the spouses.[217] The justification for this was, apparently, that the only effect of a posthumous declaration of nullity would be to bastardize and disinherit the issue. This, however, would exceed the spiritual courts' duty to act *pro salute animae*.[218]

As in Protestant Germany, the Reformation did have an effect on staffing. Although, according to Brian Outhwaite, even in the later Middle Ages the judges, proctors, and registrars practicing in the church courts

214. R. Brian Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge: Cambridge University Press, 2006), 4.

215. Although the marital jurisdiction of the ecclesiastical courts remained largely intact, some historians maintain that the Reformation left them morally weakened.

216. Outhwaite, *Rise and Fall,* 47. Although Parliament did pass some statutes that effectively removed jurisdiction from the spiritual to the temporal courts (e.g., in cases of bigamy) or that gave the temporal courts concurrent jurisdiction (e.g., in aspects of tithe and probate), these had no implications for the ecclesiastical courts' jurisdiction over the formation and dissolution of marriage. A removal of marriage cases to the secular courts seems never even to have been under discussion in England. Even Edward VI's draft *Reformatio* would have preserved ecclesiastical jurisdiction over marriage.

217. *Kenn's Case* (1606) 77 E.R. 474; and *Pride v. The Earls of Bath and Montague* (1656) 91 E.R. 113.

218. Voiding a marriage could hardly tend to the reformation of the spouses if the spouses were already dead. What began as a time limit on ecclesiastical sentences of nullity became a distinction between canonical and civil impediments in the eighteenth century. The former impediments were said to result in *voidable* marriages, and required avoidance *during the lifetime of both spouses*. The latter impediments rendered the marriage *ipso iure* void. For the distinction, see *Elliott v. Gurr* (1812) 161 E.R. 1063.

had not always been clerics, but sometimes products of the universities, trained in the canon law,[219] the Reformation sped up this process toward laicization. Following Henry VIII's suppression of the teaching of canon law in the universities and a 1545 Act making laymen and doctors of the civil law eligible for appointment,[220] judges in the ecclesiastical courts tended increasingly to be lay lawyers.[221]

Marriage Law

Along with ecclesiastical jurisdiction in marriage cases, post-Reformation England preserved most of the pre-Reformation canon law.[222] Henry Swinburne's *Treatise of Spousals* is full of references to leading indigenous and foreign medieval canonists such as Hostiensis, Panormitanus, Henry Boich, and William Lyndwood. He even cites some post-Reformation Catholic canon lawyers such as the Spanish late scholastic Covarruvias, an indication that he regarded himself as standing in an unbroken canonist tradition. Roman law and ancient customs are generally territories into which Swinburne declares that "I will not wade,"[223] and although he acknowledges Protestant jurists such as Schneidewin, Kling, and Oldendorp—a fact that shows him well aware of the full panoply of continental juristic conversation about marriage—he usually disagrees with them.[224]

Formation

Post-Reformation England preserved Pope Alexander III's twelfth century formation rules wholesale. Until the mid-eighteenth century, it clung to the position that "present and perfect Consent [or future consent followed by copula …] alone maketh Matrimony, without either Publick Solemnization or Carnal Copulation; for neither is the one, nor the other

219. Outhwaite, *Rise and Fall*, 65. Outhwaite refers to the diocese of Canterbury, but does not produce further evidence for his assertion.

220. 37 Henry 8, c. 17, re-enacted by 1 Elizabeth 1, c. 1.

221. Outhwaite, *Rise and Fall*, 65.

222. Richard Helmholz's assessment of the impact of the English Reformation is that "the history of the law of marriage and divorce [. . . in this era] combines essential continuity with real change. In this instance, the continuity is the more remarkable." See Helmholz, *Roman Canon Law in Reformation England*, 69.

223. Swinburne, *Treatise of Spousals*, 45–46. Quotation at 46.

224. In one of his few references to divorce (*Treatise of Spousals*, 146), for example, Swinburne follows Panormitanus in only allowing a *mensa* separation in cases of adultery ("Matrimony. . .is not utterly dissolved for Adultery"), but notes that Schneidewin holds otherwise.

of the *Essence* of Matrimony, but *Consent* only,"[225] leading to the paradoxical position that a central plank of the medieval Catholic canon law of marriage survived in post-Reformation England much longer than it did in the Catholic Church itself. (The Catholic Church discarded Alexander's rules at the Council of Trent [1545–63] and henceforth required the presence of a priest and two additional witnesses for validity.) Clandestine unions that flouted the Book of Common Prayer's vision of proper marriage formation (that is, that marriages should be preceded by banns or license, should take place in a church or chapel at the place where one of the parties lived, between 8 am and noon, during permissible seasons, and, in the case of parties under the age of 21, with parental consent), were frowned upon (just as they had been by the Catholic Church).

