

## Chapter 25

### Law and the Protestant Reformation

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#### Abstract

*The sixteenth-century Protestant Reformation revolutionized not only theology and the church, but also law and the state. This northern European reform movement, though divided into Lutheran, Anabaptist, Anglican, and Calvinist branches, collectively broke the international rule of the medieval Catholic Church and its canon law, and permanently splintered Western Christendom into competing nations and regions. The Reformation also triggered a massive shift of power, property, and prerogative from the church to the state. Protestant states now assumed jurisdiction over numerous subjects and persons previously governed by the medieval church, and they gave new legal form to Protestant teachings. But these new Protestant laws also drew heavily on the medieval *ius commune* as well as on earlier biblical and Roman jurisprudence. This chapter analyses the new legal syntheses that emerged in Protestant lands, with attention to the new laws of church-state relations, religious and civil freedom, marriage and family law, education law, social welfare law, and accompanying changes in legal and political philosophy.*

**Keywords:** Protestantism; Reformation; Lutheranism; Anabaptism; Anglicanism; Martin Luther; John Calvin; Menno Simons; Philip Melancthon; Henry VIII; Thomas Cranmer; Richard Hooker; Calvinism; Church-State Relations; Crime and Punishment; Marriage and Family; Education; Social Welfare; Christianity and Law; Political Theology

#### Introduction

The Protestant Reformation erupted in 1517 with Martin Luther's posting of the 95 Theses on the church door in Wittenberg, and his burning of the medieval canon law books at the city gates three years later. The Reformation soon split into four main branches – Lutheranism, Anabaptism, Anglicanism, and Calvinism -- with ample

regional and denominational variation within each branch. Lutheranism spread throughout the northern Holy Roman Empire, Prussia, and Scandinavia and their later colonies, consolidated by Luther's catechisms and the Augsburg Confession (1530), and by local liturgical books and Bible translations. Anabaptists fanned out in small communities throughout Western and Eastern Europe, Russia, and eventually North America, most of them devoted to the founding religious principles of the Schleitheim Confession (1527). Anglicanism was established in England by King Henry VIII and Parliament in the 1530s, and, once consolidated by the Great Bible (1539) and Book of Common Prayer (1559) spread throughout the vast British Empire in North America, Africa, the Middle East, and India. Calvinist or Reformed communities, modeled on John Calvin's Geneva and anchored by the Geneva Bible and Genevan Academy, spread into portions of the Swiss Confederation, France, the Palatinate, the Lowlands, Scotland, England, and North America. This checkerboard of Protestant communities, living tenuously alongside each other and their Catholic neighbors, was protected for a time by the Peace of Augsburg (1555), Union of Utrecht (1579), Edict of Nantes (1598), Peace of Westphalia (1648), and other peace treaties, though religious persecution and religious warfare were tragically regular events in early modern Europe.

While new confessions, creeds, and catechisms helped to inspire and integrate these Protestant movements, it was new law that usually set them in motion and consolidated them. Hundreds of local "church ordinances" (*Kirchenordnungen*), or "legal reformations" (*Rechtsreformationen*) were issued by Lutheran German cities, duchies, and principalities after 1520, and echoed in national church ordinances in Sweden, Denmark, Norway, Finland, and Iceland over the next half century. Local Anabaptist elders issued short "church orders" to establish and govern their small, self-sufficient Anabaptist communities, many of their rules drawn directly from biblical and early apostolic teachings. Parliament's Supremacy Act (1534) declared the English monarch to be "supreme head" and "defender of faith" in the freestanding Church of England (*Anglicana Ecclesiastica*). Geneva's "Reformation Edict" (1536), modeled on similar edicts passed the decade before in Zurich and other Swiss cities, was echoed in scores of European towns and provinces and later North American colonies that accepted Reformed Protestantism.

All these early Protestant legal declarations were, in part, firm rejections of the law and theology of Roman Catholicism. The Catholic Church had been the universal legal authority of the West since the twelfth century. Medieval church authorities claimed exclusive jurisdiction over doctrine, liturgy, clergy, polity, marriage, family, inheritance, trusts, education, charity, contracts, moral crimes, and more. They also claimed concurrent jurisdiction over many other legal subjects, sometimes filling gaps in local civil rules and procedures, but often rivalling local civil authorities in governing the local population. And the church had huge property holdings – more than a quarter of the land in some regions of Europe – all of which remained under exclusive church control and free from secular taxes and regulation. To exercise this power, the medieval church developed an intricate system of canon laws promulgated by the pope, bishops, and church councils, and enforced by a hierarchy of church courts and clerical officials under the final papal authority of Rome. A vast network of church officials,

immune from secular legal control, presided over the medieval church's executive and administrative functions. The church registered its citizens through baptism. It taxed them through tithes. It conscripted them through crusades. It educated them in church schools. It nurtured them in cloisters, monasteries, chantries, hospitals, and guilds. It cared for them and their families even after death through perpetual obits, indulgences, and foundations. The medieval church was, in Harold Berman's apt phrase, "the first true state in the West."<sup>1</sup> Its canon law was the first international law in place since the fall of Rome and its Roman law in the fifth century.

Already in the fourteenth and fifteenth centuries, strong secular rulers started to rebel against the power, prerogatives, and privileges of the medieval church and put in place legal reforms. In fourteenth-century England, several statutes of "provisors" and "praemunire" limited papal control over local clerical appointments, church taxes, and local property disputes. Beginning in 1414, the Holy Roman Emperors called a series of great church councils that put limits on the operation of canon law and church courts in the Empire, and aimed to regularize papal succession and the appointments of bishops, abbots, and abbesses. In the Pragmatic Sanction of Bourges (1438) and again in the Concordat of Bologna (1516), French kings banned various papal taxes, limited appeals to Rome, required election of French bishops by local church councils called by the king, and subjected French clergy and church property to royal controls. Fifteenth-century Spanish monarchs subordinated church courts to civil courts on many legal subjects, and assumed political and legal control over the inquisition. Fifteenth-century German and Scandinavian princes and city councils passed numerous "legal reformations" that placed limits on church property and religious taxation, disciplined wayward clergy and monastics, and curtailed the jurisdiction of church courts over crime, family, inheritance, and contracts. Medieval reformers like Marsilius of Padua (c. 1280 - c. 1343), John Wycliffe (c. 1330-1384), John Hus (c. 1370-1415), and several others pressed for attendant theological reforms, often at the cost of their lives.

The Protestant Reformers built on these late medieval reforms, but went beyond them. The Reformers now called for full freedom from the medieval Catholic legal regime – freedom of the individual conscience from intrusive canon laws, freedom of political officials from clerical power and privilege, freedom of local clergy from centralized papal and conciliar rule. "Freedom of the Christian" was the rallying cry of the early Protestant Reformation. It led the Reformers to denounce canon law and clerical authority altogether and to urge radical legal and political reforms on the strength of the new Protestant theology. The church's canon law books were burned. Church courts and episcopal offices were forcibly closed. Clerical privileges and immunities were stripped. Mendicant begging was banned. Mandatory celibacy was suspended. Indulgence trafficking was condemned. Annates and tithe payments to Rome or to distant bishops were outlawed. Diplomatic and appellate ties to the pope and his curia were severed. Catholic bishops, priests, and monastics were banished from their homes, sometimes maimed or killed. The church's vast properties and institutions were seized, often with violence and bloodshed. Priceless church art,

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<sup>1</sup> Quoted by Harold J. Berman, *Law and Revolution* (Harvard University Press, 1983), 276.

literature, statuary, and icons were looted, sometimes destroyed. And church sanctuaries, parsonages, and seminaries were confiscated and converted to Protestant control.

