SASKIA LETTMAIER

Spouses, Church, and State

Max-Planck-Institut für ausländisches und internationales Privatrecht

Beiträge zum ausländischen und internationalen Privatrecht

Mohr Siebeck

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Spouses, Church, and State

Marriage Law in England and Protestant Germany from the Reformation until the Close of the Nineteenth Century

Mohr Siebeck

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Für
Rami Nikolai

Preface and Acknowledgments

This book has its origins in my abiding interest in legal change and in what makes legal change happen. Arguably, the greatest change to have occurred within the Western law of marriage in the last five hundred years was the shift from a unified marital order, legislated and adjudicated by a universal church and influenced by theological principles, to a non-unified marital order, legislated and adjudicated by separate and sovereign states and influenced by secular principles. I was interested in the trajectory of that change in different territories and in teasing out the legal as well as extra-legal factors that might have led to the varying patterns and profiles of change in different national settings. I investigated my two research questions through the lens of two countries: England and a precursor of modern-day Germany – the territory of (Brandenburg-)Prussia. As the book shows, the investigation yielded a complicated story of similarities, but also of remarkable differences that seem to be connected to the different political, social, and ideological structures as well as the different legal traditions to which the former *ius commune* of marriage had to adapt itself in the two national contexts.

But all this is looking ahead. When presenting a book for publication, it is a pleasure to stand still for a moment and look back on the many individuals and institutions that have made a special contribution towards its existence. This is all the more true when the book in question was quite a long time in the making, as this one was. I started out on the journey that led to this book as an SJD student at Harvard Law School back in 2008, and finished it as a member of the law faculty of Kiel University (Germany) in 2024. When I enrolled in the SJD program at Harvard, I had quite a different dissertation topic in mind. That this book ended up being about the comparative history of marriage law in the early modern and modern periods is largely owing to my intrepid SJD supervisor, Charles Donahue Jr., who allowed and even encouraged me to change topics in midstream when I came to him with that proposal. Charlie Donahue, a mentor of mine for over two decades now, has guided me through all phases of this writing project, providing tremendously helpful feedback in long conversations and emails, and giving encouragement in dark moments.

I also owe a debt of gratitude to my other mentors at Harvard, in particular to Janet Halley, for her warmth and generosity in sharing her deep insights into legal philosophy and the philosophy of the family with me, and to Robert

Sitkoff and Bruce Mann, for sitting on my dissertation committee. At the University of Regensburg, which accepted an earlier version of the present text in partial satisfaction of the requirements of the degree of *Dr. iur. habil.*, I must first of all acknowledge the immense help of Martin Löhnig, the chair of my Regensburg *Habilitation* committee. He was the one who first encouraged me to think of a *Habilitation*, and he subsequently nurtured this project to its successful completion. Special thanks are also due to Anatol Dutta, who acted as my ever-helpful co-supervisor and second reader at Regensburg.

Many other scholars in Germany, England, and the United States have been gracious enough to privilege me with their time and expertise. I am especially grateful to Reinhard Zimmermann, who accompanied this book project (as he did previous and subsequent projects of mine) with characteristic kindness and wisdom, providing the right guidance at key moments, facilitating research visits at the library of the Max Planck Institute for Comparative and International Private Law in Hamburg, and recommending the book for inclusion in the series edited by the Institute. I also owe special thanks to John Witte Jr., my external SJD examiner, for being, to this day, unfailingly supportive of my work and always ready to give advice on all matters law and religion. Many other scholars, colleagues, and friends contributed to this book, by reading parts of one or more of my drafts, assisting with troubling questions, or listening to my ideas. Here, I must particularly single out Jane Bestor (who might be counted as an honorary dissertation committee member in light of the sheer volume of time and care she spent reading and commenting on my dissertation), Robin Eagles, Philipp S. Fischinger, Nikitas Hatzimihail, Richard Helmholz, Jonathan Herring, Joanna Innes, Hans Joas, the late Peter Landau, Michael Lobban, Elizabeth Papp Kamali, Kenneth Pennington, Rebecca Probert, Werner Schubert, Dieter Schwab, Paul Seaward, Adam Shinar, Larry Shiner, Christian Smith, Anna Su, Andreas Thier, and Stefan Vogenauer. Any errors that remain are, of course, my own.