The Canons of 1604 threatened ministers who celebrated matrimony without due observation of the Prayer Book rules with 3 years' suspension;[226] during the Elizabethan reign, disciplinary action was regularly taken against laymen who were present at, or witnessed, such marriages;[227] sex between the marital partners was forbidden on pain of church penance until they had solemnized their union in church;[228] and the common-law courts—since at least the time of Bracton[229]—had consistently denied the important property consequences of marriage (that is, application of the spousal-unity doctrine, giving the husband property in the wife's goods and depriving the wife of her contractual and testamentary[230] capacity; dower rights), as well as the inheritance rights of issue to marriages that had not been celebrated *in facie ecclesiae*.[231] Although English marriage law therefore "by an indirect route. . .approached the result of the Council of Trent's decree,"[232] and the innovations of the Lutheran

225. Swinburne, *Treatise of Spousals*, 14 (emphases in original).

226. Canons 62, 63. See Cardwell, *Synodalia*, 1:282.

227. Helmholz, *Roman Canon Law in Reformation England*, 71–72.

228. Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century* (Cambridge: Cambridge University Press, 2009), 37–38.

229. Giesen, *Grundlagen und Entwicklung*, 75–83.

230. This needs qualification. Although a married woman could own no property, the canon lawyers, from their theory of alms-giving, fought for a wifely right of bequest. Documents of practice from the thirteenth and fourteenth centuries indicate that wives made wills and that these were executed. Therefore, although the common law steadfastly refused to implement the wills of married women, they frequently managed to distribute property at death nonetheless. See Michael M. Sheehan, "The Influence of Canon Law on the Property Rights of Married Women in England," *Medieval Studies* 25 (1963): 119–21.

231. The church courts also made certain rights (such as the widow's right to administer her intestate husband's estate) dependent on a regular church marriage. On the legal shortcomings of contract marriages, see Swinburne, *Treatise of Spousals*, 108, 234–35.

232. Helmholz, *Roman Canon Law in Reformation England*, 72.

reformers, it signally stopped short of making either publicity or parental consent a requirement for the *validity* of marriage.[233]

Impediments

The English Reformation did produce one major change. At the time of the Reformation, the opportunity was taken to erect a simpler law of impediments more nearly based on Scripture. The innovations in this field strongly resembled those of the Lutherans. A marriage would be voided by the traditional vices of consent and by an attenuated array of physical bars. Impotence, consanguinity, and affinity were retained, with consanguinity and affinity cut down to the degrees illustratively[234] set out in Leviticus and clarified by a table published by Archbishop Parker in 1563.[235] The impediments of legal and spiritual affinity and public honesty were discarded.[236] The religious impediments (orders, vows, crime, and disparity of cult), too, fell with the Reformation.[237] However, clerical marriage remained controversial in England until the seventeenth century.[238]

Unlike the Lutheran reformers, the English did not relax the *impedimentum ligaminis*. As in pre-Reformation times, the spouses of missing persons could safely remarry only if they had absolute proof of their

233. Rebecca Probert has maintained that because contract marriages *per verba de praesenti* were difficult to prove and devoid of the important common-law consequences of marriage, they were neither a full nor a functional alternative to a regular church wedding (*Marriage Law and Practice*, 21–130). This attaches insufficient weight to the fact that the *de praesenti* contract gave rise to the exclusionary consequences of marriage (forbidding marriage to and sex with third parties) and that the parties could be compelled to solemnize their contract *in facie ecclesiae*, which would trigger the positive effects (cohabitation, property, and inheritance rights).

234. As in Lutheran Germany, the degrees set out in Leviticus were not regarded as exhaustive.

235. Edward Cardwell, *Documentary Annals of the Reformed Church of England: Being a Collection of Injunctions, Declarations, Orders, Articles of Inquiry etc*., vol. 1 (Oxford: At the University Press, 1844), 316–20. The table was incorporated by reference into the 1604 Canons, canon 99 (Cardwell, *Synodalia* 1:304).

236. Giesen, *Grundlagen und Entwicklung*, 315–18.

237. Edward Coke, *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient, and Other Statutes* (London, 1642), 684–85.