The Reformers defended this revolutionary purging of the church as a theological necessity. All the early Protestant leaders – Martin Luther (1483-1546), John Calvin (1509-1564), Thomas Cranmer (1489-1556), Menno Simons (1496-1561), and others – taught that salvation comes through faith in the Gospel, not by works of the Law. Each individual was to stand directly before God, to seek God's gracious forgiveness of sin and to conduct life in accordance with the Bible and Christian conscience. To the Reformers, the Catholic canon law administered by the clergy obstructed the individual's direct relationship with God and obscured simple biblical norms for right living. All the early Reformers further taught that the church was at heart a community of saints, not a corporation of law. Its cardinal signs and callings were to preach the Word, to administer the sacraments, to catechize the young, and to care for the needy. The Catholic clergy's legal rule in Christendom obstructed the church's divine mission and usurped the state's role as God's vice-regent called to appropriate and apply divine and natural law in the earthly kingdom. Protestants did recognize that the church needed internal rules of order to govern its own polity, teaching, and discipline. Church officials and councils needed to oppose legal injustice and combat political tyranny. But, for most early Protestants, law was primarily the province of the state not of the church, of the magistrate not of the pastor.

These new Protestant teachings helped to transform Western law in the sixteenth and seventeenth centuries. The Protestant Reformation broke the international rule of the Catholic Church and the canon law, permanently splintering Western Christendom into competing nations and regions, each with its own religious and political rulers. The Protestant Reformation triggered a massive shift of power and property from the church to the state. State rulers now assumed jurisdiction over numerous subjects and persons previously governed by the church and its canon law.

These massive shifts in legal power and property from church to state in Protestant lands did not, however, signal the secularization of law or the cessation of traditional Christian influences on the law. For all of their early attacks on canon law, Protestant leaders eventually transplanted many Catholic canon law rules and procedures directly into the new Protestant state laws -- some trimmed of theologically offensive provisions, others reformed in light of new teachings, but many retained largely in their medieval forms, but now administered by the state instead of the church. Moreover, in creating other new state laws, Protestant authorities drew anew on Christianized Roman law and medieval civilian jurisprudence, Christian republican political thought, and biblical and Talmudic law, all of which were staples in the new Protestant law faculties. And Protestant leaders worked hard to convert some of their own distinct new theological teachings, especially concerning family, charity, education, and crime, into new legal forms. What emerged from the Protestant Reformation were impressive new legal syntheses that skillfully blended classical and biblical, Catholic and Protestant, civilian and canonical teachings.

This chapter summarizes and illustrates these new legal syntheses born of the Protestant Reformation, with a focus on changes in the laws of church-state relations and religious and civil freedom, marriage and family law, education law, social welfare law, with attention to accompanying changes in legal and political philosophy. Where Lutheranism, Anabaptism, Anglicanism, and Calvinism made distinct contributors, I spell those out separately; where the reforms were comparable across the traditions, I pick illustrative case studies.

## The Law of Church-State Relations and Religious Freedom

**Lutheranism.** The Lutheran Reformation of Germany and Scandinavia territorialized the Christian faith, and gave to the local Christian magistrate ample new political power over civil and spiritual affairs. Luther replaced medieval teachings with a new two kingdoms theory. The “invisible” church of the heavenly kingdom, he argued, was a perfect community of saints, where all stood equal in dignity before God, all enjoyed perfect Christian liberty, and all governed their affairs in accordance with the Gospel. The “visible” church of this earthly kingdom, however, embraced saints and sinners alike. Its members still stood directly before God and still enjoyed liberty of conscience, including the liberty to leave the visible church itself. But, unlike the invisible church, the visible church needed both the Gospel and human law to govern its members’ relationships with God and with fellow believers. The clergy must administer the Gospel. The magistrate must administer the law.

Luther regarded the magistrate as God’s vice-regent in the earthly kingdom, called to elaborate and enforce God’s Word and will and to reflect God’s justice and judgment for earthly citizens. “Law and earthly government are a great gift of God to mankind,” Luther wrote. “Earthly authority is an image, shadow, and figure of the dominion of Christ.” But magistrates also exercise God’s judgment and wrath against human sin. “Princes and magistrates are the bows and arrows of God,” equipped to hunt down God’s enemies near and far, using military power and criminal punishment. The hand of the Christian magistrate, judge, or soldier “that wields the sword and slays is not man’s hand, but God’s.”<sup>2</sup>

Luther further regarded the magistrate as the “father of the community” (*paterpoliticus*). He was called to care for his political subjects as if they were his children, and his political subjects were to “honor” and “obey” him as if he were their parent. Like a loving father, the magistrate was to keep the peace and to protect his subjects from threats or violations to their persons, properties, and reputations. He was to deter his subjects from abusing themselves through drunkenness, wastrel living, prostitution, gambling, and other vices. He was to nurture and sustain his subjects through the community chest, the public almshouse, and the state-run hospital. He was

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<sup>2</sup> Quoted by John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge University Press, 2002), 87-117.

to educate them through the public school, library, and lectern. He was to see to their spiritual needs by supporting the ministry of the locally established church, and encouraging their attendance and participation through the laws of Sabbath observance, tithing, and holy days. He was to see to their material needs by reforming inheritance and property laws to ensure more even distribution of the parents' property among all children. He was to set a moral example of virtue, piety, love, and charity in his own home and private life for his faithful subjects to emulate and to respect.

Luther and his colleagues called on Christian magistrates to build their positive laws on the basis of the Ten Commandments, which they regarded as a universal statement of natural law. "The Decalogue is not the law of Moses," Luther wrote, "but the Decalogue of the whole world, inscribed and engraved in the minds of all men from the foundation of the world."<sup>3</sup> The Christian magistrate is "a voice of the Ten Commandments" within the earthly kingdom, wrote Philip Melanchthon (1509-1560), a Wittenberg theologian and jurist with wide influence in Germany and Scandinavia. "When you think about *Obrigkeit*, about princes or lords, picture in your mind a man holding in one hand the tables of the Ten Commandments and holding in the other a sword."<sup>4</sup>

Melanchthon took this image directly into his theory of political authority and positive law, which he organized using the two tables of the Decalogue. The First Table of the Decalogue, he wrote, undergirded the state's positive laws that govern spiritual morality, the relationship between persons and God. The Second Table undergirded the state's positive laws that govern civil morality, the relationships between persons. As custodians of the First Table of the Decalogue, Melanchthon wrote, the magistrate must not only pass laws against idolatry, blasphemy, and violations of the Sabbath -- offenses that the First Table prohibits on its face. He must also "establish pure doctrine" and right liturgy, "prohibit all wrong doctrine," "punish the obstinate," and root out the heathen and the heterodox.<sup>5</sup> Melanchthon came to this position reluctantly in the 1530s and 1540s, knowing he was departing from Luther's early call for universal religious freedom. But Melanchthon lamented the perennial outbreaks of violent antinomianism, spiritual radicalism, "and "diabolical rages" by those who took too literally Luther's teaching of free grace. To allow such blasphemy and chaos to continue without firm rejoinder, Melanchthon believed, was ultimately to betray God and to belie the essence of the political office. Magistrates must "maintain external discipline according to *all* the commandments" and thus must "prohibit, abolish, and punish these depravities" and "compel them to accept the Holy Gospel."<sup>6</sup>

This was the theoretical basis for the welter of new religious establishment laws set out in the elaborate "church ordinances" promulgated in Lutheran and other

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<sup>3</sup> WA 39/1:478.

<sup>4</sup> G. Bretschneider, ed., *Corpus Reformatorum* (Brunswick: H. Böhlau, 1864), 22:615 [hereafter CR].

<sup>5</sup> *Ibid.*, 22:617-18.

<sup>6</sup> Philip Melanchthon, *Melanchthon on Christian Doctrine: Loci Communes 1555*, trans. and ed. Clyde L. Manschreck (Oxford University Press, 1965), 324-36.