A great number of other people have also contributed to the success of this project. I am indebted to many librarians and archivists on both sides of the Atlantic. In Germany, I would like to thank the staff of the *Universitätsbibliothek* Regensburg, the *Staatsbibliothek* Bamberg, the *Geheimes Staatsarchiv Preußischer Kulturbesitz* in Berlin, and the library of the Max Planck Institute in Hamburg, particularly Elke Halsen-Raffel. In England, I must acknowledge the staff at the British Library, the British Museum, the National Archives, the Shropshire Archives and the Parliamentary Archives, particularly Helen Wong. In the United States, the staff at the Harvard libraries, particularly the Harvard Law Library, was unfailingly helpful. I must mention by name Melinda Kent, who provided invaluable research assistance on some elusive English materials. I also could not have written this book without a number of online resources, chief among them the UK Parliamentary Papers database.

Papers related to this project were given at Harvard Law School, the University of Kiel, the Max Planck Institute for Comparative and International Private Law, Boston College Law School, the University of Münster, the University of Freiburg, the 2019 British Legal History Conference at St. Andrews, the 43rd *Rechtshistorikertag* in Zurich, and the University of Göttingen. I am grateful to the organizers of these events – particularly Rudolf Meyer-Pritzl, Reinhard Zimmermann, Daniel Coquillette, Mary Bilder, Peter Oestmann, Nils Jansen, Sebastian Lohsse, Frank Schäfer, Andreas Thier, Ulrike Babusiaux, Wolfgang Ernst, Johannes Liebrecht, Eva Schumann, Wolfgang Sellert, and Okko Behrends – for affording me an opportunity to present my ideas. I am also very grateful for the helpful feedback I received from attendees at these presentations.

Thanks of a different sort are due to the Fritz Thyssen Foundation, Gibson, Dunn & Crutcher LLP, the University of Regensburg, and Harvard Law School for financial support during my graduate studies at Harvard. Generous financial assistance in the later stages of this project was provided by *Professorinnenprogramm II des Bundes und der Länder*. Last but not least, I must thank the University of Kiel for one semester of research leave that allowed me to complete work on the manuscript, and the *Deutsche Forschungsgemeinschaft* for its generous subvention of the publication costs.

An early and shorter version of chapter 1 was published in *Law and History Review* 35, no. 2 (May 2017): 461–510. An article entitled "A Tale of Two Countries: Divorce in England and Prussia, 1670–1794" was published in the *American Journal of Comparative Law* 20 (2021): 1–43. Chapters 2–6 significantly expand upon this article, but I remain grateful to its readers for their feedback and to the American Society of Comparative Law for awarding it the 2022 Hessel Yntema Prize. Some of my research on divorce in the eighteenth century was published in German in *Zeitschrift für Neuere Rechtsgeschichte* 39 (2017): 52–76. In all cases, the material has been substantially rewritten. This manuscript was completed in the summer of 2024. It takes into account research up to that point in time.

Over the years, many research assistants have helped me to complete this book, but none more so than my research assistant of eight years, Moritz-Philipp Schulz, whose technical and archival expertise supported me throughout. I am grateful to Patricia Crotty for her excellent job copyediting the manuscript. I would also like to thank the distinguished editors of this series – Holger Fleischer, Ralf Michaels, and Anne Röthel – and everyone who assisted with the production of this book, in particular Christian Eckl at the Hamburg Max Planck Institute, and Julia Scherpe-Blessing, Lisa Laux, and Jutta Thumm at Mohr Siebeck.

No words of acknowledgment can ever express what I owe to my family. With inexhaustible patience, unquenchable good humor, and unshakeable as

well as wholehearted support, they have accompanied me through all the highs and lows of this journey and provided the material, intellectual, and emotional home that made this book. This book is dedicated to my family, and especially to its youngest member, Rami Nikolai, who teaches me every day that there is much more to family life than family law and its history.