238. Henry defended clerical celibacy throughout his life. Clerical marriage became legitimate under Edward (2 & 3 Edward 6, c. 21; 5 & 6 Edward 6, c. 12). However, this legislation was repealed by Mary and consciously *not* reinstated by Elizabeth, although the Thirty-Nine Articles of Religion (1571) noted that bishops, priests, and deacons were not compelled by God's law to abstain from marriage. Cardwell, *Synodalia*, 1:102. Despite this ecclesiastical pronouncement, a suspicion of illegality attached to the marriage of the clergy, and the confusion was not cleared up until James I revived the Edwardian statutes (1 James 1, c. 25, ss. 49, 50). Still, the prejudice against clerical marriage lingered on.

partners' death. Although the 1603 Bigamy Act,[239] which added to the traditional church sanctions by making bigamy a temporal crime punishable by death, exempted cases in which the remarriage occurred after the offender's spouse had been missing for 7 years (s. 2), the statute was *not* read to *allow* such remarriages. Rather, the civilians read it to remove only the death penalty,[240] holding that "'in other respects the ius commune [. . . was] still in force.'"[241]

Divorce

Post-Reformation England retained the classical canon-law doctrine of divorce. Its church courts continued to grant a divorce from the bond of matrimony (*quoad vinculum*) only if the putative marriage had been void from the beginning by reason of a diriment impediment. There was no right of remarriage of either party after a judicial separation for adultery, heresy, or cruelty, a fact unequivocally spelt out by the Canons of 1604.[242] Ecclesiastical judges began to include express prohibitions of second marriages in formal sentences of separation (the 1604 Canons even exhorted them, on pain of suspension from office, to require the parties to post bonds not to remarry[243]), and they consciously avoided the misleading word "divorce" in their separation orders.[244] With the traditional canon-law escape route from an unhappy marriage; that is, annulment for a diriment impediment, narrowed by an attenuated array of marital bars, the overall effect of the English Reformation was, if anything, to tighten rather than to slacken the bonds of matrimony.[245]

239. 1 James 1, c. 11.

240. In other words, the Act recognized a moral difference between bigamists who remarried after a prolonged absence, with no certain knowledge that their partners were alive, and bigamists who contracted new marriages *knowing* that they had a spouse still living. The Act drew a similar moral distinction between remarriage after an ecclesiastical separation sentence and remarriage without such a sentence. The former remarriage did not attract the death penalty (s. 3).

241. Helmholz, *Canon Law and Ecclesiastical Jurisdiction*, 555.

242. Canon 107. See Cardwell, *Synodalia*, 1:308 ("neither shall they, during each other's life, contract matrimony with any other person"). The indissolubility of a marriage validly contracted is also implicit in Swinburne's *Treatise of Spousals* (his projected volume on divorces and separations was never written). Although there is one surprising passage, where he says that spousals *de praesenti* are "perpetually indissoluble, except for Adultery" (15), a later statement makes clear that Swinburne would only allow a *mensa* separation in cases of adultery: "Matrimony. . .is not utterly dissolved for Adultery" (146).

243. Canons 107, 108. See Cardwell, *Synodalia*, 1:307–8.

244. Helmholz, *Roman Canon Law in Reformation England*, 74.

245. This is all the more true in that the (papal) power to dissolve unconsummated present-consent spousals (on that power, see note 58) also does not seem to have survived

IV. Marriage and the Reformation: An Assessment

When assessing the importance of the Lutheran and the English Reformations for the secularization of marriage, it is helpful to distinguish between their immediate and tangible consequences (that is, the legal effects I detailed in Sections II and III) and their wider, largely intellectual and hence less "visible" implications.

The Reformation's Immediate Consequences

Taking a bird's-eye view, the most dramatic shift in the triangular relationship among spouses, church, and state brought about by the Reformation—in both its Lutheran and its English versions—is on what I have termed "the institutional side." The Reformation unequivocally made the temporal ruler, rather than the pope, the ultimate locus of jurisdictional and legislative authority over marriage.[246] This shift appears dramatic. It is, however, a shift that even Catholic countries proved capable of under the influence of seventeenth century regalist doctrine.[247] Moreover, the ascription of exclusive jurisdictional and legislative competence over marriage to the secular sphere did not have the effect of removing marriage from church influence, either jurisdictionally or substantively.