Protestant lands in the sixteenth and seventeenth centuries. These church ordinances both reflected and directed the resystematization of dogma; truncation of the sacraments; reforms of liturgy, devotional life, and the religious calendar; vernacularization of the Bible, liturgy, and sermon; expansion of catechesis and religious instruction in schools and universities; revamping of corporate worship, congregational music, religious symbolism, church art and architecture; radical reforms of ecclesiastical discipline and local church administration; new practices of tithing, baptism, confirmation, weddings, burial; diaconal care, sanctuary, and much more. All these aspects of church and spiritual life had been governed in detail by the medieval church's canon laws and sacramental rules. They were now subject to the Protestant state's religious establishment laws. Particularly after the Peace of Augsburg (1555) and the Peace of Westphalia (1648) confirmed the constitutional principle that each civil ruler was free to establish the religion of his own local polity (*cuius regio eius religio*), these religious establishment laws became increasingly detailed, ornate, and routinized. Vestiges of these laws remain in place in Lutheran lands still today, though strong new policies of religious disestablishment are now afoot.

While the First Table of the Decalogue supported state positive laws governing relations between God and persons, the Second Table supported positive laws governing the relations between persons. Melancthon and Lutheran jurists like Johan Oldendorp (ca. 1486-1567) and Nicolaus Hemming (1513-1600) set out a whole series of positive laws under each Commandment of the Second Table. On the basis of the Commandment to "Honor thy father and mother," they argued, magistrates were obligated to prohibit and punish disobedience, disrespect, or disdain of authorities such as parents, political rulers, teachers, employers, masters, and others. They were also to build the positive laws of authority – constitutional law, administrative law, master-servant laws, and more. The Commandment, "Thou shalt not kill" undergirded laws against unlawful killing, violence, assault, battery, wrath, hatred, merciliness, and other offenses against the bodies of one's neighbors. "Thou shalt not commit adultery" and "Thou shalt not covet thy neighbor's wife or maidservant" were the foundations of laws against sex crimes -- adultery, fornication, incontinence, prostitution, pornography, obscenity, and similar offenses as well as positive laws of marital formation, maintenance and dissolution, child care, custody, and control, parental rights, roles, and responsibilities, and more. The Commandment "Thou shalt not steal" supported positive laws against theft, burglary, embezzlement, and similar offenses against another's property, as well as waste or noxious use or sumptuous use of one's own property. It also supported positive laws of real and personal property, its acquisition, use, maintenance, encumbrance, sale, alienation, and more. On the basis of the Commandment, "Thou shalt not bear false witness," magistrates were to punish all forms of perjury, dishonesty, fraud, defamation, and other violations of a person's reputation or status in the community. And they were to build the positive laws of promises and contracts, of keeping one's word to one's neighbor, as well as the laws of procedure, evidence, and testimony in court proceedings. Finally, on the basis of Commandment, "Thou shalt not covet," magistrates were to punish all attempts to perform offensive acts against another's person, property, reputation, or relationships,

and to establish the basic rules protecting the privacy of one's household from the covetous privations of neighbors.

Many of these aspects of social intercourse had been governed by the Catholic Church's canon law and organized in part by the church's seven sacraments. The sacrament of marriage, for example, supported the positive law of sex, marriage, and family life. The sacrament of penance supported the canon law of crimes against the persons, properties, and reputations of others. The sacraments of baptism and confirmation undergirded the constitutional law of natural rights and duties of Christian believers. The sacrament of holy orders supported the law of the clergy. The sacrament of extreme unction supported the positive laws of burial, inheritance, foundations, and trusts. Lutheran jurists used the Ten Commandments, instead of the seven sacraments, to organize the various systems of positive law. And they looked to the state, instead of the church, to promulgate and enforce these positive laws on the basis of the Ten Commandments and the biblical and extra-biblical sources of natural law and morality. This became a standard way of systematizing and teaching in many early modern Protestant state laws, eventually on both sides of the Atlantic.

**Anabaptism.** Early modern Anabaptists communalized the faith, by expounding a two kingdoms theory that more fully separated the redeemed realm of religion and the church from the fallen realm of politics and the state. Emerging as a new form of Protestantism in the early 1520s, Anabaptists were scattered into various groups of Amish, Brethren, Hutterites, Mennonites, Baptists, and others. Some of the early splinter groups, like the followers of Thomas Müntzer (1489-1525) and Caspar Schveckenfeld (d. 1561) were politically radical or utopian spiritualists. Others, like the Anabaptist sect in Münster under John of Leiden (d. 1536), practiced polygamy for a short time, which they enforced ruthlessly against detractors. But most Anabaptist communities by the mid-sixteenth century were quiet Christian separatists, monogamists, and pacifists, taking their lead from such theologians as Menno Simons, Pilgrim Marpeck (d. 1556), Dirk Philips (1504-1568), and Peter Riedeman (1506-1556) who urged their followers to return to the simple teachings of the New Testament and apostolic church.

Anabaptist communities ascetically withdrew from civil and political life into small, self-sufficient, intensely democratic communities. These communities were governed internally by biblical principles of discipleship, simplicity, charity, and non-resistance. They set their own internal standards of worship, liturgy, diet, discipline, dress, and education. They handled their own internal affairs of property, contracts, commerce, marriage, and inheritance – so far as possible by appeal to biblical laws and practices, not those of the state. And they enforced these internal religious laws not by coercion, but by persuasion, and not for the sake of retribution, but for the redemption of the sinner and restoration of that person to community. Recalcitrant sinners and community members who grew violent, destructive, or persistently betrayed the community's ideals were shunned and if necessary banned from the community. Moreover, when Anabaptist communities grew too large or too internally divided, they deliberately



colonized themselves, eventually spreading Anabaptists from Russia to Ireland to the furthest frontiers of North America.

The state and its law, most Anabaptists believed, was part of the fallen world, which was to be avoided so far as possible in accordance with biblical injunctions that Christians should not be “of the world” or “conformed” to it. Once the perfect creation of God, the world was now a fallen, sinful regime that lay beyond “the perfection of Christ” and beyond the daily concern of the Christian believer. God had built a “wall of separation” (*paries maceriae*) between the redeemed church and the fallen world, Menno Simons wrote, quoting Ephesians 2:14.<sup>7</sup> God had allowed the world to survive by ordaining magistrates and their positive laws who were empowered to use coercion and violence to maintain a modicum of order and peace. Christians should obey the laws of political authorities, so far as the Bible commanded -- paying their taxes, registering their properties, avoiding theft and homicide, keeping their promises, and testifying truthfully. But Christians should avoid active participation in and unnecessary interaction with the world and the state -- avoiding litigation, oath-swearing, state education, banking, large-scale commerce, trade fairs, public festivals, drinking houses, theaters, games, political office, policing, or military service. Most early modern Anabaptists were pacifists, preferring derision, exile, or death to active participation in war or violence. This aversion to common political and civic activities often earned Anabaptists scorn, reprisal, and repression by Catholics and Protestants alike – violent martyrdom in many instances.

While unpopular in its genesis, Anabaptism ultimately proved to be a vital source for Western legal arguments for the separation of church and state and for the protection of the civil and religious liberties of a plurality of all peaceable faiths. Equally important for later legal reforms was the Anabaptist doctrine of adult rather than infant baptism. This doctrine gave new emphasis to religious voluntarism as opposed to traditional theories of birthright or predestined faith, let alone traditional practices of coercing believers to accept the established religious faith or penalizing the wrong religious choices they made. In Anabaptist theology, each adult was called to make a free conscientious choice to accept the faith -- metaphorically, to scale the wall of separation between the fallen world and the realm of religion to come within the perfect realm of Christ. And it was up to God, not to the state or to any other authority, to decide which forms of religions should flourish, and which should fade. In the seventeenth and eighteenth centuries, various Free Church followers, both in Europe and North America, converted this cardinal image into a powerful platform of freedom of conscience and free exercise of religion. Particularly in America, diverse leaders like Roger Williams (ca. 1604-1684), William Penn (1644-1718), Isaac Backus (1724-1806), and John Leland (1754-1841) grounded their religious freedom advocacy in these earlier Anabaptist arguments, and their views helped to shape new American constitutional laws that disestablished religion and protected freedom of conscience and free exercise of religion for all.