Kiel, in September of 2024 *Saskia Lettmaier*

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Abbreviations

Abt.	Abteilung
ALR	Allgemeines Landrecht für die Preußischen Staaten
Ann.	Anne
art.	article
B.C.	before Christ
BGB	Bürgerliches Gesetzbuch
BGBl.	Bundesgesetzblatt
bk.	book
bks.	books
BM	British Museum
Bros.	Brothers
C	Causa
c.	chapter in an Act of Parliament, canon
CA	California
ca.	circa
cap.	caput
Car.	Charles
cf.	confer/compare
ch.	chapter
chs.	chapters
col.	column
cols.	columns
CT	Connecticut
D.	Distinctio
d.a.c.	dictum ante canonem
DC	District of Columbia
def.	definition
Dig.	Digesta
disp.	disputatio
diss.	dissertation
dist.	distinction(s)
Dr.	Doctor
Dr. iur. habil.	Doctor iuris habilitatus
ed.	edited by, edition, editor
eds.	editors
Edw.	Edward
e. g.	exempli gratia
E.R.	English Reports
esp.	especially

Esq.	Esquire
et al.	et alia
etc.	et cetera
fol.	folio
fols.	folios
Geo.	George
HC	House of Commons
HL	House of Lords
HMSO	Her/His Majesty's Stationary Office
i.e.	id est
IN	Indiana
JO	Journal Office
Jr.	Junior
KY	Kentucky
lib.	liber
LLP	Limited Liability Partnership
MA	Massachusetts
MI	Michigan
MO	Missouri
MP	Member of Parliament
MPs	Members of Parliament
MS	Manuscript
MS Add.	Additional Manuscripts
n.	note
NC	North Carolina
n.d.	no date
NH	New Hampshire
NJ	New Jersey
no.	number
nos.	numbers
Nov.	Novellae
NY	New York
ON	Ontario
p.	page
PA	Pennsylvania
para.	paragraph
PhD	Doctor of Philosophy
PO	Parliament Office
pp.	pages
pt.	part
q.	question
Rep.	Repertorium
repr.	reprint
rev.	revised
s.	section
Sch.	Schedule
sess.	session
sic	sic erat scriptum

SJD	Scientiae Juridicae Doctor/Doctor of Juridical Science
ss.	sections
St.	Saint
Suppl.	Supplement
s.v.	sub verbo
s.vv.	sub verbis
tit.	title
trans.	translated by, translator
TX	Texas
UK	United Kingdom
UMI	University Microfilms International
v.	versus
Vict.	Victoria
viz.	videlicet
vol.	volume
vols.	volumes
Will.	William

Introduction

Marriage Law and Secularization

If a hypothetical German couple, let's call them Georg and Katharina, wanted to get married today, they would have to consult the *Bürgerliches Gesetzbuch* for information on how they could validly do so. (We will keep things simple here by assuming that our couple do not get married abroad or switch jurisdictions during the course of their marriage.[1]) The relevant provisions of the German Civil Code (paring them down to their essentials) would tell them that – provided Georg and Katharina[2] are both legally competent,[3] over eighteen,[4] not related in the direct line or (half-)siblings,[5] and not currently married to anyone[6] – they can enter a valid marriage[7] by mutually stating their intention to marry before the *Standesbeamter* or civil registrar.[8] The Civil Code would also tell them that they can do so *only* in this way.[9] From the Civil Code and the Judicature Act, Georg and Katharina would learn that should their marital relationship hit a snag in the future, any resultant divorce proceedings would have

[1] A cross-border element would call into play issues of private international law. For a German and an English perspective, respectively, see Marianne Andrae, *Internationales Familienrecht*, 4th ed. (Baden-Baden: Nomos, 2019) and John Murphy, *International Dimensions in Family Law* (Manchester: Manchester University Press, 2005).