As has been discussed, England preserved ecclesiastical jurisdiction in matrimonial causes wholesale (there was more lay involvement, but, at least according to some medievalists,[248] this laicizing and professionalizing move had been underway since pre-Reformation times), and Brandenburg-

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the Reformation. The Court of Delegates and the Faculty Office in England, which replaced the papal curia as the source of dispensations, do not seem to have granted any dispensations from pre-existing, but unconsummated marriages. An examination of D. S. Chambers's edition of the 1534–40 and 1543–49 registers (David Sanderson Chambers, ed., *Faculty Office Registers, 1534–1549: A Calendar of the First Two Registers of the Archbishop of Canterbury's Faculty Office* [Oxford: Oxford University Press, 1966]) did not disclose any such dispensations, although one would have to check the manuscript records of the Faculty Office at Lambeth Palace in London to be absolutely sure.

246. This shift was helped by the reformers' denial of the sacramental quality of marriage, which had provided the Catholic Church with a powerful justification for its legislative and jurisdictional claims.

247. Regalist doctrine, exemplified by the Frenchmen Jacques d'Hennequin and Jean Launoy, separated the contractual and sacramental elements in marriage and regarded the contract as foundational, the sacrament as something added to and presupposing a valid contract. According to regalist doctrine, legislative competence over the contract of marriage had continued with the temporal ruler even after Christ instituted the sacrament of matrimony. For a summary of the regalist arguments, see Jean de Launoy, *Regia in matrimonium potestas* (Paris: Martinus, 1674), pt. 1, art. 1, ch. 9, pp. 49–53.

248. See note 219.

Prussia's consistories, with their mixed membership of clerics and laymen, reflected a similar reluctance to incorporate marriage within the secular court system. What is true of marriage jurisdiction was also true of marriage legislation. In both Prussia and England, the new marriage laws did not take the form of downright secular enactments. Rather, marriage was dealt with in *Kirchen-* and *Konsistorialordnungen* and in ecclesiastical canons, respectively, and the drafting was usually masterminded by clerics. Perhaps as a result, large planks of the traditional canon law survived.

This is not to deny that substantive marriage law, more so in Brandenburg-Prussia than in England, did change, but was this substantive change really a change toward greater secularization? I shall look at the innovations in turn.

Brandenburg-Prussia abandoned the canon-law rule—laid down by Pope Alexander III—that marriage was formed by the spouses' present consent alone. But it is already difficult to see that Alexander's twelfth century formation rules were somehow "nonsecular" or "spiritual" rules. Although an argument can be made that the doctrine of formation by consent alone was intimately connected to the Catholic Church's sacramental theology of marriage (in that "a theology that sees in marriage a sign of the mutual yearning of the soul for God and of God for the soul would tend to emphasize. . .the element of choice in marriage, and would tend to exclude the choice of anyone else"[249]), the "consent-alone" doctrine was also the rule of some secular societies, such as the Roman one at the beginning of the Christian era,[250] and it was a rule that would later be abandoned by the Catholic Church itself (significantly, without the church at the same time abandoning the sacramental theology of marriage).[251] Arguably, the chief effect of Christianity and of sacramental theology on marriage formation had been not that spousal consent became the *only* requirement for a valid marriage, but that it became a *necessary* one. The church classed the absence and the vices of consent (e.g., force,

249. Charles Donahue, in the words quoted, presents what he regarded as the strongest form of the argument that is warranted for the proposition that "the sacramentality of marriage was a necessary, if not a sufficient condition, for the legal doctrine to have developed in the way that it did." However, he does not ultimately regard that argument as convincing. See Donahue "Difference," 24, 26.

250. The principle was: *nuptias enim non concubitus sed consensus facit* (Dig. 35.1.15). Third-party consent was required, however, if a party was *in patria potestas*. See Percy Ellwood Corbett, *The Roman Law of Marriage* (Oxford: Oxford University Press, 1930), 71–78, 90–96.

251. Simultaneously to changing the formation rules, the *Decree Tametsi* declared canonically that marriage was one of the seven sacraments of the Catholic Church. See Henry Joseph Schroeder, trans., *Canons and Decrees of the Council of Trent* (St. Louis: Herder Book, 1955), 180.

fear) as marital impediments resting on divine law[252] and, therefore, put a stop to a custom of the pre-Christian Germanic peoples that an older generation of legal historians has called *Kaufehe* or bride purchase.[253] Alexander III may have adopted his "consent-only" rule for the pragmatic reason that he had no real choice.[254] The institutional setting of the church in Alexander's time was precarious, as both exclusive jurisdiction and intimate involvement of the church in marriage cases were relatively recent innovations. Accordingly, "[a]ny attempt to impose a common form of marriage ceremony on the universal Church of this time would probably have been doomed to failure, and such a failure could well have meant the loss of jurisdiction."[255] These prudential considerations having largely lost their force by the time of the Council of Trent, the Catholic Church began to require more than consent and insisted upon the presence of a priest and two witnesses for a valid marriage.