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<sup>7</sup> Quoted by Walter Klaassen, *Anabaptism in Outline* (Herald Press, 1981), 245-57.

**Anglicanism.** Whereas Anabaptism communalized the Protestant faith, and Lutheranism territorialized it, Anglicanism nationalized the faith under the final spiritual and political rule of the Christian monarch. King Henry VIII resolved his bitter dispute with the papacy over dissolution of his marriage with Catherine of Aragon from 1527 to 1533 by cutting all legal and political ties with Rome, and declaring the Catholic Church in England to be the separate Anglican Church of England. Henry and early Anglican Reformers like Thomas Cranmer and Thomas Cromwell (1485-1540) pushed through Parliament a series of sweeping new laws that rapidly established the new Anglican order in top-down fashion, and with brutal executions of scores of dissenters and exile for thousands of others. The Supremacy Act (1534) declared the monarch to be the "Supreme Head" of the Church and Commonwealth of England. The Act for the Submission of Clergy and Restraint of Appeals (1534) gave the monarch final authority to appoint, discipline, and dismiss all clergy, to call church councils, to reform the church's doctrine, liturgy, and canon law, and to register church properties and personnel. The Act for First Fruits and Tenths (1534) required church tithes and taxes to be paid to the Crown. The Act Dissolving the Greater Monasteries (1539) and later acts led to the massive seizure and dissolution of monasteries, cloisters, chapels, chantries, guilds, schools, colleges, hospitals, fraternities, almshouses and other properties held by the church, cutting to the heart of the pre-Reformation church-based systems of welfare and education. Within a decade and a half of the break with Rome, the King and his retinue had replaced the Pope and his curia as supreme rulers of the Church of England and its growing colonial empire.

Having seized the church's institutions and properties, the Anglican Reformers also moved rapidly to establish by law the new Anglican faith and worship, but this proved more difficult. Thomas Cranmer did issue, with royal approval, The Great Bible in 1539, an English translation based on the earlier masterwork of William Tyndale (1494-1536) and Miles Coverdale (1488-1569). This text was now to be used for Anglican worship and devotional life. Other Bible translations were censored, and would remain so until the King James Version (1611) became the authorized English Bible. Parliamentary Acts of Uniformity in 1549 and 1552 further mandated the use of Cranmer's Book of Common Prayer in Anglican worship, with escalating penalties for clergy and laity who deviated from its prayers, liturgy, and sacramental rites. The king also approved the Forty-Two Articles of the Faith, a new creed that, while consonant with medieval Catholic tradition on many matters, included a number of familiar Lutheran and Calvinist teachings about God, sin, salvation, and the sacraments and rejected Anabaptist teachings about adult baptism, biblical asceticism, and separation of church and state.

A more sweeping Reformation of Ecclesiastical Law, however, akin to the many legal reforms passed by Continental Protestants, floundered despite repeated efforts to enact it in 1552, 1559, and 1571. This proposed Reformation aimed to retain church courts in England and to maintain their traditional jurisdiction over marriage, tithes, inheritance, defamation, and benefices. But the document also envisioned major new Parliamentary reforms of each of these laws and stronger review of church courts by royal courts. It also proposed sweeping reforms of clerical and lay marriage, rights to

fault-based divorce and remarriage, and annual conferences and regular democratic meetings between bishops, priests, and laity. None of these changes came to pass in the Reformation era. The structure of the church courts, and of the clerical hierarchy altogether, remained largely unchanged, though appeals from church court judgments now went not to the curia in Rome but to a new Court of Delegates in England, staffed by civilians and canonists. The law administered by these Anglican church courts remained largely the canon law of the medieval Catholic church, with only minor changes gradually introduced by Parliament and Convocation over the next three centuries.

This Anglican adherence to legal and religious tradition reflected not only inertia, but also ample resistance of the English clergy and laity to the Crown's heavy-handed top-down reformation of church and state. Moreover, Queen Mary (r. 1553-1558) sought to return England forcibly to full recommunication with Rome. In twin acts of 1553 and 1555, Mary aimed to repeal all the Reformation laws and practices of her father Henry VIII and half-brother Edward VI, to repair England's relations with the papacy, and to restore to the Catholic Church and clergy their traditional power, property, and prerogatives. When church and state officials resisted these changes, too, more than 250 Protestant heretics were executed, and thousands more, called the Marian Exiles, fled to the Continent, leaving the English church, state, and society in turmoil.

During Queen Elizabeth's long reign from 1558 to 1603, England gradually settled on a *via media* between Roman Catholicism and Continental Protestantism, and this settlement, too, was legally prescribed and judicially enforced. Parliament issued an Act of Uniformity (1559) that reestablished clearly the Anglican doctrine, liturgy, and creed of the church and commonwealth. Communicant status in the Anglican Church was now made a condition for citizenship status in the English Commonwealth, for holding high political and religious office, acquiring professional licenses and charters, and for exercising many other basic rights. Parliamentary acts prohibited papal bulls and "traitorous" worship, publications, or teaching by Catholics and Protestant "sectaries," and these laws were enforced firmly in Star Chamber, High Commission, and other royal courts in Elizabeth's reign and even more firmly by her Stuart successors, Kings James I and Charles I. Elizabeth's Parliament further renewed the Act of Supremacy (1559), restoring to the Crown final authority over the Anglican Church's clergy, polity, and property. The English church courts retained their jurisdiction, though new canons introduced piecemeal legal changes in 1571, 1575, 1585, 1597, and 1604. Parliament passed the Poor Relief Act (1598) and Charitable Uses Act (1601) that sought to restore some of the robust pre-Reformation welfare and educational system of England, now largely through Anglican parishes and Crown-chartered private enterprises.

This Elizabethan settlement of church and state, and of law and religion attracted new political and legal theories from such Anglican divines as John Jewel (1522-1571), Edmund Grindal (1519-1583), and Richard Bancroft (1544-1610). The most important defense came in the massive *Laws of Ecclesiastical Polity* by Richard Hooker (1553-1600), who defended the Anglican establishment against more radical Calvinist views of

congregational and presbyterian forms of democratic church government. “The powers that be are ordained by God,” Hooker quoted from Scripture, and reflect God’s authority as supreme monarch over the entire universe, which he rules by his eternal law. The Christian monarch on earth embodies God’s monarchical government in heaven; indeed the monarch is a “god on earth” as Psalm 82:6 put it. And the monarch embraces God’s law for all of religious and civil life.<sup>8</sup> As God’s vice-regent, the monarch is called to promulgate positive laws to instruct humans on how to live together and to live well in Christian communion. While every individual has the rational capacity to ascertain the natural law for their private lives, Hooker wrote drawing on Thomas Aquinas (1225-1274), the monarch’s positive laws of church and state must guide and govern their communal spiritual and temporal lives in accordance with the eternal laws of Christ. While different nations have formed their own voluntary compacts with God and their political rulers, England and its great common law tradition had formed a unique “covenant,” with God’s blessing, whereby the people had consented to this Christian monarchical reign of church, state, and society. Hooker’s defense of Christian monarchy in a unitary church and commonwealth became more expansive in the theories of “the divine right of kings” and absolute monarchy offered by King James I, Sir Robert Filmer (1588-1653), and others in the seventeenth century – theories which John Locke (1632-1704) would later counter directly with his proto-democratic arguments in his *Two Treatises on Government* (1689).

