

THE REFORMATION OF MARRIAGE LAW IN MARTIN LUTHER'S GERMANY: ITS SIGNIFICANCE THEN AND NOW

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INTRODUCTION

"[T]he estate of marriage has fallen into awful disrepute," Martin Luther declared in 1522.

There are many pagan books which treat of nothing but the depravity of womankind and the unhappiness of the estate of marriage. . . . Every day one encounters parents who forget their former misery because, like the mouse, they have now had their fill. They deter their children from marriage and entice them into priesthood and nunnery, citing the trials and troubles of married life. Thus do they bring their own children home to the devil, as we daily observe; they provide them with ease for the body and hell for the soul.

Furthermore,

the shameful confusion wrought by the accursed papal law has occasioned so much distress, and the lax authority of both the spiritual and the temporal swords has given rise to so many dreadful abuses and false situations that I would much prefer neither to look into the matter nor to hear of it. But timidity is no help in an emergency.¹

According to many contemporary observers, Luther's alarm over the decrepit estate of marriage and marriage law was certainly not unfounded. Germany suffered through decades of indiscipline and immorality in the late fifteenth and early sixteenth centuries. Prostitution was rampant. High clerics and officials of government regularly kept concubines and visited the numerous brothels in German cities. The small fines incurred for such activity discouraged few.

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1. M. Luther, *The Estate of Marriage* (1522) in 45 LUTHER'S WORKS 36, 17 (J. Pelikan et al. eds. 1955) [hereinafter LUTHER].

Drunken orgies were commonplace. Women were raped and ravaged, particularly by robber bands and soldiers. Lewd pamphlets and books exalting sexual liberty and license were published with virtual impunity. Writings by some Roman Catholics extolling celibacy and deprecating marriage and sex dissuaded many couples from marriage and persuaded many parents to send their children to monasteries and cloisters. The number of single men and women, of monasteries and cloisters, of monks and nuns reached new heights in the years shortly before the Reformation. Within the estate of marriage itself, instances of bigamy, incest, and polygamy appeared with alarming frequency. The canon laws governing the formation and dissolution of marriages were flouted or arbitrarily enforced in several parts of Germany. Laws prescribing care and education of children as well as laws proscribing abortion, abuse of family members, adultery, and desertion were regularly violated.² Calls such as Luther's for the reformation of marriage and marriage law and for the reinforcement of public morality were therefore received sympathetically by Roman Catholics and Protestants alike.

Unlike the Roman Catholics, however, Luther and other German Protestant reformers attributed much of the decay of marriage not only to the negligence and arbitrariness of authority and the moral laxness of society but also to the canon laws of marriage and the Roman Catholic theological concepts of marriage underlying these laws. For the reformers the canon law of marriage yielded paradoxical results. It discouraged and prevented mature persons from marrying by its celebration of celibacy, its proscriptions against the breach of vows to celibacy, its permission to breach oaths of betrothal, and its numerous impediments. Yet it encouraged marriages between the immature by declaring valid secret unions consummated without parental permission as well as oaths of betrothal followed by sexual intercourse. It highlighted the sanctity and solemnity of marriage by deeming it a sacrament. Yet it permitted a couple to enter this holy union without clerical or parental witness, instruction, or participation. Celibate and impeded persons were thus driven by their sinful passion to incontinence and all manner of sexual deviance. Married couples, not taught the Scriptural norms for marriage, adopted nu-

2. See generally S. OZMENT, *WHEN FATHERS RULED: FAMILY LIFE IN REFORMATION EUROPE* 1-49 (1983) [hereinafter OZMENT]; B. Gottlieb, *Getting Married in Pre-Reformation Europe* (unpubl. Ph.D. dissertation, Columbia, 1974); 2 M. HEIMBUCHER, *DIE ORDEN UND KONGREGATIONEN DER KATHOLISCHE KIRCHE* 97ff. (3d ed. 1934); W. KAWERAU, *DIE REFORMATION UND DIE EHE* 67ff. (1892).

merous immoral practices. Such paradoxical results, the reformers averred, were rooted in tensions within the Roman Catholic theology of marriage. Although Roman Catholic theologians emphasized the sanctity and sanctifying purpose of the marriage sacrament, they nevertheless subordinated it to celibacy and monasticism. Although they taught that marriage is a duty mandated for all persons by divine natural law, they excused many from this duty through the restrictions of canon law. Both the Roman Catholic theology and the canon law of marriage thus met with sharp criticism on the part of the reformers.

This criticism was motivated by more than a concern for public morality and sexual propriety, more than a desire to remove arbitrariness and abuses in the law. The reformers deliberately focussed on traditional marriage doctrine and the traditional canon law of marriage for two additional reasons.

First, many of the cardinal issues of the Lutheran Reformation were implicated by this doctrine and law. The Roman Catholic Church's exclusive legal authority over marriage was, for the reformers, a particularly flagrant example of the church's usurpation of civil legal authority. The Roman Catholic sacramental concept of marriage, on which the church had founded this authority, raised questions of sacramental theology and Scriptural interpretation. The numerous canon law impediments to marriage and prohibitions against complete divorce were in tension with the reformers' understanding of Scriptural norms for marriage. That a child could enter marriage without instruction or permission raised questions about the responsibilities of the family, church, and state to children. Issues of marriage doctrine and law implicated and epitomized the broader theological, political, and social issues of the Reformation. Thus it is not surprising that such a large number of German reformers—Luther, Melanchthon, Bucer, Brenz, Osiander, and numerous other theologians as well as Schürpf, Monner, Kling, Lagus, Beust, Schneidewin, and many other jurists³—debated these questions with such vigor.

Second, the reformers viewed the family as an independent model of authority and rule and a vital instrument for the reform of the church and society. "[T]he Christian household . . . [was] the

3. Martin Luther (1483-1546); Philip Melanchthon (1497-1560); Martin Bucer (1491-1551); Johannes Brenz (1498-1570); Andreas Osiander (1498-1552); Hieronymous Schürpf (1481-1554); Basilius Monner (c. 1501-1566); Melchior Kling (1504-1571); Konrad Lagus (d. 1546); Joachim von Beust (1522-1597); and Johannes Schneidewin (1519-1568). For biographical and bibliographic information on these and other Lutheran reformers discussed in the text, see ALLGEMEINE DEUTSCHE BIOGRAPHIE (1875-1910). See also *infra*, note 45 for a list of some of their writings on marriage law.

source of evangelical impulses in society. . . . The families of Lutheran [believers] were to serve as wholesome examples of wedded life and it is clear that Luther regarded his own household as a model of conjugal and parental conduct in both its private and its public aspects."⁴ The family was seen as an indispensable social unit alongside church and state, with its own sphere of authority and responsibility and its own moral and pedagogical tasks within society. Because, in the reformers' view, traditional marriage law and doctrine did not adequately respect and protect the integrity and autonomy of the family or facilitate its social tasks, its reform was an urgent priority.

Acting on these criticisms, the Lutheran reformers transformed many traditional concepts and laws of marriage. They rejected the sacramental concept of marriage and the subordination of marriage to celibacy and removed numerous marriage laws that were developed on these assumptions. They introduced a social concept of marriage and the family, defining a variety of distinctive social tasks and uses for the family. They shifted jurisdiction over marriage from the church to the state and substantially revised the role of parents, priests, and peers in the process of marriage formation and dissolution.

Luther embodied this new Protestant concept of marriage and family in his own life. He left the Augustinian monastery where he had spent five years of his life. He later married a nun in defiance of the bishop and made his home a place of temporary refuge for other women who had left the cloister. Members of his family provided for the poor, destitute, and wayfarers and visited the sick and the lonely. Luther stressed the family's communal activities, such as singing and praying together and carrying on discussions around the dinner table. Luther's famous *Table Talk* was, in fact, a collection of epigrams assembled by his guests and family members from these discussions, songs, and prayers.

The German Lutheran reformers did not, however, entirely eclipse the marriage doctrine and law of the Roman Catholic tradition. Several cities and territories in Germany remained avowedly Roman Catholic, preserved the traditional theology of marriage, and continued to administer the canon law in ecclesiastical courts. These Roman Catholic polities were ultimately protected in their faith and law by the Peace of Augsburg (1555), which established in each Ger-

4. G. STRAUSS, LUTHER'S HOUSE OF LEARNING: INDOCTRINATION OF THE YOUNG IN THE GERMAN REFORMATION 112 (1978) [hereinafter STRAUSS]. See *infra* note 23 and note 29 and accompanying text regarding the Lutheran concept of the family.

man principality the religion of the prince, whether Roman Catholic or Lutheran. Even in many Lutheran cities and territories, the break with the Roman Catholic tradition was ultimately not nearly so radical as the early reformers had envisioned. The new theology of marriage, though filled with bold revisions, preserved much of the teaching of the Roman Catholic tradition. The new marriage courts were frequently comprised of both church consistories and civil judges with both civil and ecclesiastical authority. Much of the new civil marriage law was heavily indebted to the canon law which it replaced.

An understanding of this historical development is of vital importance today when marriage law is undergoing an upheaval similar in scope and intensity to that of the sixteenth century. Like the Lutheran reformers, contemporary reformers have abandoned older concepts and beliefs about marriage and the family and rejected the laws rooted in these assumptions. Like the Lutherans, they seek to accommodate the law to new social needs and visions. The concepts and laws now being reformed, however, are those that were first introduced by Lutheran and other Protestant reformers in the sixteenth century. This reform has not proceeded with the historical consciousness shown by the Lutherans, with the careful study and adoption of the wisdom of the past. It has also not been grounded and guided by an integrated body of marriage concepts and laws. An understanding of the reforms of the sixteenth century, therefore, helps to guide and critique both the methods and the contributions of contemporary reformers.

The purpose of this article is to study the Lutheran reformers' transformation of the Roman Catholic theology and law of marriage. Part I provides a brief overview of the Roman Catholic theology and law of marriage in the early sixteenth century. Part II provides a more detailed analysis of the reformers' theological doctrines of marriage and marriage law. Part III outlines the reforms of marriage law posed by Lutheran theologians and jurists and accepted by various German polities. The Conclusion reflects upon the significance of this historical development for current debates over marriage and marriage law in the academy and in the courts.⁵

5. This article will not analyze the impact of the Lutheran Reformation on Germanic customary marriage law or on Romanist marital jurisprudence, nor will it treat the influence of the humanists on marriage doctrine and law. Responsible analysis of these intricate topics would require another article lengthier than this one.

I. CONCEPTS AND LAWS OF MARRIAGE IN THE ROMAN CATHOLIC TRADITION

The doctrine and law of marriage was an important concern to the Christian Church from its very beginnings. Several early Christians wrote commentaries on Biblical passages on marriage. The Church Fathers, most notably St. Ambrose (c. 339-397) and St. Augustine (354-430), discussed the sacramental character of marriage, the problems of divorce and remarriage, and the propriety of sex and contraception. The Church urged Roman and Germanic rules to adopt laws proscribing polygamy, adultery, and oppression of women, and prescribing education and proper care for children. By the tenth century church councils began insisting on these reforms in a number of decrees. But, in Western Europe, at least, the doctrine and law of marriage in the church of the first millennium remained primitive and under the shadow of pagan folkways and folklaw.⁶

It was not until the revolutionary upheaval of the late eleventh through thirteenth centuries that a systematic theology and canon law of marriage emerged. For the first time theological doctrines, including the doctrine of marriage, were categorized, systematized, and refined, initially in the discourses of St. Anselm (1033-1109) and Peter Abelard (1079-1142), then in the great *Summae* of Peter Lomard (1100-1160), Albert the Great (c. 1200-1250) and Thomas Aquinas (1225-1274). For the first time a systematic body of canon law, including marriage law, was formed by Gratian (c. 1095-1150) and his commentators and elaborated by papal and conciliar legislation. For the first time the external forum of the church began to exercise autonomous jurisdiction over numerous subjects, including marriage, and to apply the new canon law.⁷

6. See J. NOONAN, *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIAN AND CANONISTS* 119ff. (1965); R. HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 584ff. (F. Philbrick trans. 1918); J. MARTOS, *DOORS TO THE SACRED: A HISTORICAL INTRODUCTION TO SACRAMENTS IN THE CATHOLIC CHURCH* 399-425 (1981) [hereinafter MARTOS]; H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 226 (1983) [hereinafter BERMAN].

7. This is the provocative thesis of BERMAN, *supra* note 6, at 226-230. Many important documents on marriage and marriage law in this period are collected in the following: QUELLEN ZUR GESCHICHTE DER EHESCHLIESSUNG 10ff. (C. von Schwerin ed. 1925); *THE TEACHING OF THE CATHOLIC CHURCH AS CONTAINED IN HER DOCUMENTS* 351ff. (K. Rahner ed. 1957); R. WEIGAND, *DIE NATURRECHTSLEHRE DER LEGISTEN UND DEKRETISTEN VON IRNERIUS BIS ACCURSIUS UND VON GRATIAN BIS JOHANNES TEUTONICUS* 283ff. (1967); and H. SCHROEDER, *DISCIPLINARY DECREES OF THE GENERAL COUNCILS: TEXT, TRANSLATION AND COMMENTARY* (1937) [hereinafter SCHROEDER]. See also 4 PETRUS LOMBARDUS, *QUATUOR LIBRI SENTENTIARUM, DIST. 26-42* (1916), partly translated in E. ROGERS, *PETER LOMBARD AND THE SACRAMENTAL SYSTEM* 243ff. (repr. ed. 1976) [hereinafter LOMBARD];

The doctrine of marriage taught by the Roman Catholic Church at the time of the Protestant Reformation was built directly upon the teachings of this earlier revolutionary period. Generations of commentators from the late thirteenth to the fifteenth centuries had refined and amended these earlier teachings and sought to resolve the tensions among them. But the cardinal doctrines of the origin, nature, and function of marriage and its laws, set out in this early period, were preserved with only a few changes.⁸

19 THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS Part III (Supp.) QQ. 41-68 (Fathers of the English Dominican Province, trans. 1922) [hereinafter AQUINAS]; HUGH OF ST. VICTOR, ON THE SACRAMENTS OF THE CHRISTIAN FAITH Part 11 (R. Deferrari trans. 1951). Authoritative secondary accounts, in addition to Berman, include G. DUBY, MEDIEVAL MARRIAGE: TWO MODELS FROM TWELFTH CENTURY FRANCE (1978); H. ZEIMENTZ, EHE NACH DER LEHRE DER FRÜHSCHOLASTIK (1973); D. SCHWAB, GRUNDLAGEN UND GESTALT DER STAATLICHEN EHEGESETZGEBUNG IN DER NEUZEIT BIS ZUM BEGINN DES 19. JAHRHUNDERTS 15-40 (1967) [hereinafter SCHWAB]; J. ZIEGLER, DIE EHELEHRE DER PONENTIALSUMMEN VON 1200-1350 (1956); J. FRIESEN, GESCHICHTE DES KANONISCHEN EHERECHTS BIS ZUM VERFALL DER GLOSSENLITERATUR (1963 repr. of 1893 ed.) [hereinafter FRIESEN]; R. SOHM, DAS RECHT DER EHE SCHLIESSUNG AUS DEM DEUTSCHEN UND KANONISCHEN RECHT GESCHICHTLICH ENTWICKELT 107-186 (1966 repr. of 1875 ed.) [hereinafter SOHM]; A. ESMEIN, LE MARIAGE EN DROIT CANONIQUE (1963 repr. of 1918 ed.); J. NOONAN, POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA (1972).

8. There are three major groups of writings on marriage and marriage law in the period from the late thirteenth to the early sixteenth centuries.

(1) By far the most numerous are commentaries on Peter Lombard's discussion of the marriage sacrament in the *Book of Sentences*. "There are as many commentaries on the 'Sentences' of Peter Lombardus," quipped Erasmus, "as there are theologians." (Letter to Volzcius in 1518; quoted in ROGERS, *supra* note 7, at 77.) The most influential of these commentaries in Germany were those of John Duns Scotus (c. 1265-1308), William of Paris (d. 1314), Petrus Aureolus (d. 1322), William of Ockham (1280-1349), Thomas of Strasbourg (d. 1357), Gabriel Biel (1425-1495), and John Major (1469-1550). Biographical and bibliographical information on each of these authors is provided in the NEW CATHOLIC ENCYCLOPEDIA (1967) and DICTIONNAIRE DE THEOLOGIE CATHOLIQUE (Vacant et al. eds. 1909-1950).

(2) A number of theologians and canonists also wrote separate tracts or treatises on marriage and marriage law and commentaries on Gratian's *Decretum* and subsequent decretal collections. The most influential of these treatises and commentaries in Germany were written by Thomas Aquinas (1225-1274), Joannes Andreae (1270-1348), Johannes Gerson (1363-1429), Jacobus de Zocchis (d. 1457), Antonius de Rosellis (d. c. 1469), Jacobus Almainus (d. 1515), Johann von Breitenbach (d. 1507), and William Hay (c. 1470-1542). Biographical and bibliographical information on each of these authors is provided in 2 J. VON SCHULTE, DIE GESCHICHTE DER QUELLEN UND LITERATUR DES KANONISCHEN RECHTS (1956 repr. of 1875 ed.); R. WEIGAND, DIE BEDINGTE EHE SCHLIESSUNG IM KANONISCHEN RECHT 6ff. (1980) [hereinafter WEIGAND]; and 2 H. COING, HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE Part I, 1011ff. (1977) [hereinafter COING].

(3) The manuals for confessors of the period also include lengthy discussions of marriage and marriage law. The most popular and broadly distributed of these Summae Confessorum were the SUMMA RAYMUNDI DE PENIAFORT DE POENITENTIAL ET MATRIMONIO (c. 1280), the SUMMA CONFESSORUM JOANNES FRIBURGENSIS (c. 1294), the SUMMA PISANA CASUUM CONSCIENTIAE (c. 1338), the SUMMA BAPTINIANA (c. 1483; after 1489 called the SUMMA ROSELLA), and the SUMMA ANGELICA DE CASIBUS CONSCIENTIAE (1486) [hereinafter

Three broad perspectives on marriage are found in the Roman Catholic tradition of the late eleventh through fifteenth centuries. Marriage was viewed (1) as a created, natural institution, subject to the laws of nature; (2) as a sacrament of faith, subject to the laws of Scripture; and (3) as a contract, subject to the general canon laws of contract formation, maintenance, and dissolution. These three perspectives were, in an important sense, complementary, each emphasizing one aspect of marriage: its divine origin, its symbolic function, and its legal form respectively. There was, nevertheless, a certain tension among these three perspectives as well, which manifested itself in the laws of marriage.

Marriage was regarded, first, as a created natural institution which serves both as "a duty for the sound and a remedy for the sick."⁹ Already in Paradise, God had commanded man and woman to "be fruitful and multiply."¹⁰ He had created man and woman as social beings, naturally inclined to one another. He had endowed them with the physical capacity to join together and beget children. He had commanded the man and the woman to help and nurture each other and to inculcate within their children the highest virtue and love of the Divine. These qualities and duties continued after the Fall into sin. But after the Fall, marriage also came to serve as a remedy for the individual sinner to allay his lustful passion, to heal his incontinence, and to substitute a bodily union with a spouse for the lost spiritual union with the Father in Paradise. Rather than allow sinful people to burn with lust, God provided the institution of marriage wherein people could direct their natural drives and desires toward the service of the human community.

Many theologians and canonists, however, subordinated the duty of propagation to that of celibate contemplation, the natural drive for sexual union to the spiritual drive for communion with the God.¹¹

ANGELUS]. See R. VON STINTZING, *GESCHICHTE DER POPULÄREN LITERATUR DES RÖMISCHEN-KANONISCHEN RECHTS IN DEUTSCHLAND AM ENDE DES 15. UND IM ANFANG DES 16. JAHRHUNDERT* 514ff. (1867) [hereinafter STINTZING]; WEIGAND, *supra* at 17-21; COING, *supra* at 1002-1008; and Trusen, *Forum internum und gelehrten Rechts im Spätmittelalter; Summae Confessorum und Traktate als Wegbereiter der Rezeption*, 57 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG* (Kan. Ab.) 83 (1971).