More importantly, it is difficult to see that the Lutheran innovations were more secular than the formation rules they replaced. The requirement of parental consent had a clear warrant in the Fourth Commandment, and whereas the scriptural argument was not the only one the reformers advanced, it was certainly a central one. The requirement of witnesses was perhaps less easy to confirm with Scripture (which did not, however, stop the Catholic Church from demanding witnesses by the Council of Trent's *Decree Tametsi*), and witnesses were accordingly *not* uniformly required in Protestant Germany. Brandenburg-Prussia, as has been discussed, appears to have been the only territory expressly to invalidate unwitnessed spousals.

The canon law of marital impediments, although arguably more scripturally based than the formation rules, was attacked and reformed precisely because it *went beyond* what could be backed up by Scripture. The aim and effect of the Lutheran and English reforms in this area was to adopt a more biblically based law of impediments, pruned of unwarranted and, in the truest sense of the word, "dispensable" obstacles, which, in

252. Esmein, *Le mariage en droit canonique*, 1:81–82; 2:387.

253. Paul Mikat (ed. Joseph Listl), *Religionsrechtliche Schriften: Abhandlungen zum Staatskirchenrecht und Eherecht*, vol. 2 (Berlin: Duncker & Humblot, 1974), 856–57.

254. Carlson (*Marriage and the English Reformation*, 24) thinks it "worth asking what options the theologians had," given that they would have had neither Scripture nor the weight of tradition on their side in any attempt to stray beyond the "consent-only" rule. For the contrary argument, that is, that Alexander was in "a situation in which he could choose, and he chose to innovate," see Charles Donahue Jr., "The Policy of Alexander the Third's Consent Theory of Marriage," in *Proceedings of the Fourth International Congress of Medieval Canon Law, Toronto, 21–25 August 1972*, ed. Stephan Kuttner (Citta del Vaticano: Biblioteca Apostolica Vaticana, 1976), 253.

255. Donahue, "Policy," 276.

Luther's caustic phrase, seemed "to have sprung into existence for the sole purpose of serving. . .as snares for taking money and as nets for catching souls."[256]

Finally, the introduction of full divorce in Lutheran territories, although representing a major break with canon-law tradition, was biblically based, resting on a different theological interpretation of the except clauses in Matthew 5:32 and 19:9. Lutheran thought took these limitations literally as meaning that under some circumstances, of which adultery was one, divorce with subsequent remarriage by the innocent spouse was scripturally permissible. It is true that Luther himself seems to have gone further, by treating the Gospel teachings as a spiritual *lex perfectionis* that bound the pious Christian, but not the secular legislator. However, this distinction was not maintained in later Protestant thought and legal practice. Rather, as has been discussed, Protestant theologians and jurists in the century after Luther tended to treat the Gospel passages as divine decrees to be rigidly observed, and most church ordinances, the Brandenburg-Prussian ones among them,[257] recognized only adultery and desertion as legitimate grounds for divorce. The divorce law introduced in Protestant German territories, therefore, seems no more secular, substantively, than the canon-law doctrine of marital indissolubility that it replaced.

What remains is that the "architect" behind marriage law and behind continued church involvement in marital jurisdiction in post-Reformation Lutheran Germany and in England was the secular ruler. Scripturally based innovations, the canon law, and ecclesiastical jurisdiction were introduced or retained, as the case may be, on the temporal ruler's orders or because of that ruler's (express or tacit) assent. Marriage law and marriage jurisdiction therefore seem, ultimately, "state-derived" and, therefore, by implication, secular.

This appearance is deceptive, however. For a start, the continued institutional involvement of the church was arguably not grounded in a secular principle, to wit: the temporal ruler's unconstrained choice, at least not exclusively (although administrative convenience may, admittedly, have played a role). In Germany, there was a strong notion that marriage was a *causa mixta*, and a plausible argument can be made that this notion actually mandated the state to cooperate with the church in regulating marriage.

More importantly, the Reformation did not liberate the temporal ruler from Christian maxims in substantive dealings with marriage. Luther certainly did not *invite* the secular prince to devise a marriage law in conflict

256. *Luther's Works*, 36:97.
257. Richter, *Kirchenordnungen*, 2:382–84.

with the New Testament teachings[258] (although I argue that he would have allowed him to). And according to his collaborator and intellectual leader of the Reformation Philipp Melanchthon, the function of the Protestant state was to propagate the Christian faith.[259] As has been discussed, sixteenth and early seventeenth century Lutheran princes regarded themselves as Christian rulers who were bound to fulfill their Melanchthonian mission.