**Calvinism.** Calvinists charted a course between Lutherans and Anglicans who subordinated the church to the state, and Anabaptists who withdrew the church from the state and society. Like Anabaptists, Calvinists insisted on a basic separation of the offices and operations of church and state, leaving the church to govern its own doctrine and liturgy, polity and property, without interference from the state. Calvin set the foundation for this church-state division in the Ecclesiastical Ordinances (1541/1561) of Geneva, which were echoed in many later Calvinist cities. Like Lutherans, in turn, Calvinists insisted that each local polity be an overtly Christian commonwealth that adhered to the general principles of natural law and translated them into detailed new positive laws of religious worship, Sabbath observance, public morality, marriage and family, crime and tort, contract and business, charity and education. Calvin drafted many such laws for Geneva during his tenure from 1541 to 1564, drawing rules variously from the Bible and Talmud, classical Roman law and medieval canon law, and local customs and city ordinances. All these piecemeal laws were eventually integrated into the Civil Edict of Geneva (1568) drafted by Calvinist jurist Germain Colladon (1508-1594). Many other Calvinist cities, provinces, and colonies issued their own local Christian laws, too, often using Geneva as their model and source.

Unlike Lutherans, Anglicans, and Anabaptists, however, Calvinists stressed that both church and state officials were to play complementary roles in the creation of the local Christian commonwealth and in the cultivation of the Christian citizen. Calvinists emphasized more fully than other Protestants the educational use of the natural and

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<sup>8</sup> Richard Hooker, *The Laws of Ecclesiastical Polity*, ed. W. Speed Hill (Harvard University Press, 1977), I.6-11; VIII.2-4.

positive law. Lutherans stressed the “civil” and “theological” uses of the law: the need for law to deter sinners from their sinful excesses and to drive them to repentance. Calvinists emphasized the educational use of the law as well: the need to teach persons both the letter and the spirit of the law, both the civic morality common to all persons and the spiritual morality that becomes the Christian life. It was the church's responsibility to teach aspirational spiritual norms, Calvinists argued. It was the state's responsibility to enforce mandatory civil norms. This division of responsibility was reflected in Geneva in the procedural divisions between the church consistory and the city council. For many non-violent legal issues, the consistory was the court of first instance; it would call parties to their higher spiritual duties, backing their recommendations with (threats of) spiritual discipline. If such spiritual counsel failed, the parties were referred to the city council to compel them, using civil and criminal sanctions, to honor at least their basic civil duties.

In sixteenth-century Geneva and other Swiss cities, the consistory was an elected body of civil and religious officials, with original jurisdiction over cases of marriage and family life, charity and social welfare, worship and public morality. Among most later Calvinists, the Genevan-style consistory was transformed into the body of pastors, elders, deacons, and teachers that governed each local church congregation, but often played a less structured political and legal role in the broader Christian commonwealth. Yet local clergy still had a strong role in advising magistrates on the positive law of the local community, and local churches and their consistories also generally enjoyed autonomy in administering their own doctrine, liturgy, charity, polity, and property and in administering ecclesiastical discipline over their members without interference from the state courts.

In addition to reconstructing the law of church-state relations, Calvinists after 1560 also laid some of the foundations for Western theories of democracy and human rights, as they faced massive repression and genocide that were killing their coreligionists by the many thousands. One method, developed by Calvinist writers like Christopher Goodman (c. 1530-1603), Theodore Beza (1519-1605), and Johannes Althusius (1557-1638), was to ground fundamental rights in the duties of the Decalogue and other biblical moral teachings. Echoing earlier Protestants, these Calvinist writers argued that the two tables of the Decalogue prescribe duties of love owed to God and to neighbors respectively. But they now translated the person's First Table duties toward God as natural rights that others could not obstruct – the right to religious exercise: the right to honor God and God's name, the right to rest and worship on one's Sabbath, the right to be free from false gods and false oaths. They cast a person's Second Table duties towards a neighbor as the neighbor's right to have those duties discharged. One person's duties not to kill, to commit adultery, to steal, or to bear false witness thus gives rise to another person's rights to life, property, fidelity, and reputation. Goodman called all these “unalienable rights” rooted in the natural law of God. Later Calvinists like Beza, John Knox (c. 1514-1572), and Philippe Duplessis-Mornay (1549-1623) argued further that the persistent and pervasive breach of these “unalienable rights” by

a tyrant triggered a further “fundamental right” to resistance, rebellion, revolution, even regicide.<sup>9</sup>

Another method, developed especially by Dutch and English Calvinists, was to draw out the legal and political implications of the signature Reformation teaching, coined by Luther, that a person is at once sinner and saint (*simul justus et peccatur*). On the one hand, they argued, every person is created in the image of God and justified by faith in God. Every person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. Every person is a prophet, priest and king, and responsible to exhort, to minister, and to rule in the community. Every person thus stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, to love and serve God and neighbor. Every person is entitled to the vernacular Scripture, to education, to work in a vocation. On the other hand, Protestants argued, every person is sinful and prone to evil and egoism. Every person needs the restraint of the law to deter him from evil, and to drive him to repentance. Every person needs the association of others to exhort, minister, and rule her with law and with love. Every person, therefore, is inherently a communal creature. Every person belongs to a family, a church, a political community.

By the later sixteenth century, Calvinists recast these theological doctrines into proto-democratic norms and forms. Protestant doctrines of the person and society were cast into democratic social forms. Since all persons stand equal before God, they must stand equal before God's political agents in the state. Since God has vested all persons with natural liberties of life and belief, the state must ensure them of similar civil liberties. Since God has called all persons to be prophets, priests, and kings, the state must protect their constitutional freedoms to speak, to preach, and to rule in the community. Since God has created persons as social creatures, the state must promote and protect a plurality of social institutions, particularly the church and the family.

Protestant doctrines of sin, in turn, were cast into democratic political forms. The political office must be protected against the sinfulness of the political official. Political power must be distributed among self-checking executive, legislative, and judicial branches. Officials must be elected to limited terms of office. Laws must be clearly codified, and discretion closely guarded. Officials must hold regular meetings to give account of themselves and to hear the people's petitions and grievances. If officials abuse their office, they must be disobeyed. If they persist in their abuse, they must be removed, even if by revolutionary force and regicide.

These Protestant teachings were among the driving forces behind the revolts of the French Huguenots, Dutch Pietists, Scottish Presbyterians, and English Puritans, against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were also critical weapons in the eventual arsenal of the revolutionaries in

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<sup>9</sup> Quoted by John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press, 2007), 117-22, 137-38.

eighteenth-century America and France. It is no small anecdote that, by 1650, almost every right listed 150 years later in the United States Bill of Rights (1791) and the French Declaration of the Rights of the Rights of Man and Citizen (1789) had already been defined, defended, and died for by Calvinists on both sides of the Atlantic.

### **Criminal Law and Procedure**

The shift of power from the church to the state led to a dramatic expansion of state criminal law in Protestant lands. Expanding on late medieval legal reforms of state criminal law, like the *Bambergensis* (1507), as well as earlier efforts to shut down the criminal jurisdiction of manorial, feudal, and mercantile courts, Protestant reformers called on the state to develop a new systematic and separate body of criminal law to replace both the medieval canon law of crimes and the Catholic Church's penitential rules. The state, Protestants argued, had to prohibit major crimes like treason, murder, rape, theft, burglary, and adultery as it always had done. But the state now had to prohibit many other major and minor offenses traditionally under church laws and courts. These included religious and ideological offenses – heresy, sorcery, witchcraft, alchemy, blasphemy, sacrilege, Sabbath-breaking, tithe-breaking, false oaths, perjury, contempt, slander, defamation, and more. They included various family and sexual offenses – wife and child neglect and abuse, malicious desertion, seduction and fornication, prostitution, pornography, voyeurism, exhibitionism, and more. And these criminal law included a growing number of offenses against “public morality and policy” (*Polizei*) – drunkenness and debauchery, sumptuousness and waste, trade, labor, and economic crimes, proper conduct in taverns, shops, and lodgings, embezzlement, usury, and banking irregularities, false weights and measures, passport and travel violations, and much more. In Lutheran, Calvinist, and Anglican polities alike, the roll and role of state criminal laws was greatly expanded, even if consistories and church courts still sometimes had a firm hand in enforcing these laws.