9. The phrase is from St. Augustine and is repeated in numerous Roman Catholic tracts on marriage.

10. *Genesis* 1:28. For discussions of the duty and remedy of marriage see LOMBARD, *supra* note 7, at Dist. 26.2; AQUINAS, *supra* note 7, at Q. 41, Art. 1; ANGELUS, *supra* note 8, first page of the discussion on marriage (the ms. is unpaginated) (1486); W. HAY, *LECTURES ON MARRIAGE* (1533-35) 19, 39-41 (J. Barry, trans. 1967) [hereinafter HAY].

11. LOMBARD, *supra* note 7, at Dist. 26.3-4; AQUINAS, *supra* note 7, at Q. 41, Art. 2; 7 J. GERSON, *OEUVRES COMPLÉTÉS* 416ff. (P. Glorieux ed. 1966), discussed in OZMENT, *supra*

For, as Peter Lombard put it,

The first institution [of marriage in Paradise] was commanded, the second permitted. . . to the human race for the purpose of preventing fornication. But this permission, because it does not select better things, is a remedy not a reward; if anyone rejects it, he will deserve judgment of death. An act which is allowed by permission, however, is voluntary, not necessary.¹²

After the Fall, marriage remains a duty, but only for those tempted by sexual sin. For those not so tempted, marriage is only an inferior option. It is far better and far more virtuous to remain celibate and to contemplate. For marriage is an institution of the natural sphere, not the supernatural sphere. Though ordained by God and good, it serves primarily for the perfection of the human community not for the perfection of the individual. Participation in it merely keeps man free from sin and vice. It does not directly contribute to his virtue. The celibate, contemplative life, by contrast, is a calling of the supernatural sphere. Participation in it increases man's virtue and aids him in the pursuit of beatitude. To this pursuit, "marriage is a very great obstacle," for it forces man to dwell on the carnal and natural rather than the spiritual and supernatural aspects of life.¹³

As a created natural institution, marriage is subject to the laws of nature and natural reason. These natural laws, the Church taught, communicate God's will that persons marry, beget children, and teach them to fear the Lord. It prescribes monogamous, indissoluble unions; it proscribes bigamy, incest, and other unnatural relations. It dictates that all true promises, including marriage promises, be binding.

Marriage is not only a natural institution created by God and governed by natural law; it is also raised by Christ to the dignity of a sacrament and is thus subject to ecclesiastical law.¹⁴ It is a visible sign

note 2, at 9-10, 188. See discussion in FRIESEN, *supra* note 7, at 25ff. and Yost, *The Value of Married Life for the Social Order in the Early English Renaissance*, 6 SOCIETAS 36 (1976). Cf. the reaffirmation of this teaching by the Council of Trent (1563): "If any one saith that the marriage state is to be placed above the state of virginity, or celibacy, and that it is not better and more blessed to remain in virginity, or in celibacy, than to be united in matrimony: let him be anathema." 2 P. SCHAFF, *THE CREEDS OF CHRISTENDOM WITH A HISTORY AND CRITICAL NOTES* 97 (1882).

12. LOMBARD, *supra* note 7, at Dist. 26.3. Lombard continues: "Now permission is received in various ways, as concession, as remission, as toleration. And there is toleration in the New Testament, for lesser good deeds and lesser evils; among the lesser good deeds is marriage, which does not deserve a palm, but is a remedy." *Id.*, Dist. 26.4.

13. See especially Aquinas, *supra* note 7, at Q. 41, Art. 2.

14. After the establishment of marriage as a sacrament in the twelfth century, Roman Catholic writers were divided on the question of whether this sacrament was already instituted

of the invisible covenant union of Christ with His church. Both the physical and the spiritual union of the married couple are symbolic. The harmony of their wills and minds reflects the concordance of the church with the will and mind of Christ. Their physical and spiritual union in love symbolizes the gracious union of spirit and flesh in the humanity of Christ. The marriage bond, like the covenant bond, is a voluntary union by both parties based on mutual consent, love, and desire, is consummated by the union of the parties, and, once consummated, becomes indissoluble and eternally binding.

Unlike the other six sacraments, marriage required no formalities and no clerical or lay instruction, witness, or participation. The two parties were themselves "ministers of the sacrament" whose consciences instructed them and whose own testimony was sufficient witness to validate their marriage. Although from the thirteenth century on, the church strongly encouraged the couple to solemnify their union with the blessing of the priest, to invite witnesses to the marriage, and to comply with the marital customs of their domicile, these were not requirements. For, as an early sixteenth century theologian wrote, "it is not of the essence of marriage to contract it in the presence of the church and according to the custom of the country, but a matter of propriety. The fitness of the parties [and the consent between them] is of the essence of marriage."¹⁵

Like the other sacraments, marriage was conceived to be an instrument of sanctification which, when contracted between Christians, conferred grace on those who put no obstacle in its way.¹⁶ Marriage sanctified the Christian couple by allowing them to comply with God's law for marriage, and by reminding them that Christ the

in Paradise or had been first created by Christ. The latter position was taken by Lombard, in LOMBARD *supra* note 7, at Dist. 26.6; AQUINAS, *supra* note 7, at Q. 42 and their many followers; the former position was taken by HAY, *supra* note 10, at 19 and many of his contemporaries. The debate turned on not only how to interpret *Ephesians* 5:32, but also how to order the sacraments. If the sacrament of marriage had been created before the Fall, it was the first and most important sacrament, and it was available to the Jews and subject to Mosaic law, as well as the new law of Christ and the church. The traditional Roman Catholic understanding that all sacraments were instruments of grace given by Christ to His church for its sanctification was thus at issue. For an analysis of this debate, see J. PELIKAN, REFORMATION OF CHURCH AND DOGMA (1300-1700) 61ff. (1984) and R. LAWRENCE, THE SACRAMENTAL INTERPRETATION OF EPH. 5:32 FROM PETER LOMBARD TO THE COUNCIL OF TRENT (1963).

15. HAY, *supra* note 10, at 31. See Canon 51 of the Fourth Lateran Council (1215) in SCHROEDER *supra* note 7, at 280-281.

16. For a discussion of the Roman Catholic view of the purpose of sacraments, see LOMBARD, *supra* note 7, at Dist. 1; AQUINAS, *supra* note 7, at QQ. 60-65. See 6 A. VON HARNACK, HISTORY OF DOGMA 200-26 (W. Gilchrist trans. 1958); FRIESEN, *supra* note 7, at 29-44; and MARTOS, *supra* note 6, at 63ff., 397ff.

bridegroom took the Church as His bride and accorded it His highest love and devotion, even to death. It sanctified the Christian community by enlarging the church and by educating its children as people of God. The natural marital functions of propagation and education were thus given spiritual significance when performed by Christians within the extended Christian church (*ecclesia*).

Because marriage was conceived a Christian sacrament, with sanctifying functions, it was subject to the authority and law of the church. As the church sought to regulate marriage formation and dissolution, marriage was increasingly conceived as a legal relationship. A person could not form and dissolve a marriage spontaneously. The Church required specific rules—arising from the moral laws of the church's internal forum and from the canon laws of the external forum—to define which unions were properly sanctioned and which could be properly dissolved.¹⁷

The canon law of marriage was built on this tripartite conceptual foundation. Through these positive laws, the church protected monogamous unions and prohibited polygamy, bigamy, homosexuality, and other unnatural unions. It encouraged the natural marital functions of propagation and child rearing and forbade contraception, abortion, and child abuse. The Church ensured that the couple entered this union freely without mistake or compulsion, and without physical ties to another person or spiritual ties to the clergy or cloister. It ensured that spiritual, familial, or blood ties between the couple, or criminal, adulterous, heretical, or pagan acts by one party, or impotence or physical abuse by either party did not obstruct sanctification by the marriage sacrament (the conferring of grace onto the couple and community). It ordered that all valid marriage promises, freely made and accepted, be indissoluble.

A man and woman could form a marriage bond only through

17. The three perspectives of marriage are intimated by Aquinas: "Matrimony as directed to the begetting of children, which was necessary even where there was no sin, was instituted before sin; according as it affords a remedy for the wound of sin, it was instituted after sin at the time of the natural law; its institution belongs to the Mosaic law as regards personal disqualifications; and it was instituted in the New Law insofar as it represents the mystery of Christ's union with the Church, and in this respect it is a sacrament of the New Law. Regarding other advantages resulting from matrimony, such as the friendship and mutual services which husband and wife render one another, its institution belongs to the civil law. Since, however, a sacrament is essentially a sign and a remedy, it follows that the nature of sacrament applies to matrimony as regards the intermediate institution; that it is fittingly intended to fulfill an office of nature as regards the first institution; and, as regards the lastmentioned institution, that it is directed to fulfill an office of society." AQUINAS, *supra* note 7, at Q. 42, Art. 2. See discussion in SCHWAB, *supra* note 7, at 34-40.

voluntary consensual agreement, and numerous treatises attempted to define 'consent' and 'agreement'.¹⁸ The canonists distinguished: (1) the betrothal or promise to marry in the future ("I, Martin, promise to take you, Mary, to be my wife"); (2) the promise to be married in the present which constitutes a true and valid union, even without sexual intercourse ("I, Martin, now take you, Mary, as my wife"); and (3) consummation of the marriage by voluntary sexual intercourse.¹⁹ Each specific stage of consent or promise was governed by a number of canon law rules.²⁰

By the early sixteenth century, the church courts recognized a variety of lawful impediments to betrothal, *i.e.*, conditions under which either of the parties could break off their engagement without sin. A faithful party could (but need not) reject a fiance who had become a heretic or pagan, had abducted another (particularly a relative of the fiance), had been raped, had become impotent, severely deformed or deranged after betrothal, had deserted him or her for more than two years, or had failed to make a present promise within the time of engagement agreed upon by the parties. In all these cases, the innocent party was required to petition an ecclesiastical judge to annul the betrothal. A religious vow or entry by either party into a religious order automatically nullified the agreement; the other party,

18. John Noonan writes: "[C]onsent makes marriage—not any consent, not merely lustful consent to intercourse, not merely intellectual consent to a shared life, but consent informed with that special quality that Gratian, drawing on the Roman law, denominated 'marital affection', an emotion-colored assent to the other as husband or wife. Neither Church nor feudal lord nor family could supply that element. Where it was wanting, there was no marriage. On that cornerstone Gratian [and his numerous followers] rested [their] doctrine of marriage." Noonan, *Power to Choose*, 4 VIATOR 419, 425 (1973); see also Noonan, *Marital Affection in the Canonists*, 12 STUDIA GRATIANA: COLLECTANEA STEPHAN KUTTNER 489 (1967).

19. For a discussion of the origin of this three-fold doctrine of consent in the debates of the early canonists and theologians, see Donahue, *The Policy of Alexander the Third's Consent Theory of Marriage*, 5 PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW, MONUMENTA IURIS CANONICI, SERIES C: SUBSIDIA 5, 251ff (1976); SOHM, *supra* note 7, at 110-44; and MARTOS, *supra* note 6, at 425-433.

20. The following overview of the canon law of marriage is derived from HAY, *supra* note 10, at 47-355; ANGELUS, *supra* note 8, at 3-23 of the section on marriage; the summary of the *SUMMA CONFESSORUM JOANNES FREIBURGENSIS VON LATEIN IN DEUTSCH GEMACHT DURCH BERTHOLD VON FREIBURG* (1472) provided by R. STANKA, *DIE SUMMA DES BERTHOLD VON FREIBURG: EINE RECHTSGESCHICHTLICHE UNTERSUCHUNG* 83-100 (1937); the summary of *JOH. ANDREAE LECTURA SUPER ARBORIBUS CONSANQUINITATIS ET AFFINITATIS*, in STINTZING, *supra* note 8, at 151ff.; AQUINAS, *supra* note 7, at QQ. 50-68; LOMBARD, *supra* note 7, at Dist. 30-42; and GRATIAN, *DECRETUM*, Part II (Noonan trans. unpubl. 1978). An exhaustive summary of the discussion of marriage law among early Roman Catholic writers is provided in FRIESEN, *supra* note 7, at 227ff.

in such instance, had no discretion to continue the relationship. Engagement could also be dissolved by mutual consent of the parties.

A future promise to marry, followed by sexual intercourse, was a consummated marriage at canon law. The sex act after betrothal raised the presumption that the parties had impliedly consented to be truly married and to consummate their marriage. This presumption could be defeated if one of the parties testified that he or she had been forcibly abducted by the other.

The canon law also recognized several other impediments to the contracting of marriage in the present. These were of two types: (1) prohibitive impediments which rendered the contracting of marriage unlawful and sinful, but whose violation did not render the marriage invalid; and (2) diriment (or absolute) impediments which proscribed the contracting of marriage, and, if it was contracted, nullified, and dissolved it completely. For a putative marriage contracted in violation of such impediments could never be considered a true and valid marriage. The first group of impediments dealt largely with cases of remarriage. A married person who had abducted a relative of his or her spouse or another married or betrothed person could not marry that person after his or her own spouse's death. For those who murdered their spouses, murdered a cleric, married a nun or monk, or had done public penance for a particularly egregious sin, marriage was proscribed altogether.

Far more important were the diriment impediments used by the ecclesiastical courts to nullify even fully consummated putative marriages. One group of these impediments sought to preserve the freedom of consent of both parties. Thus a mistake about the identity of the other party nullified the marriage; mistakes about the social, financial, or civil status of the other were generally no longer considered to be grounds for nullification by the early sixteenth century. Extreme duress, fear, compulsion or fraud (by parents, spouses, or third parties) also impinged on consent and invalidated the marriage contract.

The canon law not only defined free consent but also specified which parties were free to give their mutual consent. Those who had made religious vows of celibacy or chastity in one of the sacred orders of the Church were eternally bound to God and thus could not bind themselves to another in marriage. Christians could not contract marriage with infidels, Jews, or pagans since the sacrament of baptism was a prerequisite for marriage; furthermore, such marriages could not symbolize the union of Christ with his faithful Church. Thus if a

party departed from the faith after consummation and remained incorrigible, the Church could declare the marriage void. Persons related up to the fourth degree either to a common ancestor or to a couple (whether or not married) who had engaged in sexual relations were prohibited from marrying. These were called the impediments of consanguinity and affinity. Parents could not marry their adopted children or grandchildren, nor the spouses of their adopted children. One who baptized or confirmed a party or who became a godparent could not marry him or her; for these persons were considered to be the "spiritual fathers or mothers" of the party who received the sacrament.

The canon law also developed a group of impediments to protect the ultimate sanctity and function of the sacrament of marriage. First, conditions attached to marriage promises which were illegal or which were repugnant to the sacrament or harmful to the offspring automatically rendered the marriage contract void. Thus a promise with the condition "that we abstain for a season" was valid; but a condition "that we abort our offspring" or "that we permit each other sexual liberty with others" nullified the marriage contract. For such conditions vitiated the entire purpose of marriage: to unite together in love and to raise children in the service of God. Second, permanent impotence, insanity, or bewitchment of either party were generally grounds for nullification as well, provided that such a condition was latent before marriage, but unknown to the parties; if the parties knew of the condition before marriage or if it arose after consummation, they had no action for nullification. Third, the church annulled all bigamous and polygamous relations as contrary to the Gospel and to the purpose of marriage. Fourth, an unconsummated marriage could be annulled if one party severely abused or consistently threatened another with death, contracted a permanent contagious disease, or committed adultery. Where the marriage was consummated, however, the church permitted only a divorce, *i.e.*, a judicial separation from bed and board. Divorce in the modern sense was not permitted; the sacramental bond, once consummated, remained indissoluble till the physical or civil death of one of the parties.

This intricate array of sacramental marriage laws remained in constant tension with the concept of marriage as a created natural institution. Though God had created marriage as a duty and a remedy for sinful man, the Church foreclosed this option to many through its numerous impediments and its protection of the vows to chastity. Though God provided the Church with His natural law and

Scripture to govern marriage, the Church added numerous other canon laws not prefigured in natural law or Scripture. This tension between the natural and sacramental concepts of marriage manifested itself in papal policy. The pope could in certain cases authorize marriage by remitting the canon law impediments of affinity and consanguinity and adopting the far less restrictive impediments set by Scripture. In other cases of hardship, inequity, or incompatibility, he was free to dissolve unconsummated marriages on grounds specified neither in canon law nor in Scripture.

More important was the tension between the concept of marriage as a sacrament governed by the moral authority of the internal forum and the concept of marriage as a contract governed by the legal authority of the external forum. This tension, writes Harold Berman,

was reflected in the questions which the ecclesiastical courts had to answer, such as whether a marriage is invalid because of mistake, fraud, or duress; whether a husband may abandon an adulterous wife; whether a wife who marries another, thinking her first husband dead, must return to the first man when he reappears; and whether a clandestine marriage, contracted with no third party present, is valid. The tension was also reflected in many of the answers which the ecclesiastical courts gave to such questions. It came out clearly in the resolution of the question of the validity of clandestine marriages. On the one hand, as Gratian stated, 'marriages secretly contracted are prohibited by all the authorities' and are unlawful. On the other hand, such marriages are valid if they can be proved by the confession of both spouses. But if the will of one of the parties has changed, the judge is not to give credence to the confession of the other. Thus the strong policy of social betrothals and of external obligations was affirmed, while the sanctity of sacramental consent was also maintained. Yet the solution—resting as it does on a fiction in the law of evidence—though 'systematic', was hardly perfect.²¹

II. THE TRANSFORMATION OF THE CONCEPT OF MARRIAGE IN THE LUTHERAN REFORMATION

The Lutheran reformers, like the Roman Catholics, viewed marriage as a duty and a remedy established at creation. The duty of marriage stems from God's command that man and woman unite, help each other, beget children, and raise them as God's servants. It is also a gift which remedies and limits man's sexual lust and

21. BERMAN, *supra* note 6, at 229-30.

incontinence.²²

Unlike many Roman Catholics, however, the reformers taught that all persons should heed the duty and accept the gift of marriage. By stressing God's moral and pedagogical functions for the family in society, alongside its procreational function, and by defining for the family its own created sphere of authority and responsibility, alongside that of the church and the state, the reformers accorded great importance to the institution. The married couple, the family, was seen as an important, independent institution of creation. It was as indispensable an agent in God's redemption plan as the church had been for the Roman Catholics. It, too, was in Luther's words, "a divine and holy estate of life," a "blessed holy calling," an institution with created social tasks. The family was to teach all persons, particularly children, Christian values, morals, and mores. It was to exemplify for a sinful society a community of love and cooperation, meditation and discussion, song and prayer. It was to hold out for the church and the state an example of firm but benign parental discipline, rule, and authority. It was to take in and care for wayfarers, widows, and destitute persons—a responsibility previously assumed largely by monasteries and cloisters.²³ The family thus no longer

22. LUTHER, *supra* note 1, at 17ff., Vol. 28, 9-15, Vol. 46, 265ff.; P. MELANCHTHON, *De Coniugio* (1551) in 21 CORPUS REFORMATORUM 1072ff. (C. Bretschneider, et al. eds. 1843) [hereinafter MELANCHTHON]. See the discussions of these writings as well as those of Bugenhagen, Cruciger, Melander, Brenz, Osiander, Corvinus, Kraft, Minther, von Beust, Kling, Apel, Lagus, Schürpf, Wesenbeck, Schneidewin and numerous other theologians and jurists in H. DIETRICH, *DAS PROTESTANTISCHE EHERECHT* (1970) [hereinafter DIETRICH]; H. LIERMANN, *Evangelisches Kirchenrecht und staatliches Eherecht in Deutschland, Rechtsgeschichtliches-Gegenwartsprobleme*, in EXISTENZ UND ORDNUNG: FESTSCHRIFT FÜR ERIK WOLF 43ff. (1962) [hereinafter LIERMANN]; E. FRIEDBERG, *DAS EHESCHLIESSUNG IN SEINER GESCHICHTLICHEN ENTWICKLUNG* 153-240 (1865) [hereinafter FRIEDBERG]; Köhler, *Luther als Eherichter*, 47 *BEITRÄGE ZUR SACHSISCHEN KIRCHENGESCHICHTE* 18 (1947); Seeberg, *Luthers Anschauung von dem Geschlechtsleben und der Ehe ihre geschichtliche Stellung*, 7 *LUTHER-JAHRBUCH* 77 (1925) [hereinafter SEEBERG]; Michealis, *Über Luthers eherechtliche Anschauungen und deren Verhältnis zum mittelalterlichen und neuzeitlichen Eherecht*, in *FESTSCHRIFT FÜR ERICH RUPPEL ZUM 65. GEBURTSTAG* 43 (1968) [hereinafter MICHAELIS]; and sources cited *infra* notes 23-35, 57-126 and accompanying text.