The Reformation also did not do away with the notion of a higher-order law, which predetermined the permissible content of human marriage legislation, at least in part. Although Luther treated the Gospel as a spiritual *lex perfectionis*, which did not absolutely bind the secular government, even he did not completely absolve the temporal ruler from the observance of all higher laws. As we have seen, Luther acknowledged the existence of an institutional natural law, although it is open to interpretation how much of a restriction this law imposed for him. As the German Reformation acquired an increasingly theocratic inflection over the course of the sixteenth and seventeenth centuries, the articulation of the limits the divine law imposed on the temporal ruler's legislative powers, especially in the area of divorce, became more and more pronounced. In a strange historical dialectic, the Lutheran Reformation may therefore be said to have led, not so much to a secularization of the spiritual sphere, as to what Harold Berman has described as a "spiritualization of the role of secular authorities [. . . and] of secular law;"[260] that is, to a scripturally based marriage law guaranteed and guarded by the territorial prince. Gerhard Dilcher has claimed, in my opinion persuasively, that the aftermath of the Lutheran Reformation represented the time of the most perfect hegemony of a spiritual law of marriage.[261]

One might even make the—at first sight paradoxical—argument that post-Reformation marriage law in England, although it retained ecclesiastical jurisdiction over marriage wholesale and almost all of the traditional canon law of marriage, was perhaps more secular, more baldly state-derived than its German counterpart. The English Reformation had, at least initially, been driven more by political desires and less by theological

258. *Luther's Works*, 21:94, where Luther clearly states that although the secular government may relax the strict standard of the Gospel, this is a concession to human weakness and "not a good thing to do."

259. Karl Gottlieb Bretschneider and Heinrich Ernst Bindseil, eds., *Corpus Reformatorum: Philippi Melanthonis opera quae supersunt omnia*, vol. 16 (Halle: Schwetschke, 1850), 95 ("ut propagari Evangelium possit").

260. Berman, *Law and Revolution II*, 187, 197.

261. Gerhard Dilcher, "Ehescheidung und Säkularisation," in *Christentum und modernes Recht: Beiträge zum Problem der Säkularisation*, ed. Gerhard Dilcher and Ilse Staff (Frankfurt: Suhrkamp, 1984), 317.

convictions. As a result, the continued application of traditional canon-law norms in England formally depended, not on whether these could be squared with Scripture as interpreted in the light of Protestant (or more specifically Calvinist) doctrine as was the case in Lutheran Germany, but on whether they had been in force at the time of the Reformation, were not prejudicial to the king's prerogative, and were not repugnant to the laws and statutes of the English realm.[262]

Likewise, the justification adduced for retaining ecclesiastical jurisdiction in matrimonial causes was not so much that marriage belonged in the ecclesiastical forum because of its (part-) spiritual character, but simply that "*by the kinges Ecclesiasticall lawes* [. . . these cases were to be] determined in the kinges Ecclesiasticall courtes."[263] Finally, according to John Witte, post-Reformation England adopted a new rationale for maintaining the traditional canon law of marriage that was—at least in part—political. Witte has argued that Anglican thought replaced the Catholic sacramental model with a commonwealth model of marriage that regarded the traditional structure of the domestic commonwealth as "the best guarantee of order within the broader commonwealths of church and state."[264]

Of course, not too much should be made of these differences. The first two may be merely linguistic. Prussian rulers grew more assertive about their assumption of legislative authority as time wore on, just as post-Reformation English rulers, in particular in the Book of Common Prayer, continued to emphasize the spiritual dimensions of marriage,[265] and the commonwealth model's conceptual link between the family and the polity was hardly unique to early modern England.[266] Moreover, as Witte notes, the commonwealth model was not a secular one, but "rooted in the Bible and natural law."[267] For all of these reasons, I do not wish to

262. 25 Henry 8, c. 19, re-enacted by 1 Elizabeth 1, c. 1.

263. BM, Cott. MSS. Cleop. F.II., fol. 7 recto-verso, quoted in Giesen, *Grundlagen und Entwicklung*, 426 (emphasis added).