Protestant reformers further called on magistrates to balance firmness and equity, severity and temperance in the administration of this expanded criminal law. In particular, they urged magistrates to stop using torture to extract confessions from the defendant. Not only were these coerced confessions often unreliable as evidence in criminal cases. But such confessions did the defendant's soul no good, Protestants argued. Medieval Catholic authorities regarded confession as an essential first step in receiving the sacrament of penance, without which the sinner faced eternal punishment in hell. A one-time act of bodily torture was thought to be a small price to pay for eternal life of the soul. Protestants rejected the sacrament of penance and the underlying rationale for torture. Every sinner had to confess directly to God, without the mediation, let alone coercion, of church or state authorities. Here was one source, alongside others, for the gradual abolition of torture in early modern criminal law.

Protestants also called on magistrates to draw more refined distinctions between degrees of criminality and to prescribe a broader range of punishments short of

execution. The refined differentiation of mortal and venial sins and their punishment that historically attached to the church's sacrament of penance, were now to be attached to the state's criminal laws and punishments. The reformers emphasized the importance of rehabilitating convicted defendants, consigning them to public work programs, workhouses, and penitentiaries (*Zuchthausen*) and furnishing them with chaplains, pastors, and teachers to bring them back to a level of sociability and morality, if not piety and spiritual integrity. These criminal justice reforms, too, were only partly achieved in sixteenth century Protestant lands, and they had other sources of inspiration besides Protestant theology— not least legal humanism and new Catholic criminal jurisprudence. But the Reformation was an important source and catalyst for these criminal law reforms.

### **Marriage and Family Law**

The Protestant reformers embraced the familiar medieval idea that God has ordained “three estates” (*drei Stände*) for the governance of human society – the church, the state, and the family. So, alongside sweeping reforms of church and state, they gave high priority to reforming marriage and family law as well. Indeed, almost every new Protestant community had a new marriage ordinance in place within a decade of accepting the Reformation -- even if some later Protestants, notably in England, retreated from some of the more radical positions of the early Reformation.

Prior to the sixteenth century, marriage was regarded as a sacrament of the Catholic Church. It was formed by the mutual consent of a fit man and a fit woman in good religious standing. It symbolized the enduring union of Christ and his church, and it conferred sanctifying grace upon the couple and their children. The parties could form this marital union in private, but once properly formed it was an indissoluble bond broken only by the death of one of the parties. As a sacrament, marriage was subject to the jurisdiction of the medieval church. A complex network of canon laws and penitential rules administered by church courts and clergy governed sex, marriage, and family life in detail. The medieval church did not regard the marital family as its most exalted estate, however. Although a sacrament and a sound way of Christian living, marriage and family life were not considered to be spiritually edifying. Marriage was a remedy for sin, not a recipe for righteousness. Marriage was considered subordinate to celibacy. Clerics and monastics were required to forgo marriage as a condition for ecclesiastical service. Those who could not were not worthy of the church's holy orders and offices.

Many early Protestant reformers challenged this medieval theology and law of the marital family. For them, the medieval Catholic Church's jurisdiction over marriage and family life was a particularly flagrant example of the church's usurpation of the state's legal authority. For them, the Catholic sacramental concept of marriage on which the church predicated its jurisdiction was a self-serving theological fiction. For them, the canonical prohibition on marriage of clergy and monastics ignored the Bible's teachings on sexual sin and temptation and the reality that most humans needed the remedial gift



of marriage, whatever their vocation. For them, the church's intricate regulations of sexual feelings and practices, even within marriage, were a gratuitous insult to God's blessing of marital love and an unnecessary intrusion on private life and Christian conscience. Moreover, the canon law's long roll of impediments to engagement and marriage together with its prohibitions against divorce and remarriage stood in considerable tension with the Protestant understanding of the right of each fit adult to marry and remarry.

Sixteenth-century Protestant political leaders rapidly translated this Protestant critique of canon law into new state law reforms. Taken together, the new Protestant family laws (1) shifted principal marital jurisdiction from the church to the state; (2) abolished monasteries and cloisters; (3) commended, if not commanded, the marriage of clergy; (4) rejected the sacramentality of marriage and the religious tests and spiritual impediments traditionally imposed on Christian unions; (5) banned secret or private marriages and required the participation of parents, peers, priests, and political officials in the process of marriage formation; (6) sharply curtailed the number of impediments to engagements and marriages that abridged the right to marry or remarry; and (7) introduced fault-based complete divorce with a subsequent right for divorcees to remarry. These reforms found their strongest legal expression in sixteenth-century Lutheran and Calvinist lands. They took three centuries to soak into the English common law and Anglican theology. Anabaptists largely retained biblical sexual ethics with little formal legal apparatus.

**Lutheranism.** Lutherans regarded the marital family as a social estate of the earthly kingdom, not a divine sacrament of the heavenly kingdom. They accepted the traditional Catholic teaching that marriage was a natural association created by God for the procreation of children and mutual protection of both parties from sexual sin. They also accepted the traditional canon law teaching that marriage was a contract formed by the mutual consent of a man and woman with the fitness and capacity to marry each other, and once properly formed was a presumptively permanent union. But Lutherans rejected the idea that marriage was a sacrament. Yes, Christian marriages symbolized the "mystery" of Christ's union with the church, as Ephesians 5:32 put. Yes, the sacrifices that husband and wife make for each other and for their children echoed the sacrificial love of Christ on the cross. But these analogies do not make marriage a sacrament on the order of baptism and the Eucharist. Sacraments are God's gifts and signs of grace ensuring Christians of the promise of redemption, which is available only to those who have faith. Marriage carries no such promise and demands no such faith. The Bible teaches that only baptism and the Eucharist confer this promise of grace; nowhere does it ascribe this promise to marriage. Calling marriage a sacrament, Luther charged, is a "fiction" that the church has created to claim jurisdiction over marriage and to fill its coffers with court fees and fines.

Lutherans also rejected the subordination of marriage to celibacy. Most adults, Lutherans argued, were too tempted by sinful passion to forgo God's soothing remedy of marriage. The celibate life had no superior virtue and was no prerequisite for clerical service. It led too easily to fornication and concubinage and impeded too often the

access to and activities of the clerical office. Moreover, the marital household, particularly that of the pastor, was a vital model of authority, charity, and pedagogy and a vital source of evangelical and charitable impulses in society.

These new Lutheran teachings influenced the new Protestant state laws of marriage and family life in sixteenth-century Germany and Scandinavia. These new state laws repeated many of the basics inherited from medieval canon law and the broader *ius commune* -- that marriage was formed by a two-step process, first of engagement then of marriage; that a valid engagement and marriage contract required the mutual consent of a man and a woman who had the age, fitness, and capacity to marry each other; that marriage was a presumptively permanent union that triggered mutual obligations of care and support for the other spouse, their children, and their dependents; that marriage often involved complex exchanges of betrothal gifts and dowry and triggered presumptive rights of dower and inheritance for widow(er)s and legitimate children; that marriages could be annulled on the discovery of various impediments and upon litigation before a proper tribunal; and that in the event of dissolution, both parents remained responsible for the maintenance and welfare of their children, and the guilty party bore heavy financial obligations to the innocent spouse and children alike. All these assumptions remained common both to the new Protestant state law and to medieval Catholic canon law.

But the new Lutheran teachings about the family also yielded crucial legal changes -- beyond the critical shift of marital jurisdiction from the church to the state. 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 and remarriage. 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, desertion, cruelty, or crime), the couple could sue for divorce. Because persons by their lustful natures were 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 wanted 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.