23. See 34 D. MARTIN LUTHERS WERKE KRITISCHE GESAMTAUSGABE 73 (1883), quoted and discussed in P. ALTHAUS, *THE ETHICS OF MARTIN LUTHER* 86ff. (R. Schultz trans. 1965) [hereinafter ALTHAUS]; *THE BOOK OF CONCORD* 393 (T. Tappert et al. trans. and eds. 1959). Gerald Strauss' discussion and collection of quotations from Luther's writings amplifies this understanding of the purpose of marriage: "God's world is governed by three estates or offices, of which matrimony is the first, the other two being the preaching and the secular power. Foolish 'philosophers and other worldlywise (Weltkluge)' men have misrepresented the matrimonial office as the least of the three estates. On the contrary, matrimony is 'the mother of all other orders [and ordinances]' . . . More ancient in the order of creation than spiritual and secular government, 'matrimony is the source in which all other estates have their origin'. Its priority as the first institution given by God to men sanctifies it." STRAUSS, *supra* note 4 at 115

stood beneath the church but alongside it. The tasks to which its members were called were as vital and virtuous as the tasks of the church officials. Marriage was thus not to be viewed as an inferior option, but rather as a divine calling and a social status desirable for all people.

The Lutheran emphasis on humanity's total depravity provided a further argument for accepting the remedial gift of marriage. Since the Fall, lust has pervaded the conscience of every person. Marriage has thus become an absolute necessity of sinful humanity. For without it, man's distorted sexuality becomes a force capable of overthrowing the most devout conscience. He is enticed by his own nature to prostitution, masturbation, and homosexuality. The gift of marriage, Luther wrote, should be declined only by those who have received God's gift of continence. Such persons are "rare, not one in a thousand, for they are a special miracle of God." The Apostle Paul has identified this group as the permanently impotent and the eunuchs; few others can claim such a unique gift.²⁴

This understanding of the created origin and purpose of marriage undergirded the reformers' bitter attack on celibacy and monasticism.

(footnotes from Luther's works omitted). For further information, see the discussion in R. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 221-37 (1955, 1963).

An even broader perspective on the worldly orders, and their origin in the creation and counsels of God, is expressed by Melancthon in *Loci communes* (1555), in MELANCTHON ON CHRISTIAN DOCTRINE 323-24 (C.L. Manschreck, trans. and ed. 1965): "The physical life has orders [Stände] and works [Werke] which serve to keep the human race, and are ordained by God, within certain limits and means. By this order we should know that this human nature is not created without the distinct counsel of God, and that God in this way lets his goodness shine on us to sustain and provide for us. Matrimony is first, for God does not want human nature simply to run its course as cattle do. Therefore, God has ordained marriage, *Genesis* 2 and *Matthew* 19 and *I Corinthians* 7, as an eternal inseparable fellowship of one husband and one wife. . . . [M]atrimony is a very lovely, beautiful fellowship and church of God, if two people in true faith and obedience toward God live together, together invoke God, and rear children in the knowledge of God and virtue. . . . Still more orders and works are decreed for the protection and maintenance of this life; namely, authority, justice, punishment, just wars, division of property, fair exchange in buying and selling, borrowing and paying; and also many useful arts, numbers, measures, distinctions of time with the course of the sun, which make our year, agriculture, medicine, and so on. If these beautiful orders were everywhere maintained, if all rulers sought God's glory and the improvement and protection of the people, if judgments were true and just, if no falsehood were used in buying and selling, we could hardly complain about these useful, wholesome orders and works. [In earlier passages, Melancthon also described the church as a separate order in the earthly kingdom. *Id.*, 255ff.]. . . . Diligently consider that these orders unite all human groups and that they are arranged for the knowledge of God, good custom, peace and unity, law, judgment, and punishment. Persons such as lords and officeholders should maintain such laws, judgment, and punishment; and subjects, who by their obedience exercise morality, should not shatter the peace. This is called *politica societas*, or politics."

24. LUTHER, *supra* note 1, at 18-22, Vol. 28, 9-12, 27-31. See the discussion of views of other theologians in DIETRICH, *supra* note 22, at 78-80.

To require celibacy of clerics, monks, and nuns was beyond the authority of the church and ultimately a source of great sin. Celibacy was for God to give, not for the church to require. It was for each individual, not for the church, to decide whether he had received the gift. By institutionalizing and encouraging celibacy the church was seen to prey on the immature and the uncertain. By holding out food, shelter, security, and opportunity, the monasteries enticed poor and needy parents to condemn their children to celibate monasticism. Mandatory celibacy, Luther taught, was hardly a prerequisite to true service of God. Instead it led to "great whoredom and all manner of fleshly impurity and . . . hearts filled with thoughts of women day and night."²⁵ For the consciences of Christians and non-Christians alike are infused with lust.

Furthermore, to impute to the celibate contemplative life superior spirituality and holier virtue was, for the reformers, contradicted by Scripture. Scripture teaches that each person must perform his or her calling with the gifts that God provides. The gifts of continence and contemplation are but two among many, and are by no means superior to the gifts of marriage and child-rearing. Each calling plays an equally important, holy, and virtuous role in the drama of redemption, and its fulfillment is a service to God. Luther concurs with the Apostle Paul that the celibate person "may better be able to preach and care for God's word." But, he immediately adds, "it is God's Word and preaching which makes celibacy—such as that of Christ or of Paul—better than the estate of marriage. In itself, however, the celibate life is far inferior."²⁶

The reformers' lengthy arguments for marriage as a created, natural institution were also arguments against the Roman Catholic sacramental concept of marriage. For, in the context of Luther's two kingdoms theory,²⁷ to place marriage in the natural order of creation

25. LUTHER, *supra* note 1, at Vol. 28, 10. A further collection of epigrams by Luther to the same effect are assembled in SEEBERG, *supra* note 22, at 94ff. See also the long diatribe against clerical celibacy in *The Judgment of Martin Luther on Monastic Vows* in LUTHER, *supra* note 1, Vol. 44, 251-400, as well as *The Apology of the Augsburg Confession* in CONCORDIA TRIGLOTTA. LIBRI SYMBOLICI ECCLESIAE LUTHERANAE 363-81 (1921)—a document drafted chiefly by Phillip Melanchthon, Luther's greatest protege in Wittenberg. For a discussion of the breadth and intensity of the reformers' attack on celibacy and monasticism, and the Roman Catholic reaction, see OZMENT, *supra* note 2, at 3-24; STRAUSS, *supra* note 4, at 111ff.; and A. FRANZEN, ZÖLIBAT UND PRIESTEREHE IN DER AUSEINANDERSETZUNG DER REFORMATIONENZEIT UND DER KATHOLISCHE REFORM DES 16. JAHRHUNDERT (1969).

26. LUTHER, *supra* note 1, at 47.

27. Luther, and many of his followers, distinguished between an earthly and a heavenly kingdom. The earthly kingdom embraces all the institutions, activities, and qualities that contribute to the preservation of the earthly life, including property, business, families, institu-

was to deny it a place in the spiritual order of redemption. Marriage was seen as an institution of the earthly kingdom. Though divinely instituted, to serve a holy purpose, it remains in Luther's words, "an outward, physical, and worldly station."²⁸ The sacraments, by contrast, are part of the heavenly kingdom of faith and salvation. They are spiritual instruments of salvation and sanctification.

By placing marriage within the earthly kingdom and sacraments within the heavenly kingdom, the reformers sought both (1) to contrast the functions or uses of marriage and sacraments; and (2) to remove marriage from the jurisdiction and law of the church.

As part of the earthly kingdom, they argued, marriage is a gift of God for all persons, Christians and non-Christians alike. It functions in the earthly kingdom much like law: it has a number of distinctive uses in the life of the person and of society as a whole.²⁹ Marriage

tional churches, civil governments, and laws. All these institutions and activities were ordained by God and "instituted from the beginning of creation." They are thus not themselves evil or the product of sin but rather divine blessings for the physical life to be used in the service of God. After the Fall, however, these institutions and activities became distorted by sin and took on negative functions: to harness sin and to check disorder and injustice. Furthermore, participation in them, though still a service to God, was no longer deserving of salvation. Salvation was by faith, not by works. The earthly kingdom is distinguished from the heavenly kingdom whose institutions and qualities of grace and faith contribute to the preservation of the spiritual life and to man's salvation. This is the perfect community of love, the pure invisible church, governed by the law of Scripture. In this time between the Fall and the Christian *parousia*, where the Christian man is both saint and sinner (*simul iustus et peccator*), he is a citizen of both kingdoms and subject to both laws. This two kingdoms theory, developed by Luther early in his career, became one of the trademarks of the Lutheran Reformation. An understanding of this theory is essential to grasp the subtleties of Luther's concept of marriage. See ALTHAUS, *supra* note 23, at 43-81; H. BORNKAMM, *LUTHER'S DOCTRINE OF THE TWO KINGDOMS IN THE CONTEXT OF HIS THEOLOGY* (K. Hertz, trans. 1966); and SEEBERG, *supra* note 22, at 88-92; see also *supra* note 23 and accompanying text on the orders of the earthly kingdom. For an important study of the development of the two kingdom theory in Luther's theology and political theory, see W. THOMPSON, *THE POLITICAL THOUGHT OF MARTIN LUTHER* 36-61 (1984); J. HECKEL, *LEX CHARITAS* 31-52 (1953).

28. LUTHER, *supra* note 1, at Vol. 21, 93; Vol. 46 at 265; Vol. 63 at 111-12. Cf. ALTHAUS, *supra* note 23, at 89 and DIETRICH, *supra* note 22, at 34ff. This view was shared by several other Lutheran theologians, particularly Philip Melancthon and Martin Bucer. See M. BUCER, *DE REGNO CHRISTI* Chap. 15 (W. Pauck ed. 1969) [hereinafter BUCER] and MELANCTHON, *supra* note 22, at 1073; cf. DIETRICH, *supra* note 22, at 80ff. and 2 W. KÖHLER, *DAS EHE- UND ZÜRCHER EHEGERICHT UND GENFER KONSISTORIUM* 427ff. (1942) [hereinafter KÖHLER].

29. For a discussion of the Lutheran doctrine of the uses of the law see F. CRANZ, *AN ESSAY ON THE DEVELOPMENT OF LUTHER'S THOUGHT ON JUSTICE, LAW, AND SOCIETY* 94-112 (1959) and Alexander, *Validity and Function of Law: The Reformation Doctrine of Usus Legis*, 31 *MERCER L. REV.* 509 (1980). The reformers themselves never spoke of the "uses of marriage," but there is remarkable unanimity in their description of the functions of marriage and of the uses of law. See, especially, LUTHER, *supra* note 1, at 38-49 and the discussion of the writings of Bugenhagen, Colerus, Brenz, and other Lutheran writers in OZMENT, *supra* note 2, at 8-9 and in DIETRICH, *supra* note 22, at 81-82.

reminds people of their lustful nature and their need for God's soothing remedy of marriage, just as law reveals to them their sin and impels them to grace; this is its theological use. Marriage restrains people from yielding to sins of prostitution, incontinence, and promiscuity, just as civil law restrains them from destructive cheating, feuding, and stealing; this is its civil use. Marriage teaches people the virtues of love, patient cooperation, and altruism, just as law teaches them restraint, sharing, and respect for another's person and property; this is its pedagogical use. Marriage therefore not only has its own created tasks, it also has distinctive social uses.

Marriage can, to be sure, symbolize for all people the union of Christ with His church, but that does not make it a sacrament. Sacraments are gifts and signs of grace ensuring Christians of the promise of redemption which is available only to those who have faith.³⁰ Marriage carries no such promise and demands no such faith. It remains an earthly institution. "Nowhere in the Scripture," writes Luther, "do we read that anyone would receive the grace of God by getting married; nor does the rite of matrimony contain any hint that this ceremony is of divine institution."³¹ Scripture teaches that only baptism and the eucharist confer this promise of grace. All other so-called sacraments are "mere human artifices" created by Roman Catholics through false interpretations of Scripture for the purposes of augmenting the church's legal powers and filling its coffers with court fees and fines.³²

Like the Roman Catholics, the Lutherans taught that a marriage contract could not be formed and dissolved spontaneously by anyone. Specific rules were needed to define which unions were proper and which could be dissolved. But, because marriage is an institution of the earthly kingdom, not a sacrament of the heavenly kingdom, it is subject to civil law and civil authority, not canon law and the church. Marital questions are to be brought before civil courts, not ecclesiastical courts.

30. Luther sets out his doctrine of the sacraments in two major tracts: *The Babylonian Captivity of the Church* (1520), in LUTHER, *supra* note 1, at Vol. 36, 11ff. and *The Smalcald Articles* (1537) in THE BOOK OF CONCORD, *supra* note 23, at 310ff. (Other reformers, in addition to Luther, helped to draft these articles.) For a comparison of the sacramental doctrine in these two works and in the works of other Lutheran writers, see J. PELIKAN, SCRIPTURE VERSUS STRUCTURE: LUTHER AND THE INSTITUTIONS OF THE CHURCH 17-31, 113-138 (1968).

31. M. LUTHER, SELECTIONS FROM HIS WRITINGS 326 (J. Dillenberger ed. 1961) [hereinafter SELECTIONS].

32. *Id.*, 331. Early in his career Luther tentatively accepted penance as a third sacrament, but later rejected this position.

This does not mean that marriage is beyond the pale of God's authority and law, nor that it should be beyond the influence and concern of the church.³³ The civil ruler holds his authority of God. His will is to appropriate God's desire. His law is to reflect God's law. His rule is to respect God's creation ordinances and institutions and to implement His purposes. His civil calling is no less spiritual than that of the church. Marriage is thus still completely subject to Godly law, but this law is now to be administered by a civil ruler.³⁴ Because marriage is an important social institution, its formation, maintenance, and dissolution are public concerns, particularly to church officials and members. The church, the reformers argued, retained a four-fold responsibility in marriage. Through its preaching of the Word and the teaching of its theologians, the church had to communicate to the civil authorities and their subjects God's law and will for marriage and the family. Second, it was incumbent upon church members as priests to quiet, through instruction and prayer, the consciences of those troubled by marriage problems and to hold out a model of spiritual freedom, love, care, and equality in their own married lives. Third, to aid church members in their instruction and care, and to give notice to all members of society of a couple's marriage, the

33. Throughout his life, Luther rejected the suggestions of many writers that, by placing marriage in the earthly kingdom, he and his followers had totally secularized marriage, *i.e.*, removed it from the pale of God's authority and law. "It is sheer folly," Luther opined, to treat marriage as "nothing more than a purely human and secular state, with which God has nothing to do." LUTHER, *supra* note 1, at Vol. 21, 95. This misunderstanding of Luther's doctrine of marriage—still much in evidence today—stems from a failure to view it in the context of his two kingdoms theory and a failure to recognize his multiple definitions of the terms 'wordly', 'earthly', and 'secular'. Paul Althaus' comments are helpful: "Luther uses the [terms] *world* and *secular* in the same broad sense that the New Testament does. When he speaks of 'living in the world' he frequently refers to people who live in this age of the world or who live 'on earth', [*i.e.*, are part of the earthly kingdom]. In this sense the Christian is a 'citizen of this world'. Luther explicitly says that this secular life and the stations that constitute it are given and instituted by God. . . .

"On the other hand, Luther, like the New Testament, frequently uses the word *world* to designate those men who have closed their hearts to God's word and live in enmity with him or to describe that area in which sin, Satan, and 'the children of Satan' have power. . . .

"Given this breadth of usage, it can happen that Luther, like the New Testament, combines the various meanings of the words *world* and *secular* in such a way that both meanings are expressed at once. But that is not always the case. At times the meanings must be clearly differentiated. Luthers says one thing when he says that marriage is 'an external, worldly matter' and something quite different when he says that the princes who persecute the gospel are 'wordly, secular princes' and live up to their name and title according to the standards of this world." ALTHAUS, *supra* note 22, at 49-50; see DIETRICH, *supra* note 22, at 32 who stresses the importance of the two kingdoms theory for understanding Luther's marriage doctrine.

34. See *id.*, 44ff., 81ff., and the many primary and secondary sources quoted therein, and SEEBERG, *supra* note 22, at 93ff.

church was to develop a publicly-available marriage registry which all married couples would be required to sign. Fourth, the pastor and consistory of the church were to instruct and discipline the marriages of its church members by blessing and instructing the couple at their public church wedding ceremony and by punishing sexual turpitude or egregious violations of marriage law with the ban or excommunication.³⁵

III. THE INFLUENCE OF THE LUTHERAN REFORMATION ON SIXTEENTH CENTURY GERMAN MARRIAGE LAW

This new Lutheran social concept of marriage not only revolutionized the theology of marriage but also helped to transform Germany's law of marriage. For the concept was a self-executing program of action. It required civil authorities to divest the Roman Catholic Church of its marital jurisdiction and ensured them that this was a mandate of Scripture, not a sin against the church. It called for new civil marriage laws that were consonant with God's Word but required that the church (and thus the reformers themselves) advise the civil authorities on what God's Word commands. Both the princes' seizure of power and the reformers' active development of new marriage laws were thus seen as Biblical tasks. The transformation of German marriage law followed this program: new civil marriage courts emerged first; new civil marriage laws followed.

A. *The Development of Civil Marriage Courts*

The reformers catalyzed the development of civil marriage courts throughout Germany. Prior to the sixteenth century, most marriage and family cases had been heard in ecclesiastical courts. Local priests or clerical bodies usually had primary jurisdiction over marital disputes between their parishioners and had authority to dispose of minor issues. More serious cases, particularly those involving divorce or annulment, were referred to the court of the cathedral dean. Parties could, in most cases, appeal judgments of the dean's court to the territorial archbishops, and, in rare instances, to the papal curia in Rome.³⁶ In the 1520s and 1530s, reformers throughout Germany

35. See *id.*, 47, 86; R. KIRSTEIN, DIE ENTWICKLUNG DER SPONSALLENLEHRE UND DER LEHRE VOM EHESCHLUSS IN DER DEUTSCHEN PROTESTANTISCHEN EHERECHTSLEHRE BIS ZU J.H. BOHMER 39ff. (1966); W. Köhler, *Die Anfänge des protestantischen Ehegesetzes*, 74 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Kan. Ab.) 271, 278ff. (1941) [hereinafter KÖHLER].

36. On ecclesiastical courts and their procedure in general, see WEIGAND, *supra* note 8, at 48-54, 64-67; R. HELMHOLTZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND (1974); T.

sharply attacked the church courts in a welter of published sermons, pamphlets, and confessional writings. These courts, they charged, had illegitimately usurped the judicial authority of the prince. They were repositories of corruption and arbitrariness, prone to bribery and gross inconsistency of judgment. They were too distant from Rome to be adequately supervised and too insulated by canon law to be disciplined by the prince or city council. Their procedures were cumbersome, their fines and punishments frequently excessive. The requirement that serious cases be brought before the cathedral dean foreclosed action to many who could not afford or risk to travel to the cathedral city.