264. Witte, *From Sacrament to Contract*, 256–63, quotation at 260.

265. Also, not all English statutes are devoid of references to a higher-order law: the Act concerning Peter-Pence and Dispensations (25 Henry 8, c. 21), for example, allowed dispensations only for "Causes not being contrary or repugnant to the Holy Scriptures and Laws of God," and, therefore, apparently recognized the supra-positive and binding quality of these bodies of law.

266. Already in Aristotelian thought, the house (*oikos*), with its three basic relationships of husband/wife, father/children, and master/servants, was regarded as geared toward the *polis* and as structurally analogous to it, and this was a concept that was carried forward by both Catholic and Protestant thinkers. See Dieter Schwab, "Die Familie als Vertragsgesellschaft im Naturrecht der Aufklärung," in *Quaderni Fiorentini per la storia del pensiero guiridico moderno*, vol. 1 (Milan: Giuffrè, 1972), 359.

267. Witte, *From Sacrament to Contract*, 258.

make the case that the English Reformation secularized English marriage law. All I am suggesting is that, perhaps because the English Reformation was, at least in its inception, less of a religious movement than the Lutheran one, its formulation of the Christian duties of, and limitations on, the secular ruler with regard to marriage may have been a little less clear.

In sum, although they denied the sacramental quality of marriage (and the legislative and jurisdictional claims of the church that flowed from it), the reformers upheld the spiritual dimensions of marriage, the Christian duties of the temporal prince, and the existence of a higher-order divine law. As a result, in neither Germany nor England, did the immediate practical outcome of the Reformation constitute a major advance toward secularization, either institutionally or substantively. On the institutional side, church officials continued to be heavily involved in marriage legislation and adjudication and their continued involvement was not founded on an exclusively secular principle. On the substantive side, the law of marriage continued to be shaped by theological teachings, which functioned as both a legislative vision and a higher-order law. For all the differences between church and state control over marriage, this was still a decidedly Christian world, with both England and Germany maintaining and enforcing oft stringent, religiously inspired establishments.

The Reformation's Wider Implications

The Reformation did not just lead to the break-up of a unitary Christian conception and law of marriage. It shattered the unity of Christendom and replaced it with a plethora of options in terms of religious ideology, faith, and practice. Luther's example allowed other, more radical, reformers (such as Calvin and Zwingli as well as Baptist and Anabaptist prophets) to come forward. The embattled Catholic Church, for its part, inaugurated a "Counter-Reformation" at the Council of Trent (1545–63), which restated the central tenets of the Roman Catholic faith and rejected all compromise with the Protestants. As a result, absolutist religious beliefs confronted each other, and Europe was plunged into what has been described as "the greatest intellectual and spiritual crisis it had experienced since the Christianization of the Roman Empire."[268]

The first fruit of this crisis of uncertainty was religious fanaticism. "Internal doubts could only be appeased by the most ferocious treatment

268. Helmut Georg Koenigsberger, *Early Modern Europe, 1500–1789* (Harlow, UK: Pearson Education, 2000), 93.

of those who disagreed."[269] As religion became an ingredient in all social and political controversies, political struggles tended to expand into civil, religious, and, ultimately, international wars. Accordingly, in history books, the chapter on "The Reformation" is followed by that on "The Wars of Religion" and, finally, that on "The Thirty Years' War (1618–48)," which began as a rebellion of a privileged group for both political and religious reasons, widened into a struggle between the emperor and the estates of the Holy Roman Empire, and eventually involved nearly all European powers, although the Protestant–Catholic antagonism remained the basic determinant.[270] Similarly, in the genesis of the English Civil War (1642–51), political causes—Charles I's (1625–49) high-handed neglect of Parliament and unpopular attempts to raise money—combined with religious grievances to produce an ultimately explosive and murderous mixture.

The second, more remote fruit of the Reformation-induced crisis of uncertainty was a deep longing for an end to religious strife and a return to order. Politically, the Peace of Westphalia (1648) concluded the Thirty Years' War and established a new constitutional framework for the Holy Roman Empire. The Treaty guaranteed the three main Christian denominations (Catholicism, Lutheranism, Calvinism) the same legal status and reaffirmed the territorial prince's right, already recognized by the Peace of Augsburg (1555), to determine the public practice of religion within his territory (with dissidents protected by a *ius emigrandi*). In other words, the Peace of Westphalia established a new political system for central Europe that was based upon the concept of "confessionalized" sovereign states. "Western Christendom was transformed from a society of plural secular polities within a single ecclesiastical state into a society of plural Christian confessions, each identified politically with one or more particular secular states."[271]