[2] It is an unstated premise that our couple is male and female (as indicated by their names). The requirement that marriage partners be of the opposite sex is deeply embedded in the Western tradition and continues to be a requirement in some European legal systems today. However, many jurisdictions have introduced functional equivalents to marriage for same-sex partners and a few – like England and more recently Germany – have even opened up the institution of marriage itself. See Marriage (Same Sex Couples) Act, 2013, c. 30 and *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* of July 20, 2017 (BGBl. I, 2787).

[3] § 1304 BGB.

[4] § 1303 BGB.

[5] § 1307 BGB.

[6] § 1306 BGB. With one exception (marriage with a minor under sixteen), all of the above impediments do not render the marriage void, but only voidable at the suit of the parties and the state (§§ 1314 s. 1, 1316 s. 1 BGB). Moreover, the right to annul the marriage may be lost in certain circumstances (§ 1315 BGB).

[7] Of course, German law also contains provisions protecting the parties' free consent (§ 1314 s. 2 BGB), but I am assuming that both Georg and Katharina actually want to get married.

[8] § 1310 BGB. Unlike the previous provisions, a failure to comply with § 1310 BGB renders the "marriage" void.

[9] This is clear from the wording of § 1310 s. 1 BGB, which includes the German word *nur* (meaning only).

to be brought in the *Familiengericht*, a special division within the German civil courts of first instance;[10] and that the judge hearing their divorce case would be required to consider whether their marriage has "failed" – a state of affairs that he would be legally compelled to presume if both Georg and Katharina wanted the divorce and had lived apart for at least one year, or if either Georg or Katharina wanted the divorce and the couple had lived apart for at least three years.[11]

If Georg and Katharina were George and Catherine and living in England, the formation and dissolution of their marriage would be governed chiefly by the Matrimonial Causes Act 1973[12] and the Marriage Act 1949,[13] as amended and supplemented by a number of further pieces of legislation.[14] The relevant sections of the applicable statutes would tell them that – provided they are both over sixteen,[15] not currently married to anyone, and not related as parent-child,[16] grandparent-grandchild, brother-sister, uncle-niece, or aunt-nephew[17] – they can enter a valid marriage by going through their choice of one of four possible marriage ceremonies,[18] to be preceded by either civil or ecclesiastical prelimi-

[10] §§ 23a s. 1, 23b s. 1 of the German *Gerichtsverfassungsgesetz* or Judicature Act.

[11] §§ 1565, 1566 BGB. There is limited protection for a spouse who resists a divorce on the three-year-separation ground. Under § 1568 s. 1 BGB, a divorce may be denied where it would cause exceptional hardship to the respondent.

[12] Matrimonial Causes Act 1973, c. 18. This Act contains the principal provisions on divorce and nullity.

[13] The Marriage Act 1949, 12 & 13 Geo. 6, c. 76. This Act as amended contains a schedule with the prohibited degrees of relationship and detailed formation rules.

[14] The Marriage Act 1949 was amended by the Marriage Act 1994, c. 34, which "privatized" civil marriage by allowing civil marriages (but not marriages in the Church of England) to go ahead in private venues like hotels or stately homes. The Matrimonial Causes Act 1973 was significantly amended by the Divorce, Dissolution and Separation Act 2020, c. 11, which received the royal assent on June 25, 2020 and entered into force on April 6, 2022.

[15] The consent of those with parental responsibility is in principle required for the marriage of a person under eighteen (and not widowed), but a marriage solemnized without such consent will be valid. Jonathan Herring, *Family Law*, 11th ed. (Harlow, UK: Pearson Education, 2023), 89.

[16] A stepparent can marry the child of a former spouse if both parties are over twenty-one and the stepparent has never acted in a parental role towards the stepchild. See Marriage (Prohibited Degrees of Relationship) Act 1986, c. 16, s. 1.

[17] Matrimonial Causes Act 1973, s. 11 and Marriage Act 1949, schedule 1. The prohibited relationships include relations of the half-blood. The impediments of close relationship, age, and existing marriage render the marriage void, and any person may seek a declaration to that effect. The traditional "vices of consent," on the other hand, including unsoundness of mind, only render the marriage voidable at the suit of the parties. See Matrimonial Causes Act 1973, s. 12 and Herring, *Family Law*, 91–109.