With these criticisms the reformers molded public and official opinion against the church courts and successfully petitioned numerous city and territorial councils to develop local civil marriage courts. The first such court was established in Zurich at the insistence of Ulrich Zwingli and his followers. Within a decade, similar courts were established in Nürnberg on the strength of Andreas Osiander's proposals, in Konstanz under the influence of Ambrosius Blarer, in Schwabisch-Hall under the direction of Johannes Brenz, in Strassburg under Martin Bucer's influence, and in Basel based on the proposals of Johannes Oekolampadus.³⁷ In the following two decades, dozens

SAFLEY, LET NO MAN PUT ASUNDER: THE CONTROL OF MARRIAGE IN THE GERMAN SOUTHWEST: A COMPARATIVE STUDY. 1550-1600 41ff. (1984) [hereinafter SAFLEY]; Hashagen, *Zur charakteristik der geistlichen Gerichtsbarkeit vornehmlich im späterern Mittelalter*, 6 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Kan. Ab.) 205 (1916); and J. Harvey, *The Influence of the Reformation on Nuremberg Marriage Laws 74-90* (Ph.D. Dissertation, Ohio State University, 1972) [hereinafter HARVEY].

37. See generally DIETRICH, *supra* note 22, at 150-52 and KÖHLER, *supra* note 35, at 272-75. For separate treatments of the development of the procedure and law of marriage courts in various territories and cities of Germany, see W. SEEBAAS, *DAS REFORMATORISCHE WERK DES ANDREAS OSIANDER* 184ff. (1967) [hereinafter SEEBAAS]; HARVEY, *supra* note 36, at 90-114; K. KOCH, *STUDIUM PIETATIS: MARTIN BUCER ALS ETHIKER* 135ff. (1962) [hereinafter KOCH]; F. WENDEL, *LE MARIAGE À STRASBOURG À L'ÉPOQUE DE LA RÉFORME 1520-1692* 77ff. (1928); KÖHLER, *supra* note 28, at 33ff. P. VOGT, *KIRCHEN- UND EHERECHT DER KATHOLISCHEN UND EVANGELISCHEN IN DER KÖNIGL. PREUSSISCHEN STAATEN* 147ff. (1857); F. HAUBER, *WÜRTTEMBERGISCHES EHERECHT DES EVANGELISCHEN* (1856) [hereinafter HAUBER]; B. GESSCHEN, *ZUR ÄLTESTEN GESCHICHTE UND EHEGERICHTSLICHEN PRAXIS DES LEIPZIGER KONSISTORIUMS* (1894) [hereinafter GESSCHEN].

Many of the Church Ordinances (*Kirchenordnungen*) and Policy Ordinances (*Polizeiordnungen*) which established these courts and defined their jurisdiction, procedure, and membership are collected and discussed in E. SEHLING, *DIE EVANGELISCHEN KIRCHENORDNUNGEN DES XVI. JAHRHUNDERTS* Vols. 1-16 (1902-1978) [hereinafter SEHLING]; A. RICHTER, *DIE EVANGELISCHEN KIRCHENORDNUNGEN DES SECHSZEHNTEHnten JAHRHUNDERTS* (1967 repr. of 1846 ed.) [hereinafter RICHTER]; 2 *QUELLEN ZUR NEUERENPRIVATRECHTSGESCHICHTE* Part 2 (W. Kunkel, et al., eds. 1938) [hereinafter KUNKEL] and G. SCHMELZEISEN, *POLIZEIORDNUNGEN UND PRIVATRECHT* 21-67 (1955) [hereinafter SCHMELZEISEN].

of cities and territories followed these early examples. In a few Lutheran territories the princes retained the church courts, but replaced church officials with civil judges or other civil officials.

This process of removing marital jurisdiction from the church also had a momentum independent of the Reformation. The territorial princes had long envied the church's lucrative and powerful control over marriage and had decried the corruption and delinquency of certain church courts and bishoprics. Already in the fifteenth century, therefore, certain civil rulers had gained a measure of control over marital questions. In a 1440 statute passed in Ulm, for example, the local civil court (*Gerichtshof*) was given authority (1) to order a man who had seduced a virgin either to marry her or to pay her dowry; (2) to fine a secretly betrothed couple and order them to publicize their marriage and to gain parental or clerical approval; and (3) to enforce some of the canon law impediments. Civil courts in other territories and cities assumed authority to fine, imprison, or banish parties guilty of concubinage, prostitution, adultery, desertion, bigamy, and wife or child abuse—though such cases had traditionally been part of ecclesiastical jurisdiction.³⁸ Such scattered instances of civil jurisdiction, however, did not change the reality of a predominant ecclesiastical authority over marriage. The church courts were fully divested of their jurisdiction only after these independent efforts of civil authorities had been grounded in the broader social vision and program of the Lutheran reformers.

The secularization of marriage courts in Germany, however, was neither as universal nor as radical as Luther and his early followers had envisioned. A number of cities and territories, particularly in southern Germany, remained devoutly Roman Catholic and retained the canon law and ecclesiastical courts. These courts were later protected by the Peace of Augsburg (1555).³⁹ Even in avowedly Lutheran cities and territories, few purely civil marriage courts emerged. Nürnberg (1526) and Strassburg (c. 1534) did develop civil courts under the exclusive control of the city councils and without church

38. See KÖHLER, *supra* note 35, at 277ff. for a discussion of civil marital jurisdiction in Ulm and in a number of other German cities and territories in the fifteenth and early sixteenth centuries. See also the marriage provisions in the *Nürnberg Reformation* (1479), Arts. 12-13, and the *Freiburg Reformation* (1520), Art. 3 in KUNKEL, *supra* note 37 at 6ff. and 265ff. These latter provisions, however, are extremely cryptic and deal only with discrete problems such as the age of consent or the timing of parental consent.

39. See a translation of the *Peace of Augsburg*, Arts. 2, 3, 7, 10 in S. EHLER and J. MORRALL, *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES* 164ff. (1954).

officials as judges or staff members—but these were exceptions.⁴⁰ Predominantly, both theologians and jurists were appointed to the court by the city council. The Wittenberg court, developed ultimately in 1545 by Melancthon, Schürpf and others, was a typical example. The city council of Wittenberg gave the court authority to hear and adjudicate all marriage cases using formal written procedures in court or the informal inquisitions of the pastor with his parishioner. The court could use either the visitation process of pastors and other church superintendents or the inspections of city police to discover or investigate violations of marriage law. In cases raising particularly difficult moral or legal questions, the court could also seek the advice of the theology and law faculties of the university. The court would then render a judgment, which was to be enforced by the city council, but was subject to its revision. In cases where the theologians of the court determined that the parties had violated the laws of Scripture, morality, or conscience, the court would also recommend that the church take spiritual disciplinary action against the parties, such as the ban or excommunication.⁴¹ Similar “mixed courts” appeared in a number of other cities and territories of Germany.⁴² In a few territories, the princes simply ordered local church consistories to adjudicate all marital disputes and sent them superintendents, conversant with the marriage law of the territory, to aid them in their task. The consistories had to judge each case in accordance with princely marriage law, and their activity was closely supervised. Each group of congregations formed a circuit (*Kreis*); a superintendent, appointed by the

40. See SEEBAAAS, *supra* note 37, at 194; HARVEY, *supra* note 36, at 98-100; KOCH, *supra* note 37, at 136.

41. See the Constitution of the Wittenberg Consistory (1542) and the Wittenberg Church Ordinance (1545) in SEHLING, *supra* note 37, at Vol. 1, Part 1, 200ff. See also the similar adjudictory structure in Württemberg and several southern German cities as described in HAUBER, *supra* note 37, at 31-41 and SAFLEY, *supra* note 36, at 41-180. The development of such a “mixed marriage court” in Wittenberg embittered Luther to no end. Many of his later caustic tirades against lawyers and jurists stemmed from his frustration over their desire to retain for ecclesiastics a prominent place in marital adjudication. See K. KÖHLER, LUTHER UND DIE JURISTEN 3-4, 39-49 (1873); T. MÜTHER, AUS DEM UNIVERSITÄTS- UND GELEHRTENSLEBEN IM ZEITALTER DER REFORMATION 206-16 (1866) and Liermann, *Der unjuristische Luther*, 24 LUTHER-JAHRBUCH 69 (1957).

42. DIETRICH, *supra* note 22, at 151ff. See the statutes of Schwabisch-Hall (1526), Hamburg (1529), Lübeck (1531), Hannover (1536), Mecklenberg (1573), and Prussia (1584) in RICHTER, *supra* note 37, at Vol. 1, 40ff., 127ff., 149ff., 154ff., 273ff., and SEHLING, *supra* note 37, at Vol. 5, 233ff., Vol. 4, 30ff. Hans Dietrich shows that, in general, “the princely territories left marital decisions to the ecclesiastics, while the independent imperial cities (where the city council was the highest civil power) accorded greatest importance to the [decisions] of council members.” H. DIETRICH, EVANGELISCHES EHESCHIEDUNGSRECHT NACH DEN BESTIMMUNGEN DER DEUTSCHEN KIRCHENORDNUNGEN DES 16. JAHRHUNDERTS 43ff. (1892).

prince to oversee the activities of churches, headed this circuit. A number of circuits formed a district (*Sprengel*) with its own supervisor. Each district was, in turn, part of the territorial church (*Landeskirche*) under the direct supervision of the prince, his council, and his court.⁴³

The continued involvement of ecclesiastics in civil marriage courts throughout the sixteenth century was a matter both of necessity and of doctrine. Ecclesiastics were often drawn onto these courts, or ordered to form their own courts, because they were respected community leaders, were educated and well-connected, and were often among the few to have the necessary financial resources. As the territorial princes and city councils grew in power, and the number of legal professionals grew, the role of ecclesiastics and consistories in marriage law diminished. A number of reformers themselves, however, in opposition to Luther, insisted on active participation in the civil marriage courts. The continued presence of learned theologians and pastors on the court, they argued, was the institutional means whereby the advisory function of the church in matters of marriage law could best be implemented.⁴⁴

B. *The New Learned and Statutory Law of Marriage*

Not only the marriage law courts but also the law applied by these courts was transformed. The reformers also helped to catalyze this transformation, for they were instrumental both in developing a new body of learned marriage law and in promoting a new body of marital legislation.

The local university became the chief forum of reform. Lutheran theologians throughout Germany, many themselves trained in law, joined with university jurists to debate detailed questions of marriage law raised by Scripture, Roman law, canon law and local custom. At the University of Wittenberg, for example, Luther, Melancthon, Bugenhagen, Cruciger, Jonas and numerous other theologians gave courses and public lectures on marriage law along with such renowned jurists as Kling, Lagus, Apel, Schürpf, Monner, Pauli, and

43. On the "established" territorial church system in Germany, see generally K. Holl, *Luther und das landesherrliche Kirchenregiment*, in 1 KARL HOLL, *GESAMMELTE AUFSÄTZE ZUR KIRCHENGESCHICHTE* 279ff. (1921) and E. SEHLING, *KIRCHENRECHT* 29-45 (1908). Sehling describes how the consistories of Ausbuch, Bayreuth and other cities answered to the consistory of Munich which, in turn, was supervised by the consistory of Rheims. The latter consistory was under the control of the prince's council and the territorial courts.

44. See DIETRICH, *supra* note 22, at 44.

Schneidewin. By 1560, the Wittenberg theology and law professors together published more than 80 tracts on marriage law questions, disseminating their ideas throughout Germany and beyond.⁴⁵ Professors at other German universities, particularly in Freiburg, Basel, Marburg, Greifswald, and elsewhere, were equally active in developing a learned civil law of marriage.

This learned law did not remain confined to the academy or to books. Four channels allowed it to penetrate directly into the law of the courts and the councils. First, the courts regularly consulted both the theology and the law faculties of local universities throughout the sixteenth century by use of what was called the *Aktenversendung* procedure. The courts sent files of marital cases raising difficult legal and moral issues to the faculties who would discuss the case and submit separate or joint judgments. These judgments were frequently accepted by (and, at times, were made binding on) the courts.⁴⁶ Studies of marriage law in Strassburg, Nürnberg, Goslar, and elsewhere have shown the important influence of this *Aktenversendung* procedure on substantive marriage law.⁴⁷ Second, and closely related, courts, coun-

45. Among the most important of these writings on marriage law by Wittenberg reformers as well as others are the following: Luther, *A Sermon on the Estate of Marriage* (1519) in LUTHER *supra* note 1, at Vol. 44, 5; *id.*, *The Order of Marriage for Common Pastors* (1529) in Vol. 53, 111; *id.*, *On Marriage Matters* (1530) in Vol. 46, 265; MELANCHTHON, *supra* note 22; *id.*, DE ARBORE CONSANGUINITATIS ET AFFINITATIS (1541); Bugenhagen, *Vom Ehebruch und Weglauffen* (1539) in SACERIUS, CORPUS JURIS MATRIMONIA folio 171 (1569); Brenz, *Wie in Eheachen* (1529) in *id.*, folio 184; J. APEL, DEFENSIO JOHANNIS APELLI AD EPISCOPUM HERBIPOLENSEM PRO SUO CONJUGIO (1523, 1524) (a defense of his marriage to a nun against the bishop who had imprisoned him for the same); M. KLING, TRACTATUS MATRIMONIALIUM CAUSARUM, METHODICO ORDINE SCRIPTUS (1553) (a collection of a number of early tracts by Kling); B. SACERIUS, SACERIUS, BUCH VOM HEILIGEN EHESTAND (1556) (an anthology of essays by Sacerius and others); B. MONNER, TRACTATUS DE MATRIMONIO IN GENERE, DE CLANDESTINIS CONJUGIIS ET EXPLICATIS QUAESTIONIS (1561) (a collection of a number of early tracts by Monner); *id.*, DE CLANDESTINE CONIUGIO LIBELLUS (1594); J. SCHNEIDEWIN, IN INSTITUTIONUM IMPERIALIUM TITULUM X, DE NUPTIIS PRIMI COMMENTARII (1571); N. HEMMING, LIBELLUS DE CONJUGIO (1578); J. WIGAND, DOCTRINA DE CONJUGIO (1578); K. MAUSER, EXPLICATIO ERUDITA ET UTILIS X. TITULI INSTITUTI DE NUPTIIS (1569); J. VON BEUST, TRACTATUS CONNUBIORUM PRAESTANTIS (1617); J. ALTHUSIUS, DE MATRIMONIO CONTRAHENDO ET DISSOLVENDO (1593). Several tracts on marriage by jurists from Wittenberg and other cities in Germany were collected in TRACTATUS CONNUBIORUM PRAESTANTIS, JURISCONSULTORUM (1618, 1742).

46. On the *Aktenversendung* process in general, see J. DAWSON, THE ORACLES OF THE LAW 198-213, 240-41 (1968); and W. EBEL, STUDIE ÜBER EIN GOSLARER RATSURTEILSBUCH DES 16. JAHRHUNDERTS 530ff. (1961).

47. See HARVEY, *supra* note 36, at 96-112 (on Nürnberg); KOCH *supra* note 37, at 139ff. (on Strassbourg); Haalk, *Die Rostocker Juristenfakultät als Spruchskollegium*, 3 WISSENSCHAFTLICHE ZEITSCHRIFT DER UNIVERSITÄT ROSTOCK 401, 414ff. (1958) (on Rostock); EBEL *supra* note 46, at 37ff, 53ff. (on Goslar). Cf. also the function of *Schöppenstuhle* in marital adjudication as described briefly by A. STOLZEL, DER BRANDENBURGER SCHÖPPENSTUHL 388ff. (1901).

cils, and litigating parties solicited opinions (*consilia*) from prominent individual jurists—a practice which thrived in sixteenth century Germany, as it had thrived in previous centuries in Italy.⁴⁸ Particularly the opinions of the new authorities on marriage law were eagerly sought after, for they were frequently dispositive of issues raised in court. Hieronymous Schürpf, for example, the Lutheran jurist at Wittenberg, was famous throughout Germany for his learned consilia on difficult marriage questions. When not teaching at the University of Wittenberg, he travelled extensively to dispense his opinions. His published consilia, along with those of many of his colleagues, were frequently reprinted and disseminated throughout Germany.⁴⁹ Third, this body of marriage law was passed on to students who ultimately became lawyers, judges, and government officials. Fourth, from the 1520s on, there was an enormous growth of civil legislation on marriage. Detailed marriage laws were set forth in a large group of church ordinances (*Kirchenordnungen*), visitation ordinances, moral and sumptuary laws, criminal laws, public policy laws (*Polizeiordnungen*), and other statutes promulgated by urban, territorial, and imperial authorities. University jurists and theologians (and their students) were often directly involved in this legislative activity as advisors, administrators, and draftsmen. Because the same jurists and theologians participated in drafting statutes, the provisions of early statutes often were repeated in subsequent ones. This is particu-

48. A list of the most important consilia by German jurists is provided in G. KISCH, *CONSILIA: EINE BIBLIOGRAPHIE DER JURISTISCHEN KONSILIENSAMMLUNGEN* (1970). On the history of the consilia practice in Europe see generally Gehrke, *Die privatrechtliche Entscheidungsliteratur Deutschlands. Charakteristik und Bibliographie der Rechtssprechungs- und Konsiliensammlungen vom 16. bis 19. Jahrhundert*, 3 *IUS COMMUNE* 25 (1974); F. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 80ff. (rev. ed. 1967); STINTZING, *supra* note 8, at 527ff.; R. VON STINTZING, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* 16ff. (Erste Ab. 1880).

49. See MÜTHER, *supra* note 41, at 186-89. Schürpf's consilia on marriage are collected in *CONSILIA SEU RESPONSA* (1556), and are discussed in Mejer, *Zur Geschichte des ältesten protestantischen Eherechts, insbesondere der Ehescheidungsfrage*, 16 *ZEITSCHRIFT FÜR KIRCHENRECHT* 35 (1881). Schürpf's involvement in the Lutheran Reformation is particularly fascinating. He was a close friend of Luther, Melancthon and other theologians and served as the "best man" at Luther's wedding. He rediscovered with Luther the important doctrine of justification by faith alone, stood by when Luther burnt the canon law books in 1520, accompanied Luther to the Diet of Worms in 1525 and spoke on his behalf, and remained an eloquent spokesman in Germany for the new Lutheran theology. It was Schürpf's example most of all, Luther wrote later in his life, "that inspired me [in 1517] to write of the great error of the Catholic Church." See MÜTHER, *supra* note 41, at 190-203 and STINTZING, *supra* note 48, at 267-68, as well as Melancthon's panegyric, *Oratio de vita clarissimiviri Hieronymi Schurffi*, in 12 *CORPUS REFORMATORUM* 86 (G. Bretschneider ed. 1843). For a thorough biography on Schürpf, see W. SCHAICH-KLOSE, *D. HIERONYMOUS SCHÜRPF: LEBEN UND WERK DES WITTENBERGER REFORMATIONSJURISTEN, 1481-1554* (1967).

larly true of the church ordinances which had the greatest concentration of marriage provisions. The Wittenberg theologian and jurist Johannes Bugenhagen, for example, helped to draft the Church Ordinances of Hamburg (1529), Lübeck (1531), Ulm (1533-34), Pommern (1535), Hannover (1536), and Wittenberg (1545) and these statutes, accordingly, have markedly similar marriage provisions. Bugenhagen also strongly influenced Martin Bucer and Johannes Brenz, and the statutes under their influence contain many similar marriage provisions.⁵⁰

The new professorial law thus became part of the statutory law, and both types of law became the primary marriage law of the courts.

Neither the professorial laws nor the statutory laws, however, admit of simple summary. For the specific provisions of these laws are frequently different and occasionally contradictory. This diversity stemmed, in part, from the plurality of independent urban and territorial authorities in sixteenth century Germany. It also stemmed from the diversity of perspective among and between the law and theology professors.