The seventeenth century search for stability and harmony, which found political expression in the Peace of Westphalia, made itself felt in the intellectual domain as well. Although the intellectual link between the Reformation and secularization is perhaps not as strong and immediate as has been claimed by the historian C. John Sommerville, who contends that Protestantism led to dissent, which led to relativism, and, ultimately, to atheism,[272] the aftermath of the Reformation certainly did prove uniquely

269. Lawrence Stone, *The Family, Sex and Marriage in England, 1500–1800* (New York: Harper & Row, 1977), 217.

270. Koenigsberger, *Early Modern Europe*, 18–21.

271. Berman, *Law and Revolution II*, 61.

272. C. John Sommerville, *The Secularization of Early Modern England: From Religious Culture to Religious Faith* (Oxford: Oxford University Press, 1992), 160–62.

fertile ground for attempts to replace appeals to divisive religious principles, to an (unprovable) "natural" moral order dictated by God, and to tradition with a pan-European nonconfessional basis of social harmony and political order grounded in reason and empirical proof. Argumentative resort to established (religious) authorities and received opinion was eroded. Nothing but "solid reason" would do to legitimate the current (or desirable future) state of political and social organization. A man such as Thomas Hobbes, eager to convince his fellow English of the "rightness" of absolute monarchy, disdained to appeal to God, the Bible, the ancients or tradition: "although," he wrote, "these do hold forth *monarchy* as the more eminent to us, yet because they do so by examples and testimonies, and *not by solid reason*, we will pass them over."[273]

As political and legal thinkers of the century *after* the Reformation began to reconsider the legitimacy and the terms of all human relationships—from relationships between individuals, to those between the governed and their governors, and, ultimately, to those between sovereign states—along rational lines, it was inevitable that marriage, as a basic human relationship, should be caught up in the debate, and it was perhaps equally inevitable that it should be transformed by it. A number of seventeenth and early eighteenth century writers (John Locke, Samuel von Pufendorf, and Christian Thomasius, to name but three) developed natural-law accounts of marriage that were "modern" in the sense that they were cognitively separate from the Bible.[274]

As they began to think about marriage on the basis of reason alone, divorced—an apt word—from any specifically religious ideas, these authors found that what had previously been immutable fixtures (such as monogamy and limited dissolubility) were in fact matters on the necessity of which human reason could not finally pronounce. Before long, jurists, particularly on the German-speaking Continent, were not just cognitively separating reason and the Bible, but denying the binding quality of biblical teachings altogether.[275] This basically eliminated all supra-positive

273. Thomas Hobbes (ed. Bernard Gert), *Man and Citizen* (De Homine *and* De Cive) (Indianapolis: Hackett, 1991), 224 (first emphasis in original, second emphasis added).

274. See, for example, John Locke (ed. Mark Goldie), *Two Treatises of Government* (London: J. M. Dent, 1993), 154–56; Samuel von Pufendorf (trans. Basil Kennett), *Of the Law of Nature and Nations: Eight Books; Written in* Latin *by the Baron Pufendorf, Counsellor of State to his late* Swedish *Majesty, and to the late King of Prussia*, 4th ed. (1729; reprinted, Clark, NJ: Lawbook Exchange, 2005), book 6, ch. 1, §§ 1–36; Christian Thomasius (ed. Werner Schneiders), *Göttliche Rechtsgelahrheit*, in *Ausgewählte Werke*, vol. 4 (1709; reprinted, Hildesheim: Georg Olms, 2001), book 3, pt. 2.

275. For an overview of this development, covering Protestant and Catholic Europe, see Schwab, *Grundlagen und Gestalt*, 181–92.

guidelines for (and binding limits on) human marriage legislation. Secular rulers were left, at least potentially, with considerably more control over marriage than they had had before the Reformation (even in Catholic lands, if to a lesser extent). It was some time before Prussian rulers acted on this newfound freedom,[276] and even longer before English rulers did.[277] However, in both countries, the state would eventually extend its reach beyond the property consequences of marriage, which it had controlled since before the Reformation. It would reclaim control of the entire marital relation, and it would refashion all aspects of it.

276. Frederick the Great and his officials embarked on sweeping reforms in the eighteenth century, introducing secular jurisdiction for marriage cases, a new set of marital impediments, and no-fault divorce.

277. England's eighteenth century reforms were not as sweeping as Prussia's. England introduced parliamentary divorce for adultery and new formation rules; however, most of these changes could still be reconciled with theological principles. England did not enact marriage legislation that was clearly secular until the nineteenth century.