On account of these legal reforms, marriages in Lutheran lands were easier to enter and exit. Family life was more public and participatory. Children were afforded

greater rights and protections. Abused spouses were given a way out of miserable homes. Divorcees and widows were given a second chance to start life anew. Ministers were married, rather than single, and better able to exemplify and implement the ideals of Christian marriage and sexual morality. But not all was sweetness and light in this reformation of domestic life. Yes, the Protestant reformers did outlaw monasteries and cloisters. But these reforms also ended the vocations of many single women and men, placing a new premium on the vocation of marriage. Ever since, adult Protestant singles have chafed in a sort of pastoral and theological limbo, objects of curiosity and pity, even suspicion and contempt. Yes, the Protestant reformers did remove clerics as mediators between God and the laity, in expression of St. Peter's teaching of the priesthood of all believers. But they ultimately interposed husbands between God and their wives, in expression of St. Paul's teaching of male headship within the home. Ever since, Protestant married women have been locked in a bitter struggle to gain fundamental equality both within the marital household and without.

**Calvinism.** Building on a generation of Lutheran and other Protestant reforms, Calvinists constructed a comprehensive new family law that made marital formation and dissolution, children's nurture and welfare, family cohesion and support, and sexual sin and crime essential concerns for both church and state. Together, the consistory and the council outlawed monasticism and mandatory clerical celibacy, and encouraged marriage for all fit adults. They set clear guidelines for courtship and engagement. They mandated parental consent, peer witness, church consecration, and state registration for valid marriage. They radically reconfigured weddings and wedding feasts. They reformed marital property and inheritance, marital consent and impediments. They created new rights and duties for wives within the bedroom and for children within the household. They streamlined the grounds and procedures for annulment. They introduced fault-based divorce for both husbands and wives on grounds of adultery and desertion. They encouraged the remarriage of divorcées and widow(er)s. They punished rape, fornication, prostitution, sodomy, and other sexual felonies with startling new severity. They put firm new restrictions on dancing, sumptuousness, ribaldry, and obscenity. They put new stock in catechesis and education, and created new schools, curricula, and teaching aids. They provided new sanctuary to illegitimate, abandoned, and abused children. They created new protections for abused wives and impoverished widows. All these reforms were set out in Geneva's Marriage Ordinance (1545), Ecclesiastical Ordinance (1561), and Civil Edict (1568), and the rich case law they inspired; these laws were echoed and elaborated in the laws of other early modern Calvinist polities, on both sides of the Atlantic.

Calvinists grounded these legal reforms in the repeated biblical reference to marriage as a covenant, not a sacrament. The idea of covenant, they argued, recognizes better the critical mutuality and consensuality of marriage. The true sacraments of baptism and eucharist involve God's unilaterally pouring his grace upon undeserving persons. But marital covenants are mutual bonds whose validity depends on the mutual consent of both spouses to the natural rights and duties that the marital covenant holds out to them. The idea of covenant also shows better that marriage is

enduring but not indissoluble. Sacraments are permanent marks of grace that cannot be erased no matter how the parties behave. But covenants have built-in conditions of mutual performance, whose fundamental breach triggers rights of exit and redress.

But for Calvinists, marriage was more than a mere contract. "When a covenant of marriage takes place between a man and a woman," John Calvin wrote, "God presides and requires a mutual pledge from both."<sup>10</sup> God participates in the formation of the marital covenant through his chosen agents on earth. The couple's parents, as God's "lieutenants" for children, instruct the young couple in the mores and morals of Christian marriage and give their consent to the union. Two witnesses, as "God's priests to their peers," testify to the sincerity and solemnity of the couple's promises and attest to the marriage event. The minister, holding "God's spiritual power of the Word," blesses the union and admonishes the couple and the community of their respective biblical duties and rights. The magistrate, holding "God's temporal power of the sword," registers the parties, ensures the legality of their union, and protects them in their conjoined persons and properties. The involvement of parents, peers, ministers, and magistrates alike represented different dimensions of God's involvement in the marriage covenant. They were essential to the legitimacy of the marriage itself, for to omit any such party was, in effect, to omit God from the marriage covenant. Covenant theology thus helped Calvinists integrate the requirements of mutual consent, parental consent, two witnesses, civil registration, and church consecration for a valid marriage. It also provided a standing response to the centuries-long problem of secret marriage. Marriage was, by its covenantal nature, a public institution, involving a variety of parties in the community. To marry secretly or privately was to defy the very nature of marriage.

God participates in the maintenance of the covenant of marriage not only through the one-time actions of these human agents, Calvinists continued, but also through the continuous revelation of the natural law, on which positive family laws are built. Calvinists grounded various biblical rules against illicit sexual unions in the natural structure of the marital covenant as a union of "male and female," who have the physical capacity and natural inclination to come together in love. They condemned sodomy, buggery, bestiality, homosexuality, and other "unnatural" acts and alliances. They condemned incestuous engagements and marriages between various blood and family relatives -- arguing that God had prohibited such unions to avoid discord, abuse, rivalry, and exploitation among those who were too close. They condemned, at greater length, the traditional Hebrew practice of polygamy, which ignored the creation of marriage as a "two in one flesh" union. Calvinists saved their greatest thunder for the sin of adultery as the most fundamental violation of the created structure of the marital covenant. They read the commandment "Thou shalt not commit adultery" expansively to outlaw various illicit alliances and actions, within and without the marital estate. Calvin in particular stretched the Commandment far beyond actual adultery and actual fornication, to include lewdness, dancing, bawdy gaming, sexual innuendo, coarse

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<sup>10</sup> Quoted by John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (2<sup>nd</sup> ed., Westminster John Knox Press, 2012), 186.

humor, provocative primping, suggestive plays and literature, rowdy wedding parties, and much more.

These Calvinist reforms of sex, marriage, and family law penetrated deeply into the early modern civil law of Protestant lands on the Continent and colonial America. Not so in England, however. While strongly pressed by many Anglican theologians in the sixteenth century, and prominently featured in the proposed Reformation of Ecclesiastical Law, these Protestant family reforms were rejected by the Crown and Parliament in favor of traditional medieval family law administered by English courts. It took more than three centuries for the English church and state to adopt piecemeal the family law changes that Continental reformers put in place in a generation.

### Education Law

The Protestant reformers soon extended their reforms to schools as well. Prior to the sixteenth century, schools were dominated by the church. Cathedrals, monasteries, chantries, ecclesiastical guilds, and large parishes offered the principal forms of lower education, governed by general and local canon law rules of the church. Gifted graduates were sent on to church-chartered universities for advanced training in the core faculties of law, theology, and medicine. The vast majority of students, however, were trained for clerical and other forms of service in the church.

Building on the ample efforts of fifteenth- and sixteenth-century humanists, Protestants transformed this church-based school system into a new system of public education. New public schools were often established in the monasteries and church schools confiscated during the Reformation, with the state now chartering most of the schools and universities and licensing their teachers and tutors. Each citizen, Protestants argued, must be literate enough to read the Bible at home in their own language, to understand the Sunday sermons and catechisms, and to participate actively in church worship and liturgy. Each citizen must also prepare for the distinct vocation that matches his or her God-given talents. Church ministry was only one such worthwhile vocation, Protestants insisted, and no better or more virtuous than any other. The vocation of the butcher, farmer, or soldier was just as spiritual and conducive to salvation as the life of the bishop, abbot, or priest. The same devotion and discipline that a cleric directed to spiritual and ecclesiastical ends could now be devoted to secular and material ends as well, with equal assurance of justification by faith.

In Lutheran lands, the magistrate, as “father of the community,” created a public school system, regulated by detailed new *Schulordnungen*. Education was mandatory for boys and girls alike. It was to be fiscally and physically accessible to all. It was marked by both formal classroom instruction and civic education through community libraries, lectures, and other media. The curriculum was to combine biblical values and Lutheran catechisms with humanistic and vocational training. Students were to be stratified into different classes, according to age and ability, and slowly selected for any number of vocations, with the most precious tapped for university training. The public

school was to be, in Philip Melancthon's famous phrase, the "civic seminary" of the commonwealth designed to combine deep faith and deep learning. This eventually became a model for public schools in many parts of the Christian world.