The most direct cause of the diversity of marriage laws, however, lay in the failure of the draftsmen and professors to agree on the sources of such laws. All agreed that marriage laws had to build upon and reflect God's law and that the Bible was the preeminent revelation of God's law. But there was little agreement over what other sources, among human institutions, also contained God's law. Three dominant positions emerged. (1) Luther, Bucer, Brenz, and the jurist Basilius Monner offered a rather eclectic, uncritical theory. They accepted as sources Scripture, reason, natural law, custom, and church tradition. Bucer and Brenz also stressed Roman law. But none of these writers made a systematic effort to define and distinguish these sources, to resolve tensions among them, or to explain clearly why certain provisions of one source were accepted and others rejected (e.g., some of the Mosaic laws of impediments were accepted, but the

50. SEHLING, *supra* note 37, at ix and Sprengler-Ruppenthal, *Zur Rezeption des römischen Rechts in Eherecht der Reformation*, 112 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Kan. Ab.) 363, 392ff. (1978) [hereinafter SPRENGLER-RUPPENTHAL]. On the contributions of these writers on Lutheran marriage law, see generally, W. RAUTENBERG, JOHANNES BUGENHAGEN, BEITRÄGE ZUR SIENEM 400. TODESTAG 60ff. (1958); Brecht, *Anfänge reformatorischen Kirchenordnungen bei Johannes Brenz*, 96 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Kan. Ab.) 322 (1969); J. ESTES, CHRISTIAN MAGISTRATE AND STATE CHURCH: THE REFORMING CAREER OF JOHANNES BRENZ (1984); Kohls, *Martin Bucers Anteil und Anliegen bei der Auffassung der Ulmer Kirchenordnung in Jahre 1531*, 15 ZEITSCHRIFT FÜR EVANGELISCHEN KIRCHENRECHT 333 (1970).

Mosaic laws of divorce and polygamy were rejected). They all generally denounced the canon law of marriage yet later accepted certain provisions if they did not "conflict with conscience."⁵¹

(2) The jurists Schürpf, Melchior Kling, Henning Goden, and Johannes Sichard, and a number of German theologians, though all supportive of the Reformation, advocated that the prince simply adopt canon law but excise irrelevant provisions or those which conflicted with the reformed understanding of Scripture. This time-tested body of law, they argued, was familiar to the people, had been built on the foundation of Scripture, natural law, and equity, and had incorporated all the valid and valuable provisions of Roman and Germanic law and custom. Kling, particularly, argued further that the Old Testament could not be a source of law, for it had been fulfilled and corrected by the New Testament. Likewise, the Roman law of marriage was invalid because it had always been attacked by the early church and was ultimately replaced by the canon law.⁵²

(3) A number of "radical reformers," most notably Lambert von Avignon, Thomas Müntzer, and the drafters of The Twelve Articles of the Peasants (c. 1523) advocated a wholesale repudiation of human marriage laws and a return to Scriptural and early church marriage laws.⁵³

Those sixteenth century statutes that include sections on marriage reflect this diversity of perspective on the sources of marriage law. Virtually all such statutes laud Scripture as the chief source of law, cite it prominently in marriage provisions, and urge judges and councilors always to apply and amend the statute in the light of Scripture. This is especially true of the Church Ordinances of Lippische (1536), Cologne (1543), and Cellische (1545) and the numerous statutes modelled on them. All begin with lengthy preambles summarizing Scripture and Lutheran theological doctrines (including marriage

51. DIETRICH, *supra* note 22, at 42-50, 82-84, 109; SPRENGLER-RUPPENTHAL, *supra* note 50, at 369-95; and KÖHLER, *supra* note 35, at 279-86.

52. See KIRSTEIN, *supra* note 35, at 46-51 and DIETRICH, *supra* note 22, at 116-20 and the primary sources cited therein. See also FRIEDBERG, *supra* note 22, at 225; and STINTZING, *supra* note 48, at 261, 274ff.

53. See discussion of FRANCISCUS LAMBERTUS AVENIONENSIS, DE SACRO CONJUGIO (1524) in KÖHLER, *supra* note 35, at 276ff. and G. MULLER, FRANZ LAMBERT VON AVIGNON UND DIE REFORMATION IN HESSEN (1958); see KÖHLER, *supra* note 41, at 2-5, 39-49 on some of the other "radical" reformers. Though these reformed groups ultimately had little influence on the official marriage law of the German cities and territories, their "theonomic" ideals did manifest themselves strongly in many of their closely-knit communities in Germany, Switzerland, The Netherlands, and England. See generally G. WILLIAMS, THE RADICAL REFORMATION 505-17 (1962) and sources cited therein.

doctrine) before setting out specific laws for the region.⁵⁴ None of the extant statutes, however, explicitly requires that Scripture be the only source of civil marriage law. A few statutes, most notably the Church Ordinance of Hannover (1536),⁵⁵ explicitly repudiate canon law, but most are silent on the question. The church ordinances influenced or drafted by Bucer, Brenz, and Bugenhagen, particularly those of Schwabisch-Hall (1526) and Ulm (1533-34), occasionally cite provisions of Roman law alongside Scripture, and urge officials of the marriage court to be conversant with Scripture and the kaiser's (Roman) law.⁵⁶ Many other statutes also vaguely urge officials and judges to respect customs and to implement justice, equity, and natural law. None of these statutes, however, seems to explore the relationships between the sources or to arrange them in an hierarchical order.⁵⁷ The statutory marriage law, therefore, like the learned marriage law, remained a diverse, eclectic body of rules gleaned from a variety of sources, most frequently from Scripture.

This new civil marriage law introduced three groups of changes in the traditional canon law of marriage, which shall be explored in turn. The new law: (1) modified the traditional consent doctrine, and required the participation of others in the process of marriage formation; (2) sharply curtailed the number of impediments; and (3) introduced a new doctrine of divorce. Such changes, taken together, simplified the laws of marriage formation and dissolution, provided for public participation in this marriage process, and protected the social functions of marriage and the family.

C. *The Law of Consent to Marriage*

As in canon law, so in the new civil law, the marriage bond was formed by free consensual union between the parties. Many of the reformers, however, accepted the traditional consent doctrine only after: (1) modifying the canonists' three-fold distinction between the betrothal or future promise to marry (*sponsalia de futuro*), the present promise to marry (*sponsalia de praesentia*), and the consent to consummate the marriage through sexual intercourse; (2) requiring that

54. SEHLING, *supra* note 37, at Vol. 1, 292.

55. *Id.*, at Vol. 2, 944.

56. RICHTER, *supra* note 37, at Vol. 2, 40. See SPRENGLER-RUPPENTHAL, *supra* note 50, at 394-406 and BRECHT, *supra* note 50, at 344ff.

57. DIETRICH, *supra* note 22, at 54ff., 93ff., 122ff., 153ff.; FRIEDBERG, *supra* note 22, at 212ff.; KÖHLER, *supra* note 28, at 375; and KIRSTEIN, *supra* note 35, at 28ff., 57ff. See, e.g., the Consistory Ordinance of Brandenburg (1573) and of Prussia (1584) in RICHTER, *supra* note 37 at Vol. 2, 383ff., 466ff.

parents and witnesses participate in the marriage process; and (3) enlarging the task of the church in marriage.

Luther was the most ardent initial advocate for these reforms, and his position is set out first. For Luther, the three forms of consent were Scripturally unwarranted, semantically confusing, and a source of grave public mischief. Scripture, Luther averred, makes no distinction between the present and future promise. Any promise to marry freely given in good faith creates a valid, indissoluble marriage before God and the world; this marriage is consummated through the physical act. Even before consummation, however, Scripture makes clear that breach of this promise through sexual relations with, or a subsequent marriage promise to, another is adultery. Furthermore, the distinction between the present and future promises depends upon "a scoundrelly game" (*ein lauter Narrenspiel*) in Latin words that have no equivalent in German and thus confuse the uneducated. The ecclesiastical courts usually interpreted the promise "Ich will Dich zum Weibe haben" or "Ich will Dich nehmen, ich will Dich haben, Du sollst mein sein," as a future promise, though in common German parlance these were usually intended to be present promises.⁵⁸ A present promise, the ecclesiastical courts insisted, must use the terms "Accipio te in uxorem" or "Ich nehme Dich zu meinem Wiebe" though neither phrase was familiar outside academic circles. Such a post hoc interpretation of promises, Luther charged, preyed on the ignorance of the common people, disregarded the intent of the couple, and betrayed the presumption of the ecclesiastical courts against marriage. By interpreting many promises to be betrothals, the ecclesiastical judges had availed themselves of the much more liberal rules for dissolving betrothals and thus had been able to dissolve numerous marriages. Through their combined doctrines of construing marriage promises as betrothals and of permitting the religious vow to dissolve betrothal, the canon lawyers had thus covertly subsidized celibacy and monasticism. To allay the confusion and reverse the presumption against marriage, Luther proposed that all promises to marry be viewed as true binding marriage vows in the present (*sponsalia de praesentia*) unless either party had expressly stipulated some future condition or event. A promise in any language with a verb in the

58. LUTHER, *supra* note 1, at 11ff., 274ff. See SOHM, *supra* note 7, at 138-39, 197-198; FRIEDBERG *supra* note 22, at 203-07; and KIRSTEIN *supra* note 35, at 28ff. The promises are ambiguous because the verbs *will* and *sollst*, though commonly understood to be in the present tense, could also be interpreted as future verbs.

future tense was not enough to defeat the presumption. An expressly-stated condition was required.

Luther and his followers did not attach such solemnity and finality to the marriage promise without safeguards. First, they insisted that, before any such promise, the couple seek the consent of their parents, or, if they were dead or missing, of their next of kin or guardian. Such consent, Luther argued, had always been mandated by Scripture (e.g., in the Fourth Law of the Decalogue) as well as by natural law, Roman law, canon law, reason, and equity. The parents played an essential role in the process of marriage formation. They judged the maturity of the couple and the harmony and legality of their prospective relationship. More importantly, their will was to reflect the will of God for the couple. Like the priest and like the prince, the parent had been given authority as God's agent to perform a specific calling in the institution of marriage. Parents, Luther wrote, are "apostles, bishops, and priests to their children." By giving their consent to the couple, parents were giving God's consent. Where parents withheld their consent unreasonably, ordered their child to lead a celibate life, or used their authority to coerce a child to enter marriage unwillingly, they no longer performed a Godly task. In such cases Luther urged the child to petition a church or government official for his consent and protection; the official would thus surrogately represent God's will. If the official, too, was unreasonable or coercive, Luther urged the child to seek refuge in another place. Marriages contracted without such parental or surrogate parental consent were, in Luther's view, void altogether; other theologians deemed these unions valid if the parents gave their consent *post hoc*.⁵⁹

Second, Luther insisted that the promise to marry be made publicly, in the presence of at least "two good and honorable witnesses." These witnesses could, if necessary, attest to the event of the marriage or to the intent of the parties and could also help instruct the couple of the solemnity and responsibility of their relationship—a function tied to Luther's doctrine of the priesthood of all believers.⁶⁰

Third, Luther and his followers insisted that, before consummating their marriage, the couple repeat their vows publicly in the church, seek the blessing and instruction of the pastor, and register in

59. LUTHER, *supra* note 1, at Vol. 46, 205ff., and *id.*, LETTERS OF SPIRITUAL COUNSEL 263ff. (T. Tappert trans. and ed. 1955). See also discussion in KIRSTEIN, *supra* note 35, at 32-35 and DIETRICH, *supra* note 22, at 54-59, 93-96.

60. LUTHER, *supra* note 1, at Vol. 46, 268ff. See discussion in ALTHAUS, *supra* note 22, at 91.

the public marriage directory kept in the church. Luther saw the further publicizing of marriage as an invitation for others to aid and support the couple, a warning for them to avoid sexual relations with either party, and a safeguard against false or insincere marriage promises made for the purpose of seducing the other party. Just as the parental consent was to reflect God's will that the couple be married, so the priest's blessing and instruction was to reflect God's will for the marriage—that it remain an indissoluble bond of love and mutual service.⁶¹

With these requirements of parental consent, witnesses, and church registration and solemnization, Luther deliberately discouraged the secret marriages that the canon law had recognized (though not encouraged). He made marriage "a public institution," advocating the involvement of specific third parties throughout the process of marriage formation. Luther did, however, concede that private vows followed by sexual intercourse could constitute a valid marriage, but only if the woman was impregnated or if the intercourse became publicly known. This concession was not given, however, because the private promise was an adequate basis for a valid marriage. Luther's concern was, rather, to protect the child and to prevent the woman from falling victim to "the strong prejudice [against] marrying a despoiled woman."⁶²

It was left to the jurists and legislative draftsmen to work out the legal implications of these reforms.

Luther's broad reform of the doctrine of marriage promises found support only among later jurists. Earlier jurists, such as Kling, Schürpf, and Lagus—despite Luther's vehement attacks on them—retained the traditional canonist distinction between present and future promises to marry and insisted on a separate group of impediments for each promise. Although they urged courts to interpret promises in accordance with the common German language, they si-

61. LUTHER, *supra* note 1, at Vol. 53, 110ff. See discussion in KIRSTEIN, *supra* note 35, at 734; KÖHLER, *supra* note 35, at 292. Most commentators conclude that Luther viewed church registration as mandatory for all, but church solemnization and celebration as mandatory only for church members. Luther is far from clear on the effects of failure to comply with these mandates. His repeated maxim that "it is as much a marriage after the public betrothal as after the church wedding" (LUTHER, *supra* note 1, at Vol. 46, 294) suggests strongly that for Luther such failure is no ground for annulment, though it may result in civil and/or ecclesiastical penalty or punishment.

62. LUTHER, *supra* note 1, at Vol. 46, 384. For further discussion of the Lutheran reformers' heavy emphasis on the requisite public character of marriage, and its relation to Lutheran theological beliefs, see MICHAELIS, *supra* note 22, at 51-56.

lently rejected Luther's other recommendations.⁶³ Only in the second half of the sixteenth century were Luther's teachings made, in Rudolph Sohm's words, "the general Protestant doctrine and praxis which lasted into the eighteenth century."⁶⁴ Beust, Schneidewin, Goden, Monner, Mauser, and numerous other later jurists rejected or severely diminished the distinction between the present promise to marry and the public unconditional betrothal. Like Luther they inveighed against the secret marriage, and many affirmed, for the same reason as Luther, the exception for private marriages whose consummation became publicly known or which resulted in pregnancy.⁶⁵

Luther's doctrine of consent also found a place in marriage statutes of the sixteenth century. Many statutes used the terms 'betrothal' ('*Verlöbnis*') and 'marriage' ('*Ehe*') interchangeably and deemed the public betrothal a completed (*geschlossen*) marriage.⁶⁶ Several other statutes, while retaining the traditional distinction between promises of betrothal and marriage, attached far greater importance and finality to public unconditioned betrothals, providing (1) that these promises take precedence over all secret betrothals (even those made subsequently); (2) that promiscuity by either betrothed party is punishable as adultery; and (3) that these promises can be dissolved only on grounds also permitted for divorce.⁶⁷ The functional distinction between future and present promises was thus considerably narrowed.

The requirements of parental consent won virtually unanimous acceptance in the sixteenth century among jurists and draftsmen alike. It was a particularly prominent topic of discussion among the jurists. They adduced supportive evidence for this role of parents from Roman, canon, and Germanic law. For several of the early jurists, like Kling and Schürpf, who advocated allegiance to canon law, parental consent was recommendable but not absolutely necessary. Couples who married without parental consent should be fined by the state and disciplined by the church, but neither the parents nor one of the parties should be able to annul the marriage because of this omis-

63. DIETRICH, *supra* note 22, at 121.

64. SOHM, *supra* note 7, at 198; *see also* FRIEDBERG, *supra* note 22, at 210.

65. *See id.*, at 233ff. and the primary sources cited therein.

66. *See* the Church Ordinances of Zurich (1529), Brandenburg-Nürnberg (1533), Württemberg (1536), Kassel (1539), Schwabisch-Hall (1543), Cologne (1543), and Tecklenberg (1588) as well as the Consistory Ordinance of Brandenburg (1573) in RICHTER, *supra* note 37, at Vol. 1, 135ff., 209ff., 270ff., 304ff., and Vol. 2, 16ff., 47ff., 476ff., and 381ff.

67. *See* the Goslar Consistory Ordinance (1555) and the Declaration of the Synod of Emden (1571) in RICHTER, *supra* note 37, at Vol. 2, 166ff. and 340. *See also* the Opinions of the Wittenberg Court *quoted in* SOHM, *supra* note 7, at 199-200.

sion. Several later jurists, most notably Monner, Mauser, and Schneidewin, argued that such clandestine marriages should be annulled, unless the parties had consummated their private vows; post hoc consent by the parties should have no effect. Virtually all the jurists urged that the couple seek the approval of both fathers and mothers. For cases where the parents were dead or missing, they assiduously listed in the order of priority the next of kin, tutors, curators and others whose consent should be sought. Finally, the jurists discussed in detail the conditions which parents could attach to their consent. Reasonable conditions of time ("You may marry my daughter but only after a year"), of place ("... only in the church of Wittenberg"), or of support ("... only when you secure a job") were generally accepted by the jurists. But they carefully denied parents the opportunity to use the consent doctrine to place coercive demands or unreasonable restrictions on the couple. Monner and Mauser, in fact, argued that parents or guardians who abused their consensual authority be stiffly fined or imprisoned.⁶⁸

Given the prominent attention to parental consent by theologians and jurists, it is not surprising that the statutes in a majority of jurisdictions in Lutheran Germany required such consent. Very few statutes, however, ordered that all marriages contracted without parental consent be nullified.⁶⁹ The presence of witnesses or the public declaration of betrothal in a church was usually accepted as an adequate substitute—though several statutes ordered stern civil and ecclesiastical penalties for parties who failed to gain parental consent.⁷⁰ The ambit of the parents' authority in the marriage process was also carefully defined. Courts prohibited parents from entering their unwilling children in cloisters or monasteries or from obstructing children who wished to leave their sacred orders. Children saddled with severe conditions or restrictions on their prospective marriages were granted

68. DIETRICH, *supra* note 22, at 123-27 and the primary sources cited therein.

69. The Marriage Ordinance of Württemberg (1537) in RICHTER, *supra* note 37, at Vol. 1, 280. The Wittenberg marriage court apparently also took this rigid stance, though absolute parental consent is not prescribed in the Wittenberg statute; see DIETRICH, *supra* note 22, at 156-57.

70. See, e.g., the Church Ordinances of Basel (1529) and Brandenburg (1573) and the Declarations of the Synod of Emden (1571) in RICHTER, *supra* note 37, at Vol. 1, 125 and Vol. 2, 376, 340. See also the Reformation Ordinance of Hessen (1526), Württemberg Ordinance (1553), and the Schauenburg Policy Ordinance (1615) in Schmelzeisen, *supra* note 37, at 33-34. The latter two statutes provide that "the divine order, the Kaiser's [Roman] law (*cf.* Inst. I. 10) as well as natural honor and equity provide that children must obey their parents and guardians and must not marry without their counsel, conscience and will [Rat, Wissen und Willen]." *Id.*, 34.

rights of appeal to the local court; where the court found for the child, the parents (or guardians) were subject to penalty.⁷¹ In most jurisdictions, parental consent was no longer required once the child reached the age of majority.⁷²

The requirement of at least two good and honorable witnesses to the marriage promise was accepted by virtually all jurists and legislative draftsmen. A few early statutes denied outright the validity of an unwitnessed marriage promise, but, in most jurisdictions, the validity of these promises was left to the discretion of the court.⁷³ At first, unwitnessed marriages were rarely dissolved. But as the scandal of pre-marital sex and pregnancy grew and courts were faced with time-consuming evidentiary inquiries into the relationship of litigating couples, these private promises were increasingly struck down. Parties who consummated their private promises were fined, imprisoned, and, in some areas, banished. In the later sixteenth century, a number of territories also began to require either that the couple invite a government official as one witness to their promises or that they announce their promises before the city hall or other specified civic building.⁷⁴

In many territories, the church was assigned an indispensable role in the process of marriage formation. Couples were required, on pain of stiff penalty, to register their marriage in the church.⁷⁵ The public church celebration of the marriage and the pastor's instruction and blessing were made mandatory even for couples who had earlier an-

71. See the Constitution of the Wittenberg Consistory Ordinance (1542), the Church Ordinance of Cellische (1545), the Marriage Ordinance of Dresden (1556), the Territorial Ordinance of Prussia (1577), the Marriage Ordinance of Kürpf (1582) and the Schauenburg Policy Ordinance (1615) in SEHLING, *supra* note 37, at Vol. 1, 20ff., 292ff., 343ff. and SCHMELZEISEN, *supra* note 37, at 36. See also DIETRICH, *supra* note 22, at 155 and OZMENT, *supra* note 2, at 24, 194.

72. See, e.g., the Church Ordinance of Goslar (1555) in RICHTER, *supra* note 37, at Vol. 2, 165. The age of majority in that jurisdiction was 20 for men, 18 for women; in some jurisdictions, the age of majority was as high as 27 for men and 25 for women; see SCHMELZEISEN, *supra* note 37, at 35.

73. The Marriage Ordinance of Zurich (1525)—copied in several south German cities—was the first to declare void *ab initio* all unwitnessed marriages. See KÖHLER, *supra* note 28, at 74ff. The more typical early statutes are the Church Ordinance of Ulm (1531) and the Marriage Ordinance of Württemberg (1537) in RICHTER, *supra* note 37, at Vol. 1, 158, 280; see discussion in KÖHLER, *supra* note 35, at 291, DIETRICH, *supra* note 22, at 122-23, 154, and SCHMELZEISEN, *supra* note 37, at 37-38.

74. Marriage Ordinance of Württemberg (1553) and Church Ordinance of Goslar (1555) in RICHTER, *supra* note 37, at Vol. 2, 129, 165. See discussion in KÖHLER, *supra* note 35, at 292.

75. See, e.g., Church Ordinance of Ulm (1531) in RICHTER, *supra* note 37, at Vol. 1, 159 and discussion in KÖHLER, *supra* note 35, at 292.

nounced their betrothal and received parental consent.⁷⁶ Several ordinances explicitly ordered punishment for betrothed couples who consummated their marriages before participating in the church ceremony.⁷⁷ By the 1550s, this "anticipatory sex" was grounds for imprisonment or banishment from the community as well as excommunication from the church.⁷⁸

These four interrelated reforms—the equation of unconditioned future and present promises to marry, along with the requirements of parental consent, of witnesses, and of church registration and celebration—remained standard provisions in the marriage law of the next three centuries, not only in Germany but also in many other western European nations.⁷⁹ The reforms also found a place in the canon law of the Roman Catholic Church. In 1563 the Council of Trent, under pressure from within and without the church, decreed that (1) to contract a valid marriage, parties had to exchange present promises in the company of a priest and witnesses; (2) all betrothals had to be announced publicly three times before celebration of the marriage; and (3) each parish was required to keep an updated public registry of marriage. The Council further encouraged (but did not require) parents to counsel their children in choosing compatible spouses.⁸⁰

D. *The Law of Impediments to Marriage*

Lutheran theologians and jurists strove with equal vigor to reform the canon law of impediments. For the reformers, a number of these obstacles to betrothal and marriage were Scripturally unwarranted; several others, though properly mandated, had become a source of corruption and confusion.

76. See the Zurich Chorgericht Ordinance (1525), the Church Ordinances of Basel (1530), Kassel (1530), Ulm (1531), Strassburg (1534), and the numerous later statutes quoted and discussed in FRIEDBERG, *supra* note 22, at 213-17 and SCHMELZEISEN, *supra* note 37, at 45-46.

77. See the Ordinances of Nürnberg (1537), Augsburg (1553), and Ulm (1557) described in OZMENT, *supra* note 2, at 36; HARVEY, *supra* note 36, at 221ff.; and Köhler, *supra* note 35, at 296ff.

78. The Marriage Ordinance of Württemberg (1553) in RICHTER, *supra* note 37, at Vol. 2, 128 and the Church Ordinances of Geneva (1561) and Palatine on the Rhine (1563) described in GOTTLIEB, *supra* note 2, at 124ff.

79. See a brief discussion of the influence of these and other reforms in M. GLENDON, *STATE LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE*, 313ff. (1977).

80. *Decree Tametsi* (1563) in H. DEUZIGER and A. SCHONMETZER, *ENCHIRIDION SYMBOLORIUM* No. 1797, 415 (36th ed. 1976). For an account of the effects of the Decree, see Conrad, *Das tridentinische Konzil und die Entwicklung des kirchlichen und weltlichen Eherecht*, in *DAS WELTKONZIL VON TRENT IN SEIN WERDEN UND WIRKEN* 297-324 (G. Schneider ed. 1951).

According to Scripture, marriage is a duty prescribed by the law of creation and a right of man protected by the law of Christ. No human law could impinge on this Godly duty or infringe on this God-given right without the warrant of divine law. No human authority could obstruct or annul a marriage without divine authorization.⁸¹ "It is contrary to faith as well as to love," wrote one reformer, "when man puts asunder, without God's command, what God has brought together."⁸² Impediments, therefore, that were not commands of God could not be countenanced. Thus the impediments protecting the sanctity of the marriage sacrament were untenable, for Scripture (as the reformers understood it) does not teach that marriage is a sacrament. Impediments protecting religious vows of celibacy or chastity were unnecessary, for Scripture subordinates such vows to the vows of marriage.

Even the Biblically-based impediments of the canon law had, in the reformers' view, become sources of corruption and confusion. It had long been the official practice of the Roman Catholic Church to relax certain impediments (such as consanguinity and affinity) where they worked injustice to the parties or to their children; parties could pay a dispensation and be excused from the legal strictures. This "equitable" practice met with little criticism. The reformers' concern was with the abuse of this practice in certain bishoprics. Corrupt clerics had turned their "equitable" authority to their own financial gain by relaxing any number of impediments if the dispensation payment was high enough. This clerical bribery and trafficking in impediments evoked caustic attacks from the reformers. "There is no impediment nowadays," Luther charged, "that the church cannot legitimize for money. These man-made regulations seem to have come into exist-

81. Luther set out the reformers' criticisms of this body of law in the most radical terms:

The pope in his canon law has thought up eighteen distinct reasons for preventing or dissolving a marriage, nearly all of which I reject and condemn. Indeed, the pope himself does not adhere to them so strictly or firmly [for] one can rescind any of them with gold and silver. . . . Is not the invention of so many impediments, and the setting of so many traps, the reason that people do not marry; or if they are married why the marriage is annulled? Who gave this power to man? It may be that they were religious men, zealous and devout, yet by whose right does any man's saintliness put limits on my own liberty? Let anyone who is so minded be a saint and zealot to any extent he likes, but let him not harm anyone else in doing it, or steal my freedom.

LUTHER, *supra* note 1, at Vol. 45, 22 and SELECTIONS, *supra* note 31, at 330-31.

82. A. OSIANDER, GUTACHTEN ÜBER DIE ZEREMONIEN 69 (1526), quoted by HARVEY, *supra* note 36, at 232; see also SEEBASS, *supra* note 37, at 191ff. for further discussion of Osiander's views.

ence for no other reason than raking in money and netting in souls."⁸³ Such abuses not only desecrated the priestly office, but resulted in a liberal law of impediments for the rich and a constrictive law for the poor. Furthermore, the reformers averred, the impediments had become so intricate that they were confusing to the common man. The confession manuals were filled with ornate legalistic discussions of the impediments, incomprehensible to the uninitiated and frequently not in the language of the common people.⁸⁴

Acting on these criticisms of canon law, the reformers developed a simplified and, in their view, more Biblical law of impediments. They (1) accepted, with some qualification, the impediments protecting the parties' consent; (2) adopted a severely truncated law of personal impediments; (3) discarded the impediments protecting the sanctity of the sacrament; and (4) adopted most of the physical impediments.⁸⁵

In accepting the consensual theory of marriage the reformers also accepted the traditional impediments that guaranteed free consent. Thus a man and a woman who had been joined under duress, coercion, or fear were seen as "unmarried before God" and thus free to dissolve their union. Both the Lutheran theologians and jurists, however, unlike their canonist contemporaries, required that the pressure exerted on the couple be particularly pervasive and malicious—a requirement which they based on patristic authority.⁸⁶ The reformers, like the canonists, accepted errors of person as grounds for annulment. Luther, Bucer, and Brenz, however, urged Christian couples to accept such unions as a challenge placed before them by God—a recommendation which is repeated in some of the statutes.⁸⁷ A number of reformers also permitted annulment of marriages based on errors of

83. SELECTIONS, *supra* note 31, at 330-31.

84. *Id.*, 330. See also LUTHER, *supra* note 1, at 22-30; BUCER, *supra* note 28, at Chap. 17 and discussion of the views of other theologians in DIETRICH, *supra* note 22, at 97-98.

85. Like other newly developed marriage laws in sixteenth century Germany, however, the civil laws of impediments were far from uniform. Again, the reason for this diversity lay not only in the independence of civil authorities but also in the failure of the jurists to agree on the sources of law. Luther looked almost exclusively to Scripture. Brenz, Bucer, and Bugenhagen stressed as well the Roman law of the Christian emperors. Melanchthon, Oslander and many other theologians looked also to natural law. Virtually all the early jurists accepted those canon law impediments grounded in Scripture and the writings of the Church Fathers. See *id.*, 61ff., 98ff., 132ff.

86. *Id.*, 66, 102, 129-30. Luther concurred in this position only after 1530.

87. DIETRICH, *supra* note 22, at 54ff., 93ff., 122ff., 153ff.; FRIEDBERG, *supra* note 22, at 212ff.; KÖHLER, *supra* note 28, at 375; and KIRSTEIN, *supra* note 35, at 28ff., 57ff. See, e.g., the Consistory Ordinances of Brandenburg (1573) and Prussia (1584) in RICHTER, *supra* note 37, at Vol. 2, 383ff., 466ff.

quality—*i.e.*, the mistaken assumption that one's spouse was a virgin. For, as the Mosaic and Pauline law made clear, one's prior commitment to marriage, whether through a promise or through sexual intercourse, prevented him or her from entering any true marriage thereafter. Thus the second putative marriage was void from the start.⁸⁸

In developing the civil law of personal impediments the reformers were far less faithful to the canon law tradition. They rejected several of these impediments and liberalized others in an attempt to remove as many obstacles to marriage and as many obfuscations of Scripture as possible. (1) Lutheran theologians and later jurists largely rejected impediments designed to protect the celibate and the chaste. The canon laws prohibiting marriage to committed clerics, monks, and nuns were unanimously rejected as unscriptural.⁸⁹ Several statutes explicitly permitted clerics to marry and enjoined subjects to accept their offspring as legitimate children and heirs.⁹⁰ Canon laws forbidding remarriage to those who had initially married a cleric, monk, or nun had no parallel in the new civil law. The traditional assumption that vows to chastity and celibacy automatically dissolved betrothals and unconsummated marriages found acceptance only among the early conservative jurists, such as Kling, Schürpf, and Apel. For Luther and many others, these were "accursed man-made regulations which seem only to have entered the church to multiply the dangers, the sins, and the devils there!"⁹¹ (2) The reformers rejected or simplified the intricate restrictions on those related by blood, family, spiritual and legal ties. Only early Lutheran jurists and legis-

88. For the views of jurists and theologians, see DIETRICH, *supra* note 22, at 65-66, 102, 128-29 and Köhler, *Gutachten der Juristen Nürnberg über die Ehesachen erstattet an Markgraf Georg zu Brandenburg*, 11 ARCHIV FÜR REFORMATIONSGESCHICHTE 254, 266ff. (1914), quoted in HARVEY, *supra* note 36, at 154. The error of quality is cited as a ground for annulment in the Kurbrandenburg Church Ordinance (1540) in RICHTER, *supra* note 37, at Vol. 1, 323ff. Although the statutes of the sixteenth century make little mention of these impediments, studies of the case law of a number of cities show that these impediments protecting consent were enforced. See DIETRICH *supra* note 22, at 157-58.

89. See LUTHER, *supra* note 1, at 28; Vol. 35, 138; M. BUCER, COMMONPLACES OF MARTIN BUCER 406ff. (D. Wright trans. and ed. 1971); and discussion of other reformers' views in DIETRICH, *supra* note 22, at 78ff., 110ff. The conservative jurists, such as Kling and Schürpf, however, rejected this impediment with great hesitation; Schürpf, in fact, by 1536, considered the children of clerics to be illegitimate and recommended that legacies and inheritances not be bequeathed to them. *Id.*, 111.

90. Church Ordinances of Northeim (1539), Kurbrandenburg (1540), Braunschweig-Wolfenbüttel (1543) as well as the Consistory Ordinance of Wittenberg (1542) in RICHTER, *supra* note 37, at Vol. 1, 287ff., 323ff., 367ff., and Vol. 2, 56ff.

91. SELECTIONS, *supra* note 31, at 335. For the view of the early jurists, see DIETRICH, *supra* note 22, at 128-29.

lative draftsmen accepted the canon law impediment of consanguinity which permitted annulment of marriages between parties related by blood to the fourth degree.⁹² Several other theologians permitted restrictions on parties related by blood only to the third or to the second degree. Both positions found statutory expression.⁹³ Luther's repeated arguments for adopting the slender group of impediments of consanguinity set forth by *Leviticus* were greeted with little sympathy.⁹⁴ Similarly, the canon law impediments of affinity and public decorum—which proscribed marriage between a person and the blood relative of his or her deceased spouse or fiance to the fourth degree—were accepted in qualified form only by the early Lutheran jurists and

92. The early writers who adopted this position—Brenz, Kling, Clammer, Mauser, Monner, and, possibly also, Schneidewin—accepted the traditional doctrine as a *restriction* on marriage; they advocated *annulment* of consummated marriages only if the parties were related by blood to the second degree. To support their position, these early writers cited Scripture (*Lev.* 18:6-13) for the first degree; Roman law (D. 23, 2, 53, 68) and Scripture for the second; canon law and Germanic law for the third; and canon law for the fourth. See DIETRICH, *supra* note 22, at 134-5.

It should be noted that strict enforcement of the impediment of consanguinity to the fourth degree eliminated for one person several hundred people as prospective marriage partners—an onerous restriction for those who lived in isolated, small communities.

93. Osiander's position, which accepted restrictions on blood relatives to the third degree, is neatly summarized by HARVEY, *supra* note 36, at 250:

Osiander proposed four rules by which one could determine which degrees of relationship were forbidden: whatever wife is forbidden to me, the same woman's brother or spouse is forbidden to my sister; female and male sex makes no difference in the degrees of blood relationship; whatever is forbidden in the ascending line is also forbidden in the descending line; whatever man my wife cannot marry after my death because she has been my wife, the same man's wife is forbidden to me after his death.

See DIETRICH, *supra* note 22, at 99 who discusses the other reformers' argument for restrictions only to the second degree. Impediments of consanguinity to the third degree were accepted by the Württemberg Marriage Ordinance (1537), the Cellisches Ehebedenken (1545), the Mecklenburg Church Ordinance (1557), the Hessen Reformation Ordinance (1572), the Mecklenburg Policy Ordinance (1572), the Lübeck Ordinance (1581) and others cited in RICHTER, *supra* note 37, at Vol. 1, 280; SEHLING, *supra* note 37, at Vol. 1, 296 and Vol. 5, 212, and SCHMELZEISEN, *supra* note 37, at 50ff. Impediments of consanguinity to the second degree were accepted by the Saxon General Articles (1557) in RICHTER, at Vol. 2, 178ff.

94. Luther writes:

I will now list for you the persons whom God has forbidden, *Leviticus* 18, namely, my mother, my stepmother; my sister, my stepsister; my child's daughter or stepdaughter; my father's sister; my mother's sister. . . . From this it follows that first cousins may contract a godly and Christian marriage, and that I may marry my stepmother's sister, my fathers' stepsister, or my mother's stepsister. Further, I may marry the daughter of my brother or sister, just as Abraham married Sarah. None of these persons is forbidden by God, for God does not calculate according to degree as the jurists do, but enumerates directly specific persons.

LUTHER, *supra* note 1, at 23. See also BUCER, *supra* note 89, at 410. The Levitical law of impediments of consanguinity was adopted by later statutes, e.g., the Brandenburg Ordinance (1694) and the Prussian Cabinet Order (1740), discussed in SCHMELZEISEN, *supra* note 37, at 51-52.

draftsmen.⁹⁵ The arguments by theologians to reduce these restrictions to "in-laws" in the third, second, or even first degrees all came to legislative expression.⁹⁶ (3) The spiritual impediments, prohibiting marriages between godparents and their children, were rejected by virtually all the reformers and draftsmen.⁹⁷ (4) Legal impediments, proscribing marriages between a variety of parties related by adoption, were liberalized.⁹⁸ (5) A number of jurisdictions that had accepted Luther's reform of the promise doctrine rejected the canon law impediment of multiple relationships. The canonists had maintained that any betrothal was dissolved if one of the parties made a subsequent marriage promise to, or had sexual relations with, another. This rule was adopted by the reformers only for conditioned betrothal promises. They regarded unconditioned public promises of betrothal as indissoluble and thus superior to any subsequent physical or verbal commitments to marriage.⁹⁹

The reformers rejected the impediments of unbelief and crime which had been designed to protect the sanctity of the marriage sacrament. The canonists had prohibited marriage between Christians and non-Christians and permitted annulment where one party had permanently left the church. Only those couples who had been sanctified by baptism and who remained true to the faith could symbolize the union of Christ and His church. To the reformers, marriage had no such symbolic Christian function and thus no prerequisites of baptism or unanimity of faith.¹⁰⁰ The canonists had also prohibited marriage to the person who had done public penance or who was guilty of certain sexual crimes. For his or her marital union would be constantly perverted by this grave former sin, and thus neither he nor his spouse could receive the sanctifying grace of the sacrament. To the reformers, marriage imparted no such sanctifying grace and thus required no

95. DIETRICH, *supra* note 22, at 135-36.

96. *Id.*, 100, 161.

97. *Id.*, 100, 136. Though most statutes silently ignore the spiritual impediments, a few statutes explicitly deny their validity, e.g., the Church Ordinance of Lower Saxony (1585) and the Braunschweiger Policy Ordinance (1618) in SCHMELZEISEN, *supra* note 37, at 53.

98. The legal impediment was retained by a few early reformers such as Kling, Schürpf and Brenz. Many later jurists who rejected the impediment still insisted that the adopted child be granted the full rights of protection and inheritance accorded the natural child. *See id.*, at 101, 137 and the Württemberg Marriage Ordinance (1537) in RICHTER, *supra* note 37, at Vol. 1, 279ff.

99. See the Cellisches Ehebedenken (1545), the Consistory Ordinance of Goslar (1555), and the Marriage Ordinance of Dresden (1556) in SEHLING, *supra* note 37, at Vol. 1, 295; RICHTER, *supra* note 37, at Vol. 2, 166 and SEHLING, *supra*, at Vol. 1, 343. *Cf. supra* note 88 and accompanying text on the reformers' related position on the error of quality.

100. DIETRICH, *supra* note 22, at 68, 102.

such prerequisite purity. To be sure, Luther writes, "sins and crimes must be punished, but with other penalties, not by forbidding marriage. . . . David committed adultery with Bathsheba, Uriah's wife, and had her husband killed besides. He was guilty of both crimes, yet he [could take] her to be his wife."¹⁰¹

Given the importance attached by the reformers to the physical union, they were understandably receptive to the canonists' physical impediments. Thus the impediment of permanent impotence, and prohibitions against polygamy and bigamy were unanimously accepted.¹⁰²

E. *The Law of Divorce and Remarriage*

The reformers' attack on the canon law of impediments was closely allied with their attack on the canon law of divorce. Just as they discarded many impediments as infringements on the right to enter marriage, they rejected the canon law of divorce as an abridgement of the right to end one marriage and to enter another.