In Calvinist lands, each city and village was expected to create schools along the same lines. In Calvin's Geneva, the *petite ecole* that was part of the *Collège de Rive* in the early days of the Reformation was subsumed into the Genevan Academy of 1559, which added advanced training in theology, law, and other subjects. In German, French, Dutch, and Scottish Calvinist communities, particularly those that were new, small or poor, church and state officials often worked together to establish schools, apprenticeships, and vocational training programs for young students, sometimes sharing teachers, space, and resources until an independent school could be built, with precocious students sent to Protestant universities elsewhere. Sixteenth-century Calvinist cities issued detailed edicts on education, collected education taxes and donations, and acquired property for new schools. City councils and consistories worked together to devise curricula, to supervise instruction, and to discipline students. Similarly, New England Puritans early on established Harvard and Yale for advanced education, with feeder primary schools attached to churches, charities, and private tutors.

In sixteenth-century Anglican communities, a good deal of primary education was initially left to the laity, who converted old church buildings into open charity or grammar schools for basic literacy and vocational training. The upper classes of gentry and merchants also established elite private schools and academies to prepare students for advanced studies at Cambridge, Oxford, or the Inns of Court. In the larger cities, the Crown looked to the Church of England to establish diocesan schools, staffed by teachers approved and supervised by the local Anglican bishops. During Elizabeth's long reign, and those of James I and Charles I, too, this diocesan-based school system was greatly expanded, and Anglican authorities in church and state sought to impose strict Anglicanism on grammar and private school teachers alike. But many of these local schools continued to harbor religious dissenters, particularly Calvinists, whose teachings slowly penetrated into seventeenth-century Anglicanism, and helped to fuel the Puritan-led English revolution against Charles I in the 1640s.

### **Social Welfare Laws**

A similar pattern occurred in the reformation of the laws of poor relief and social welfare. Here the Protestant theological critique of Catholicism was more complicated. The medieval church taught that both poverty and charity were spiritually edifying. Voluntary poverty was a form of Christian sacrifice and self-denial that conferred spiritual benefits upon its practitioners and provided spiritual opportunities for others to accord them their charity. Itinerant monks and mendicants in search of alms were the most worthy exemplars of this ideal, but many other deserving poor were at hand as well. Voluntary charity, in turn, conferred spiritual benefits upon its practitioner, particularly when pursued as a work of penance and purgation in the context of the

sacraments of penance or extreme unction. To be charitable to others was to serve Christ, who had said, "Inasmuch as you have done it unto one of the least of these my brethren, you have done it unto me."<sup>11</sup>

These teachings helped to render the medieval church, at least in theory, the primary object and subject of charity and social welfare. To give to the church was the best way to give to Christ, since the church was the body of Christ on earth. The church thus received alms through the collections of its mendicant monks, the charitable offerings from its many pilgrims, the penitential offerings assigned to cancel sins, the final bequests designed to expedite purgation in the life hereafter, and much more. The church also distributed alms through the diaconal work of the parishes, the hospitality of the monasteries, and the welfare services of the many church-run almshouses, hospitals, schools, chantries, and ecclesiastical guilds. A rich latticework of canon law and confessional rules calibrated these obligations and opportunities of individual and ecclesiastical charity, and governed the many charitable corporations, trusts, and foundations under the church's general auspices.

The Protestant Reformation destroyed a good deal of this teaching and practice. Protestant reformers rejected the spiritual idealization of poverty and the spiritual efficaciousness of charity. All persons were called to do the work of God in the world, they argued. They were not to be idle or to impoverish themselves voluntarily. Voluntary poverty was a form of social parasitism to be punished, not a symbol of spiritual sacrifice to be rewarded. Only the worthy local poor deserved charity, and only if they could not be helped by their immediate family. Charity, in turn, was not a form of spiritual self-enhancement. It was a vocation of the priesthood of believers. Charity brought no immediate spiritual reward to the giver. It brought spiritual opportunity to the receiver. The Protestant doctrine of justification by faith alone undercut the spiritual efficacy of charity for the giver; salvation came through faith in Christ, not through charity to one's neighbor. But the Protestant doctrine of the priesthood of all believers enhanced the spiritual efficacy of charity for the receiver. Those who were already saved by faith became members of the priesthood of all believers; they were called to love and serve their neighbors charitably in imitation of Christ. Those who received the charity of their neighbors would see in this personal sacrificial act the good works brought by faith, and so be moved to have faith themselves.

These Protestant teachings built on humanist teachings and anti-begging laws already in place before the Reformation. The Protestant reformers went further, however, in outlawing not just mendicancy but monasticism altogether. They translated their belief in the spiritual efficacy of the direct personal relationship between the giver and the receiver into a new emphasis on local charity for the local poor, without dense administrative bureaucracies. Particularly the complex tangle of ecclesiastical guilds, endowments, foundations, and other charitable institutions of the medieval church were, for the early reformers, not only economically inefficient but a distraction from the church's essential mission. The local church should continue to receive the tithes of its

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<sup>11</sup> Matthew 25:40.

members, as biblical laws taught. It should continue to tend to the immediate needs of its local members, as the apostolic church had done. But most other gifts to the church and the clergy were, in the reformers' view, misdirected. Most other forms of ecclesiastical charity, particularly those surrounding pilgrimages, penance, and purgation, were, for the reformers, types of "spiritual bribery," predicated on the fabricated sacraments of penance and extreme unction and on the false teachings of purgatory and works righteousness.

In Lutheran and Calvinist lands, the reformers instituted a series of local civil institutions of welfare, usually administered directly by local townsmen. Local welfare systems were centered on the community chest, administered by the local magistrate. These community chest funds were, at first comprised of the church's monastic properties and endowments that had been confiscated, and were eventually supplemented by local taxes and private donations. In larger cities and territories, several such community chests were established, and the poor closely monitored in the use of their services, often under the watchful eye of church and state officials. At minimum, this system provided food, clothing, and shelter for the poor, and emergency relief in times of war, disaster, or pestilence. In larger and wealthier communities, the community chest eventually supported the development of a more comprehensive local welfare system featuring public orphanages, workhouses, boarding schools, vocational centers, hospices, and more, administered by the local magistrate, with the cooperation of the consistory and diaconate.

In England, the rapid and widespread dissolution of monasteries and church-based charities in the early Reformation produced a massive welfare crisis by the mid-sixteenth century. The Privy Council and eventually Elizabeth's Parliament thus passed several laws that placed poor relief and social welfare directly into the hands of individual Anglican parishes. Anglican church wardens and justices of the peace were now made responsible for distributing aid to widows, the disabled, and chronically sick, for finding homes, schools, apprenticeships, and work for orphans and non-marital children, and more.

In Anabaptist communities, an internal system of community property and of mutual caring and sharing within and across families provided local members with the support they needed from cradle to grave. Anabaptist church orders also instructed the community to offer Christian hospitality to the poor and needy who were "sojourners in their gates." Only in dire emergencies would early modern Anabaptists look to the state or the established church for aid, or turn away a wayfarer or sojourner who had need. These Anabaptist communities were often the closest analogues Protestants had to Catholic monasteries.

## **Conclusions**

The Protestant Reformation had its most direct and enduring impact on early modern laws of church-state relations, religious and civil freedom, marriage and family,



education and social welfare. Some areas of criminal law and civil law were affected by Protestant teachings as well. Many of the legal reforms introduced by Protestants built directly on a “legal reformation” movement already afoot on the Continent and in England in the fourteenth and fifteenth centuries. They also drew on pre-Reformation movements of humanism, conciliarism, nominalism, nationalism, and pietism. But the new Protestant teachings helped integrate these pre-Reformation movements, and to translate them directly into new legal, political, and social norms and forms. And with the establishment of the printing press and dozens of new law faculties at Protestant universities, these new Protestant teachings yielded a vast new legal literature that held sway in many Protestant lands until the great codification movements and liberal reforms of the later eighteenth and nineteenth centuries.

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