The Roman Catholic Church had, for centuries, taught that (1) divorce meant only separation of the couple from bed and board; (2) such separation had to be ordered by an ecclesiastical court on proof that one party had committed adultery, brutalized the other, or contracted a contagious disease; and (3) despite the divorce, the sacramental bond between the parties remained intact, and thus neither party was free to remarry. This stern law of divorce was partly mitigated by the law of impediments which permitted many parties to dissolve putative marriages and enter others. But the declaration of annulment simply meant that the marriage never existed because it had been contracted improperly. It often also meant that the parties sinned gravely in joining together and were subject to penitential (and, at times, also legal) discipline. Annulments did not dissolve valid consummated marriages. Once properly established, the marriage bond could never be severed, even if the parties became bitter enemies. This traditional doctrine the reformers rejected with arguments from Scripture, history, and utility.

In the reformers' view of Scripture, marriage was a natural institution of the earthly kingdom, not a sacramental institution of the

101. LUTHER, *supra* note 1, at 26. The story of David and Bathsheba is reported 2 *Samuel* 11:1-27.

102. These physical factors, however, were more frequently regarded by the reformers as grounds for divorce rather than for annulment. The distinction is discussed in the following sub-section.

heavenly kingdom. The essence of marriage was the cleavage and the community of husband and wife in this life, not their sacramental union in the life to come.¹⁰³ For a couple to establish "a true marriage" in this earthly life, wrote one reformer, "God requires them to live together and be united in body and mind . . . The proper end of marriage is . . . the communicating of all duties, both divine and human, each to the other with the utmost benevolence and affection."¹⁰⁴ Irreconcilable separation of the parties was tantamount to dissolution of the marriage, for the requisite benevolent communion between the parties had been destroyed. Furthermore, the social tasks of marriage could no longer be carried out. The Roman Catholic teaching that permanently separated couples were still bound in marriage rested on the unbiblical assumption that marriage is an eternally binding sacrament.

Furthermore, the reformers charged, for the church to equate divorce with judicial separation and to prohibit divorcees from remarriage had no basis in Scripture. The term '*divortium*', as used in Scripture, means dissolution of marriage, not simply separation. No philological evidence from Biblical or early patristic times suggests otherwise. The Roman Catholics had improperly introduced their interpretation of the term in order to support their sacramental concept of marriage.¹⁰⁵ Where Scripture permits divorce, it also permits remarriage. "In the case of adultery [for example]," Luther writes, "Christ permits divorce of husband and wife so that the innocent per-

103. The reformers often quoted *Genesis*. 2:24 in support of their view: "Therefore a man leaves his father and mother and cleaves to his wife, and the two become one flesh." The reformers set forth their views on divorce and remarriage in a variety of tracts. See, e.g., LUTHER, *supra* note 1, Vol. 46, at 276ff.; MELANCHTHON, *supra* note 22; id., 7 CORPUS REFORMATORIUM 487 (C. Bretschneider ed. 1843); BUGHENHAGEN, *supra* note 45, at folio 171ff.; BRENZ, *supra* note 45, at folio 185ff.; SCHNEIDWIN, *supra* note 45, at 484ff.; MAUSER, *supra* note 45, at 335ff.; MONNER, *supra* note 45, at 203ff.; and sources cited *infra* notes 108, 111-12, 116-17. For general discussions, see H. HESSE, EVANGELISCHES EHESCHEIDUNGSRECHT IN DEUTSCHLAND (1960); F. ALBRECHT, VERBRECHEN UND STRAFEN ALS EHESCHEIDUNGSGRUND NACH EVANGELISCHEN KIRCHENRECHT (1903); J. GRABNER, UEBER DESERTION UND QUASIDESERTION ALS SCHEIDUNGSGRUND NACH DEM EVANGELISCHEN KIRCHENRECHT (1882); A. RICHTER, BEITRÄGE ZUR GESCHICHTE DES EHESCHEIDUNGSRECHT IN DER EVANGELISCHEN KIRCHE (1858).

104. BUCER, *The Judgment of Martin Bucer Touching Divorce taken out of the second book entitled, The Kingdom of Christ*, in THE COMPLETE PROSE WORKS OF JOHN MILTON 465 (1643-1648; repr. ed. 1959).

105. BUCER, *supra* note 84, at 416-7; LUTHER, *supra* note 1, at Vol. 46, 275-281. See also J. GREVE, DIE EHESCHEIDUNG NACH DER LEHRE DES NEUEN TESTAMENTS 225ff. (1873). The Roman Catholic interpretation of divorce, however, was also rooted in the teachings of the Church Fathers, whom the reformers also cited in support of their exegesis. See, e.g., GRATIAN, DECRETUM II. 32, 1-16 who derives his interpretation of the term from a number of Church Fathers, especially Augustine.

son may remarry."¹⁰⁶ Other reformers considered the sentence of divorce and the right of remarriage to be "one and the same."¹⁰⁷ For the divorcee, like any single person, had to heed God's duty to form families and to accept God's remedy against incontinence and other sexual sins. To deprive the divorcee of the spiritual and physical benefits of marriage, as the Roman Catholic Church had done, could not be countenanced. It was unbiblical and led to all manner of sexual sin.

A number of reformers bolstered these Scriptural arguments for divorce and remarriage with arguments from history. They adduced support for their Biblical exegesis from the commentaries of the Church Fathers. They found a wealth of precedent for laws of divorce and remarriage in the Mosaic law, the ordinances of the early church, and the decrees of the Christian Roman emperors.¹⁰⁸

These historical laws of divorce, however, were hardly commensurate with the teachings of the Gospel. Christ had permitted divorce only on grounds of adultery and only as a special exception to the general command "what God has joined together let not man put asunder."¹⁰⁹ The laws of Moses, of the early Church, and of the Roman Empire, however, had put marriages asunder for many other reasons besides adultery. The Mosaic law had permitted divorce for indecency and incompatibility of all kinds. In Roman law, a person could divorce a spouse who was guilty of treason or iconoclasm, who had committed one of many felonies or fraudulent acts against third parties, or who had abused, deserted, threatened or, in other ways, maltreated members of their family. Divorce was also permitted if a husband wrongly accused his wife of adultery or if a wife was guilty of shameful or immoral acts (such as abortion, bigamy or exhibitionism), became delinquent, insolent, or impotent or persistently refused to have sexual relations. In the later Roman Empire, divorce was even permitted by mutual consent of the parties. The innocent party was, in most instances, permitted to remarry another. The early church not only acquiesced in this liberal law of divorce but was the

106. LUTHER, *supra* note 1, at 30-31.

107. Bucer, quoted and discussed by OZMENT, *supra* note 2, at 84.

108. Bucer's writings on divorce provide a particularly good example of such interwoven Scriptural and historical arguments; they are filled with loosely conjoined quotations from Scripture and the Church Fathers, Roman law and the Stoics. See BUCER, *supra* note 104, at 447ff. and *supra* note 89, at 407ff. For the historical arguments of other reformers, see DIETRICH, *supra* note 22, at 103ff., 142ff.

109. *Mark* 10:2-12; *Luke* 16:18; *Matthew* 5:31-32, 19:3-19.

first to advocate the adoption of many of its provisions.¹¹⁰ Such liberal laws remained in constant tension with Christ's command that all but the unchaste must remain indissolubly bound.

The reformers resolved this tension by distinguishing between moral laws designed for Christians and civil laws designed for the sinful earthly kingdom. Christ's command, the reformers taught, is an absolute moral standard for Christians. It demands of them love, patience, forgiveness, and a conciliatory spirit. It sets out what is absolutely right, what the true law would be if the earthly kingdom were free from sin and populated only by perfect Christians. The earthly kingdom, however, is fallen and many of its sinful citizens disregard the moral law. Thus it becomes necessary for civil authorities to promulgate laws that both facilitate and protect marriage and its social functions as well as maintain peace and order in sinful society. The positive laws of the German princes, like those of Moses and the Roman emperors, therefore, must inevitably compromise moral ideals for marriage. They must allow for divorce and remarriage.¹¹¹ Luther wrote,

It might be advisable nowadays, that certain queer, stubborn, and obstinate people, who have no capacity for toleration and are not suited for married life at all, should be permitted to get a divorce, since people are as evil as they are, 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.¹¹²

110. *THEODOSIAN CODE* 3.16.1,2 (trans. and ed. C. Pharr 1959); *JUSTINIAN CODE* 5.17.8,9,10 in *THE CIVIL LAW* (S.P. Scott trans. and ed. 1932). Divorce by mutual consent, permitted by Emperor Anastasius in 497, was rejected some forty years later in Justinian's *Novella* 117. 8-14 in *id.* For a discussion of the Roman law of divorce, see P. CORBETT, *THE ROMAN LAW OF MARRIAGE* 218ff. (1930). For a discussion of the influence of the early Christian church on the Roman laws of divorce, see E. JONKERS, *HET INVLOED VAN HET CHRISTENDOM OP DE ROMANISCHE WETSGEVING BETREFFENDE HET CONCUBINAAT EN DE ECHTSCHEIDING* (1938).

111. LUTHER, *supra* note 1, at Vol. 21, 94ff.; BUCER, *supra* note 89, at 411ff.; and the views of Brenz and Bugenhagen discussed by OZMENT, *supra* note 1, at 89 and by SPRENGLER-RUPPENTHAL, *supra* note 50, at 395ff.

112. LUTHER, *supra* note 1, at Vol. 21, 94. Brenz offers a similar perspective: Because people who marry remain different and some totally lack the will to agree and cooperate, in time obstinacy and hatred overwhelm some marriages. For this reason, and in order to protect such couples from greater harm and unhappiness, Moses in the Old Testament favored their divorce, reasoning that while it did not accomplish anything positive, it at least prevented further and greater evil. J. BRENZ, *WIE IN EHESACHEN* (1531), quoted by OZMENT, *supra* note 2, at 89. Cf. also the sentiment of Bucer:

The Kingdom of the World . . . Christ entrusted to the laws of Moses and any other laws instituted for the common peace and probity, while himself he presented as the

Laws of divorce and remarriage, like other positive laws, must thus be inspired by norms of Scripture and morality as well as by concerns of utility and good governance.

By conjoining these arguments from Scripture, utility, and history, the reformers established that (1) divorce in the modern sense had been instituted by Christ; (2) the expansion of divorce was a result of sin and a remedy against greater sin; and (3) God had revealed the expanded grounds for divorce in history. On this basis, the reformers successfully advocated a new civil law of divorce and remarriage. They specified the proper grounds for divorce and the procedures which estranged couples had to follow.

The theologians and legislative draftsmen unanimously accepted adultery as a ground for divorce on the authority of Scripture and frequently also of Roman law and early canon law.¹¹³ Theologians such as Luther and Bugenhagen, however, advocated that the couple first be given time to resolve the matter privately. They instructed adulterers to seek forgiveness and innocent spouses to be forgiving; they further urged pastors and friends to sponsor the mending of this torn marriage in any way. These recommendations found statutory support. A number of marriage ordinances repeated the reformers' prescriptions.¹¹⁴ Criminal statutes provided that punishment of the adulterer could not commence until the innocent party sued for divorce. Absent such suits, a judge could begin criminal proceedings against an adulterer only if his or her violation was "open, undoubted,

king of the kingdom of those who believe in him [laws that required] repentance and committed of themselves to the gracious will of God. . . . But even though the magistrate may personally keep in view the aim of inward integrity and blamelessness, nevertheless his commission extends only to the cognizance of outward conduct, and the goal assigned to him is the maintenance of public peace and quiet and wholesome decent behavior.

BUCER, *supra* note 89, at 411-12. See also the similar views of Melanchthon and Bugenhagen discussed in RICHTER, *supra* note 103, at 32ff. and ALBRECHT, *supra* note 103, at 12ff.

113. See the numerous church ordinances and other statutes quoted and discussed by DIE-TRICH, *supra* note 22, at 12-14, 164; HESSE, *supra* note 103, at 31-33; and ALBRECHT, *supra* note 103, at 43-46. The Church Ordinance of Lübeck (1531) and Marriage Ordinance of Württemberg (1537), drafted by Brenz, as well as the Marriage Ordinance of Pfalz (1563) and Church Ordinance of Huttenberg (1555) cite Roman law prominently alongside Scripture in support of this ground for divorce. See SEHLING, *supra* note 37, at Vol. 5, 356; RICHTER, *supra* note 37, at Vol. 1, 180 and Vol. 2, 257, 163. Melanchthon and Kling refer several times to earlier canonical and patristic writings in their discussions of adultery. MELANCHTHON, *supra* note 22 and 103 and KLING, *supra* note 45, folio 101v. See also RICHTER, *supra* note 103, at 29-30 for a discussion of Kling's views.

114. LUTHER, *supra* note 1, at 32; OZMENT, *supra* note 2, at 85ff.; HESSE, *supra* note 103, at 32.

and scandalous.”¹¹⁵ Even in such cases, authorities preferred less severe penalties (not banishment or imprisonment) that would still allow the couple to rejoin. Where efforts of private reconciliation failed, and continued cohabitation of the parties yielded only misery and threats to the safety of the parties and their children, the innocent spouse could sue for divorce. He or she was then permitted to remarry, after a time of healing. The adulterer faced stern criminal sanctions scaled to the egregiousness of the offense. These ranged from fines and short imprisonment to exile and execution in the case of repeat adulterers. The call by many reformers to execute all divorced adulterers found little acceptance among the authorities, though many jurisdictions, in response, stiffened their penalties for adultery. Only the egregious repeat offender was subject to execution.¹¹⁶

Though a few theologians and legislative draftsmen accepted adultery as the only ground for divorce,¹¹⁷ many others defended a far more expansive divorce law.

Desertion or abandonment was a widely accepted ground for di-

115. *Bambergisches Halsgericht und rechtliche Ordnung*, Art. 145 (1507) and *Constitutio Criminalis Carolina*, Art. 120 (1532), quoted in HARVEY, *supra* note 36, at 117-18. Both criminal statutes were drafted by the great criminal law reformer, Johann von Schwarzenberg, a friend and protege of Luther and other Lutheran reformers. On Schwarzenberg, see Berman, *Law and Belief in Three Revolutions*, 18 VAL. L. REV. 569, 582-85 (1984); W. SCHEEL, JOHANN FREIHERR ZU SCHWARZENBERG (1905). On the marriage provisions in the Bambergensis and Carolina, see Schmidt, *Sinn und Bedeutung der Constitutio Criminalis Carolina als Ordnung des materiellen und prozessualen Rechts*, 83 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Ger. Ab.) 239 (1966) and R. HIS, GESCHICHTE DER DEUTSCHEN STRAFRECHTS BIS ZUR KAROLINA 140ff. (1928).

116. For the views of the reformers on capital punishment of adulterers, and the responses of civil authorities to these views, see SELECTIONS, *supra* note 31, at 32-33; BUCER, *supra* note 89, at 410-11; DIETRICH, *supra* note 22, at 105ff.; HARVEY, *supra* note 36, at 113ff.; KOCH, *supra* note 37, at 141ff.; and KÖHLER, *supra* note 28, at 109ff. The Bambergensis and Carolina, however, ordered “death by the sword” as criminal punishment for adultery; these statutes further provided that innocent spouses who, on discovery of the philandering parties, immediately killed one or both of them, were not subject to penalty. Such provisions, which had been part of Germanic law for centuries, were only rarely enforced by the end of the sixteenth century. Even where the adulterer was spared, however, he or she was denied the right to remarry and was subject to severe penalty when prosecuted for subsequent acts of prostitution, homosexuality, and other sexual crimes. See SCHMELZEISEN, *supra* note 37, at 53-54.

117. This was the view of, e.g., Ambrosius Blarer and Johannes Oekolampadus, among theologians, and Schürpf, Schneidewin, Kling, and the draftsmen of the Church Ordinances of Schwabisch-Hall (1531) and of Lower Saxony (1585), among jurists. Johannes Brenz initially permitted divorce only on this ground, but later expanded the grounds for divorce. Even in this later period, however, Brenz permitted remarriage only to victims of adultery, and exacted ecclesiastical penalties against church members who divorced for reasons other than adultery. See KÖHLER, *supra* note 35, at 302; HESSE, *supra* note 103, at 32-33; ALBRECHT, *supra* note 103, at 14-16; and SCHMELZEISEN, *supra* note 37, at 61.

voce among the reformers. A party who deserted his or her spouse and family destroyed the bond of communal love, service, and support needed for the marriage to survive and for children to be properly nourished and reared. Not every absence of a spouse, however, could be considered an abandonment. Jurists, such as Schneidewin and Bugenhagen, insisted that the abandonment be willful and malicious; this requirement was repeated in several statutes.¹¹⁸ No divorce was thus permitted if the absent partner was serving the prince's army, engaged in study or business abroad, or was visiting a foreign place. Divorce for desertion was permitted only where the partner's absence was completely inexcusable and inequitable, left the spouse and family in grave danger, or was so unreasonably prolonged that the party had presumably died or fallen into delinquency or adultery. The deserted spouse was in such cases free to remarry. The deserter was regarded and punished as an adulterer.¹¹⁹ Where the deserter never returned, the spouse could, after a designated period of time, petition for divorce and for the right to marry another.

Quasi-desertion, the unjustifiable abstention from sexual intercourse, found limited acceptance as a ground for divorce. Luther, Brenz, and Bucer, and the jurist Clammer argued that voluntary abandonment of such an essential aspect of marriage was tantamount to abandonment of marriage itself. Furthermore, it violated the Apostle Paul's injunction that spouses abstain from sex only by mutual consent. Luther counselled the deprived spouse to warn the other of his or her discontent, and to invite the pastor or friends to speak with the spouse. If the spouse remained abstinent, he permitted divorce.¹²⁰ A few statutes adopted this teaching and further permitted remarriage to the deprived spouse.¹²¹

At the urging of several liberal Lutherans, most notably Bucer and Sarcerius, numerous other grounds for divorce sporadically

118. Among the numerous statutes quoted and discussed by HESSE, *supra* note 103, at 33-35; DIETRICH, *supra* note 42, at 17-25; GRABNER, *supra* note 103, at 63ff.; and SCHMELZEISEN, *supra* note 37, at 60-61, see especially the Church Ordinances of Pommern (1535) and Lippische (1538), in RICHTER, *supra* note 37, at Vol. 1, 250ff. and Vol. 2, 499ff. For a general historical overview of divorce based on desertion, see Hinschius, *Beiträge zur Geschichte des Desertionsprozesses*, 2 ZEITSCHRIFT FÜR KIRCHENRECHT 28 (1861).

119. See, e.g., the Church Ordinances of Goslar (1531) and Cellische (1545) and the Consistory Ordinance of Mecklenberg (1571) in RICHTER, *supra* note 37, at Vol. 1, 156; SEHLING, *supra* note 37, at Vol. 1, 295ff., and Vol. 5, 239ff.

120. LUTHER, *supra* note 1, at 33-34; DIETRICH, *supra* note 22, at 105-106, 145; DIETRICH, *supra* note 42, at 25-31.

121. Church Ordinances of Lippische (1538), Göttingen (1542), Mecklenberg (1552), the Württemberg Marriage Ordinance (1553) and the Consistory Ordinance of Prussia (1584) in RICHTER, *supra* note 37, at Vol. 1, 365, Vol. 2, 120, 130, 466, 499.

gained acceptance in Lutheran territories. Already in the 1520s, Zurich and Basel recognized, alongside adultery and desertion, impotence, grave incompatibility, sexually incapacitating illnesses, felonies, deception, and serious threats against the life of a spouse as grounds for divorce.¹²² By the 1550s, confessional differences between the couple, defamation of a spouse's moral character, abuse and maltreatment, conspiracies or plots against a spouse, acts of incest and bigamy, delinquent frequenting of "public games" or places of ill repute, and acts of treason or sacrilege all came to legislative expression as grounds for divorce.¹²³ Though apparently no single marriage statute in this period explicitly adopted all these grounds for divorce, a few statutes did permit divorce "on any grounds recognized by Scripture and the Roman law of Justinian."¹²⁴ Whether courts in these territories actually enforced the expansive Roman law of divorce has, however, not been closely studied.

The reformers insisted that divorce, like marriage, be a public act. Just as a couple could not form the marriage bond in secret, so they could not sever it in secret. They had to inform the community and church of their intentions and petition a civil judge to order the divorce.¹²⁵ This requirement of publicity was a formidable obstacle to divorce. Couples who publicized their intent to divorce invited not only the counsel and comfort of friends and pastors but frequently also the derision of the community and the discipline of the church. Furthermore, judges had great discretion to deny or delay petitions for divorce and to grant interim remedies short of this irreversible remedy. Particularly in conservative courts, the petitioner had a heavy burden of proof to show that the divorce was mandated by statute, that all efforts at reconciliation had proved fruitless, and that no alternative remedy was available.¹²⁶

SUMMARY AND CONCLUSIONS

For more than three centuries before the Lutheran Reformation,

122. OZMENT, *supra* note 2, at 93.

123. See the numerous statutory provisions listed in DIETRICH, *supra* note 42, at 31ff.; HESSE, *supra* note 103, at 35ff. and KÖHLER, *supra* note 35, at 303ff.

124. See the Church Ordinances of Hannover (1536) and Huttenberg (1555), and the Marriage Ordinance of Pfalz (1563), quoted in DIETRICH, *supra* note 42, at 31-32. A similar provision is recommended by SACERIUS, *supra* note 45, at folio 216.

125. See, e.g., LUTHER, *supra* note 1, at Vol. 36, 102ff., Vol. 45, 30ff., and Vol. 46, 311ff.

126. Witness the conservative practices of the courts of Nurnberg, Zurich, and Basel as described in HARVEY, *supra* note 36, at 153ff.; OZMENT, *supra* note 2, at 93ff.; and A. STAEHELIN, DIE EINFÜHRUNG DER EHESCHIEDUNG IN BASEL ZUR ZEIT DER REFORMATION 101ff. (1957).

Roman Catholic concepts and laws of marriage had dominated Germany. Marriage, the Church had taught, was at once an institution of creation, a sacrament of the Church, and a legal relation between two fit parties. Marriage was instituted at creation to permit man to beget and raise children and to direct his passion to the service of the community. Yet marriage was subordinated to celibacy; propagation was made less virtuous than contemplation. Marriage was also raised to the dignity of a sacrament. It symbolized the indissoluble union between Christ and His Church and thereby conferred sanctifying grace upon the couple and the community. Couples could perform the sacrament in private, provided they were capable of marriage and complied with rules for marriage formation. As a legal relation, properly contracted, marriage prescribed a relation of love, service, and devotion and proscribed unwarranted recission of or disregard for one's obligations and covenant under the marriage contract.

The Church built an intricate body of marriage law upon this conceptual foundation. Because marriage was a holy sacrament, the Church claimed exclusive jurisdiction over it, appropriating and expanding the laws of nature, Scripture, and morality. The canon law punished contraception, abortion, and child abuse as violations of the created marital functions of propagation and childrearing. It proscribed unnatural relations, such as homosexuality, bigamy, and polygamy. It protected the sanctity and sanctifying purpose of the marriage sacrament by deeming valid bonds indissoluble and by impeding or dissolving numerous invalid unions such as those between Christians and non-Christians, between parties related by legal, spiritual, blood, or familial ties, or between parties who could not or would not perform their connubial duties. It supported celibacy by dissolving unconsummated vows to marriage if one party made a vow to chastity, by prohibiting remarriage to those who had married a priest or monastic, and by punishing clerics or monastics who contracted marriage. It ensured free consensual union by dissolving marriages contracted by mistake or under duress, fear, fraud, or coercion.

The Lutheran Reformation gave birth to a new social concept of marriage, and, on that basis, transformed the marriage law of Germany. The reformers, like the Roman Catholics, taught that marriage is a natural, created institution, but they rejected the subordination of marriage to celibacy. Man was too tempted by his sinful passion to forgo marriage. The family was too vital a social institution in God's redemption plan to be hindered. The celibate life had no superior virtue and no inherent attractiveness vis-à-vis mar-

riage and was no prerequisite for ecclesiastical service. The reformers replaced the sacramental concept of marriage with a social concept. Marriage, they taught, was part of the earthly kingdom, not the heavenly kingdom of faith, redemption, and sanctification. Though a holy institution of God, marriage required no prerequisite faith or purity and conferred no sanctifying grace, as did true sacraments. Rather, it had distinctive uses in the life of the individual and of society. It revealed to man his sin and his need for God's marital gift. It restricted prostitution, promiscuity and other public sexual sins. It taught love, restraint, and other public virtues and morals. Any fit man and woman were free to enter such unions, provided they complied with the laws of marriage formation. As part of the earthly kingdom, marriage was subject to the prince, not the pope. Civil law, not canon law, was to govern marriage. Marital disputes were to be brought before civil courts, not ecclesiastical courts. Marriage was still subject to God's law, but this law was now to be administered by the civil authorities who had been called as God's vice-regents to govern the earthly kingdom. Church officials were required to counsel the prince about God's law and to cooperate with him in publicizing and disciplining marriage. All church members, as priests, were required to counsel those who contemplated marriage and to admonish those who sought annulment or divorce. But the church no longer had legal authority over marriage.

The reforms of marriage law introduced in Lutheran Germany gave expression to this reconceptualization of marriage. Civil marriage courts replaced ecclesiastical courts in numerous Lutheran territories, frequently at the instigation of Lutheran reformers. A welter of new civil marriage statutes were promulgated, many replete with Lutheran marriage doctrine and Scriptural marriage laws. Lutheran jurists throughout Germany published treatises on marriage law, affirming and embellishing the basic marriage doctrine set forth by the theologians. The new statutory and learned marriage law, however, like the new marriage doctrine, remained indebted to the tradition. Traditional marriage laws, like prohibitions against unnatural relations and against infringement of marital functions, remained in effect. Impediments that protected free consent, that implemented Scriptural prohibitions against marriage of relatives, and that governed the couple's physical relations were largely retained. Such laws were as consistent with Roman Catholic as with Lutheran concepts of marriage. But changes in marriage doctrine also yielded changes in marriage law. Because the reformers rejected the subordination of

marriage to celibacy, they rejected laws that forbade clerical and monastic marriage, that denied remarriage to those who had married a cleric or monastic, and that permitted vows of chastity to annul vows of marriage. Because they rejected the sacramental nature of marriage, the reformers rejected impediments of crime and heresy and prohibitions against divorce in the modern sense. Marriage was for them the community of the couple in the present, not their sacramental union in the life to come. Where that community was broken, for one of a number of specific reasons (such as adultery or desertion), the couple could sue for divorce. Because man by his lustful nature was in need of God's remedy of marriage, the reformers removed numerous legal, spiritual, and consanguineous impediments to marriage not countenanced by Scripture. Because of their emphasis on the Godly responsibility of the prince, the pedagogical role of the church and the family, and the priestly calling of all believers, the reformers insisted that both marriage and divorce be public. The validity of marriage promises depended upon parental consent, witnesses, church consecration and registration, and priestly instruction. Couples who wished to divorce had to announce their intentions in the church and community and petition a civil judge to dissolve the bond. In the process of marriage formation and dissolution, therefore, the couple was subject to God's law, as appropriated in the civil law, and to God's will, as revealed in the admonitions of parents, peers, and pastors.

Many of these legal changes, to be sure, had other causes. The shift in marriage jurisdiction, for example, resulted as much from German princes who sought to expand their jurisdiction as from the reforms introduced by Lutherans. The new laws of divorce resulted as much from jurists newly enamored of the Roman law of divorce as from the reform of theologians who had denied the sacramental nature of marriage. It was the new concept of marriage introduced by the Lutheran Reformation, however, that provided both the new paradigm and the revolutionary situation needed to stimulate and justify these legal reforms.

An understanding of this history of marriage doctrine and law remains important still today for three reasons. First, it allows us to appreciate the momentousness of the reform now being introduced in American marriage law. Second, it provides a method to analyze and critique these reforms. Third, it provides sophisticated models of marriage doctrine and law that contemporary reformers have not taken into account.

The marriage concepts and laws initially developed by the Roman Catholics and transformed in the Lutheran Reformation are not relics of a culture long past, to be studied by historians and anthropologists alone. Until one or two generations ago, this was our marriage doctrine and law. Concepts and laws of marriage similar to those developed in the Lutheran Reformation were introduced in England, France, Scandinavia, and, later, also in America and were preserved with few changes.¹²⁷ At the turn of the century in this country, leading authorities on marriage law still spoke of marriage as a "state of existence ordained by the Creator," "a consummation of the Divine command 'to multiply and replenish the earth'," "the highest state of existence," "the only stable substructure of social, civil, and religious institutions."¹²⁸ The United States Supreme Court still spoke of marriage as "more than a mere contract," "a sacred obligation," "a holy estate," "the foundation of the family and society, without which there would be neither civilization nor progress."¹²⁹ In the same period, American law, like the law of other Western nations, countenanced only monogamous unions between a man and a woman and punished polygamy, incest, bigamy, and homosexuality. It required that betrothals be formal and that marriages be contracted with parental consent and witnesses. It required marriage licenses and registration and solemnization before civil and/or ecclesiastical authorities. It prohibited marriages between couples related by blood or family ties. It also proscribed or, in some jurisdictions, strongly discouraged marriage where one party was impotent, deranged, or had a contagious disease. Couples who sought to divorce had to publicize their intentions and to petition a court and show adequate cause or fault.¹³⁰

These prevailing concepts and laws of marriage have come under increasing attack in the past twenty years. A growing number of writers have criticized these marriage laws and concepts for their exces-

127. For historical surveys of marriage law in these other countries, see GLENDON, *supra* note 79, at 26ff., 189ff., 316ff.; J. BRISSAUD, *A HISTORY OF FRENCH PRIVATE LAW* 82ff. (R. Howell trans. 2d ed. 1912); HUEBNER, *supra* note 6, at 588ff.; L. STONE, *THE FAMILY, SEX, AND MARRIAGE IN ENGLAND 1500-1800* (1977); H. COING, *EUROPÄISCHES PRIVATRECHT* 224-260 (1985).

128. W. ROGERS, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* 2 (1899)

129. *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888); *Reynolds v. United States*, 98 U.S. 145, 165 (1878); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

130. See, e.g., J. SCHOULER, *A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* (6th ed. 1921); Radin, *Common Law of the Family*, 6 NAT. L. LIB. LEG. REL. 79 (1939); J. MORLAND, *KEEZER ON THE LAW OF MARRIAGE AND DIVORCE* (3d ed. 1946).

sive moralism, their paternalism, their bias toward heterosexual, monogamous unions and against other types of unions. They have sharply criticized the state for its excessive regulation of marriage in the past. They now call for a private contractual model of marriage where each party has equal and reciprocal rights and duties and where the couple has full freedom and privacy to form, maintain, and dissolve their relationship, as they see fit.¹³¹

Courts and legislatures have been far from indifferent to this attack.¹³² Antenuptial contracts between parties determining in advance their duties and rights during and after marriage have gained increasing acceptance.¹³³ Most states have passed no-fault divorce statutes, reducing the divorce proceeding to a mere formality.¹³⁴ Requirements of parental consent and witnesses have disappeared in many jurisdictions. The functional distinction between the rights of the married and the unmarried has been considerably narrowed by a new constitutional law of the family and of sexual privacy. Unmar-

131. See, e.g., Foster, *A "Basic Civil Right of Man"*, 37 *FORD. L. REV.* 51 (1968); Comment, *Marriage as Contract: Towards a Functional Redefinition of the Marriage Status*, 9 *COLUM. J.L. & SOC. PROB.* 607 (1973); Weitzmann, *Legal Regulation of Marriage: Tradition and Change, A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 *CALIF. L. REV.* 1169 (1974); WEITZMANN, *THE MARRIAGE CONTRACT* (1981); and Schulz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *CALIF. L. REV.* 204 (1982) [hereinafter SCHULZ].

132. An overview of marriage law developments in the past decade is provided in W. WEYRAUCH & S. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* (1983) [hereinafter WEYRAUCH & KATZ] and literature cited therein. Note these penetrating observations of GLENDON, *supra* note 79, at 1:

Beginning in the middle 1960s, there has been an unparalleled upheaval in the family law systems of Western industrial societies. Legal norms which had been relatively undisturbed for centuries have been discarded or radically altered in the areas of marriage law, divorce law, the legal effects of marriage and divorce, the legal relationship of parent and child and the status of illegitimate children. . . . The change equals and surpasses in magnitude that which occurred when family law matters passed from ecclesiastical to secular jurisdiction in most Western countries in the age that began with the Protestant Reformation. The change is characterized by progressive withdrawal of legal regulation of marriage formation, dissolution and the conduct of married life, on the one hand, and by increased regulation of the economic and child related consequences of formal or informal cohabitation on the other.

133. One of the leading cases, followed by many jurisdictions, is *Posner v. Posner*, 223 So. 2d 381 (Fla. 1970). For a discussion of the recent case and statutory law, see Clark, *Antenuptial Contracts*, 50 *U. COLO. L. REV.* 141 (1979); Haskell, *Premarital Estate Contract and Social Policy*, 57 *N.C.L. REV.* 415 (1979); SCHULZ, *supra* note 131, at 280ff.; and WEYRAUCH & KATZ, *supra* note 132, at 4-44.

134. The first such statute was passed in California [Cal. Civ. Code § 4506 (West., 1970)]; within a decade, similar statutes were passed in all but two states. See generally, Freed & Foster, *Divorce in the Fifty States*, 14 *FAM. L.Q.* 229 (1981); L. WEITZMANN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 15-51 (1985). For a comparative perspective, see GLENDON, *supra* note 79, at 225-78.

ried persons living with their children have the same rights as married persons living with their children.¹³⁵ Married and unmarried women have the same rights to decide whether to bear or abort a child.¹³⁶ Children of unwed mothers have the same rights as those of married mothers.¹³⁷ Unwed couples have increasingly been given the same reciprocal rights and duties as married couples.¹³⁸ Homosexual couples have begun to gain the same rights accorded heterosexual couples.¹³⁹

Taken as a whole, these sweeping reforms of marriage law, over such a short period of time, are signs of a fundamental upheaval.

An understanding of the history of marriage doctrine and law provides a distinctive insight not only into the scope and significance of the reforms of contemporary marriage law, but also into their conceptual sources. The reforms of contemporary marriage law are usually explained as responses of the law to a new society, with new social and economic roles for women, new concerns to remove discrimination based on sex and sexual preference, new means of fertilization and contraception, new acceptance of single parents and unmarried cohabiting couples, and new recognition of homosexual couples. They are seen as necessary steps to modernize the law: to purge it of its obsolete institutions, to introduce provisions that address contemporary social needs.

This article shows that any such sociological analysis must be

135. See, e.g., *New Jersey Welfare Rights Organ. v. Cahill*, 411 U.S. 619 (1973); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *King v. Smith*, 392 U.S. 309 (1968); *Stanley v. Illinois*, 405 U.S. 645 (1972). See interesting discussions of these and other cases in Noonan, *The Family and the Supreme Court*, 23 CATH. U. OF AM. L. REV. 255 (1973) and Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

136. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). See J. NOONAN, *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* (1979) and WEYRAUCH & KATZ, *supra* note 132, at 235-44.

137. See cases cited *supra* note 136, as well as *Trimble v. Gordon*, 430 U.S. 762 (1977) and *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

138. For a discussion of recent American case and statutory law, see SCHULZ, *supra* note 131, at 280; WEYRAUCH & KATZ, *supra* note 132, at 115-224; and W. O'DONNELL & D. JONES, *THE LAW OF MARRIAGE AND MARRIAGE ALTERNATIVES* (1982). For a comparative perspective, see GLENDON, *supra* note 79, at 78-112 and Agell, *The Swedish Legislation on Marriage and Cohabitation: A Journey Without a Destination*, 29 J. COMP. L. 285 (1981).

139. Though homosexual couples do not, as yet, have the right to marry, there is a growing movement to secure for homosexual couples the same rights and privileges accorded to heterosexual married couples. Among the numerous writings, see T. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 67ff. (1983); *HOMOSEXUALITY AND THE LAW* (D. Knutson, ed. 1980); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); and Comment, *Homosexuals' Rights to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979).

combined with conceptual analysis, that legal reforms must be traced not only to social changes, but also to changes in theological and philosophical concepts, beliefs, and doctrines. For legal doctrine and theological dogma are intimately tied. *Rechtsgeschichte* is inseparable from *Dogmengeschichte*. This is as true today as it was in the time of Luther. Like contemporary reformers, Lutheran reformers were reacting to the social effects of traditional marriage law: priests visiting prostitutes and keeping concubines; widespread homosexuality, rape, incest, pornography, and adultery; unchecked violations of laws against wife abuse, child abuse, abortion, and contraception; numerous clandestine marriages and divorces; and much else. Their reforms of marriage law were, in part, an attempt to purge society of this immorality and abuse. But, more fundamentally, these legal reforms gave expression to the abandonment of traditional Roman Catholic views and the establishment of new Lutheran concepts of marriage and the family. It was in this reform of doctrine and belief that the reform of marriage law found its deeper impetus and strength.

Likewise, the reforms of contemporary marriage reflect not only changes in society but also changes in underlying concepts and beliefs about marriage and marriage law. The beliefs of the Christian past have, over the course of this century, been largely abandoned or privatized. They have become inconsequential in the public square and in the courts of law. It has thus become anachronistic to think that marriage is a distinctive institution of creation; that the family plays a vital social role; that a legal institution like marriage can be outside of the church, yet still holy and subject to Godly law; that when making their marriage vows, parties assume a Godly duty and responsibility; that parents perform a priestly function for their children in giving their consent; that parties minister to their peers when they serve as witnesses; that the state communicates God's law by regulating marriage; that judges perform a profoundly moral function when they decide whether or not to grant a divorce. Because these founding assumption and beliefs have been largely abandoned, traditional doctrines and laws of marriage have lost their meaning and significance, the traditional grounds for distinguishing and protecting marriage and the family have eroded away. Reform has thus become inevitable.

The reform of contemporary marriage law, however, has proceeded without the conceptual and historical consciousness of the Lutheran Reformation. The Lutherans attacked the beliefs and laws of the Roman Catholic tradition in order to establish new concepts and

laws of marriage which they thought were more Biblical, more just, and more socially effective. They made no attempt to develop these concepts and laws on a *tabula rasa*; they looked to the tradition—to Roman law, German law, old canon law, Mosaic law—preserving the wisdom but discarding the folly of the past. Most contemporary reformers of marriage law, by contrast, offer no new paradigm, no new integrated body of marriage concepts and laws to ground and guide their reform. They have hitherto proceeded with primitive notions of individual autonomy, sexual privacy, gender neutrality, and parity. Their reforms have thus been largely pragmatic, not programmatic. Furthermore, these reformers have proceeded largely with historical myopia. There is little awareness of earlier bodies of marriage law and even less awareness of the conceptual foundations of these earlier laws.

To bring to light the past concepts and laws of the Roman Catholic and Lutheran traditions is not to offer a panacea. One cannot uncritically transpose such concepts and laws into our culture. But these traditions offer valuable insights even for our day. From different perspectives, both traditions saw that marriage and the family were of vital importance to the individual and to the preservation of social order, integrity, and morality; that in order to survive, marriage and the family had to be governed externally by a legal authority and internally by a moral authority; that these authorities had to appropriate laws of Scripture, nature, and conscience and also consider the demands of utility and good governance. These time-tested insights should not be lost on a society which no longer seems to recognize the sanctity and utility of marriage and the family or the value and validity of marriage law.