[18] These are: civil marriage; marriage according to a non-Anglican religious ceremony; marriage according to the rites of the Church of England; Quaker and Jewish marriages. The current law still reflects the structure of the law established by the Marriage Act of 1836, which is discussed in chapter 8. Judith Masson, Rebecca Bailey-Harris, and Rebecca Probert, *Principles of Family Law*, 8th ed. (London: Sweet & Maxwell, 2008) offers a good summary of the modern English law of marriage formalities at 18–39. A description of its history since 1836 can be found in Rebecca Probert, *Tying the Knot: The Formation of Marriage 1836–2020*

naries[19] and followed by an "astonishingly complex"[20] process of registration.[21] From the Matrimonial Causes Act 1973, our couple would learn that should their relationship hit a snag in the future, they might obtain a divorce from the family court by showing that their marriage has irretrievably broken down. Under the law in force before April 6, 2022, they also had to show that the breakdown was caused by one (or more) of five facts.[22] These facts included the parties' consent plus two years' separation, or a unilateral separation that had lasted for a continuous period of at least five years.[23] However, the new Divorce, Dissolution and Separation Act 2020, which entered into force on April 6, 2022, replaced the five facts with a requirement to provide a statement of irretrievable breakdown. The court dealing with a divorce application must take that statement to be conclusive evidence that the marriage has broken down and, after the lapse of twenty-six weeks from the start of proceedings, must make a final divorce order.[24]

There are three things to take away from this brief contemplation of our hypothetical couple. Firstly, for Georg/George and Katharina/Catherine, the rules governing the formation and dissolution of their marriage are different (at least in detail), depending on where they find themselves. Secondly, *irrespective* of where they find themselves, entering and terminating their marriage brings them into close contact with the *state*, as both the framer of the applicable laws and, generally,[25] the legal entity behind the person (registrar/judge) who oversees the beginning and end of their marriage. Thirdly, the applicable formation and dissolution rules give wide latitude to the spouses' – or even the individual spouse's – private choice: provided our prospective marriage partners are willing to comply with some formalities, there are relatively few restrictions on

(Cambridge, UK: Cambridge University Press, 2021) and Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2003), 3–32.

[19] All marriages other than those to be solemnized in the Church of England have to be preceded by civil preliminaries before the superintendent registrar of the relevant district.

[20] Stephen Cretney and Judith M. Masson, *Principles of Family Law*, 6th ed. (London: Sweet & Maxwell, 1997), 32. The law of marriage formalities was under review by the Law Commission, which published its final report on July 19, 2022. See <https://www.lawcom.gov.uk/project/weddings/> (last accessed December 14, 2023).

[21] Only knowing and wilful disregard of the most important of these formalities will render the marriage void. Marriage Act 1949, ss. 25, 49.

[22] Matrimonial Causes Act 1973, s. 1 (in its former version).

[23] The remaining three facts were the respondent's adultery, unreasonable behavior, or desertion. Unlike the other two, these facts did not involve delay. As in Germany, there was some protection for a spouse who resisted a divorce on the unilateral-separation ground (Matrimonial Causes Act 1973, s. 5). However, this provision was omitted by virtue of the Divorce, Dissolution and Separation Act 2020, c. 11, Sch. para. 5.

[24] Matrimonial Causes Act 1973, s. 1. The Act also removed the possibility of contesting the divorce and introduced an option for a joint application.

[25] In England, it is still possible to enter a valid marriage before a church rather than a state authority (n. 18).

whether they can get married and to whom; and divorce – if they are prepared to wait a bit – is, basically, on unilateral demand.[26]

Given this state of affairs, it is easy to forget that things were once different. If our couple had gotten married just over five hundred years ago, in 1515 rather than in 2023, it would, for a start, not have mattered where in the Western world they found themselves; nor would forming and dissolving their marriage have brought them into close contact with the state – or rather the relevant secular authorities, since the term "state," in our common modern acceptation of that term, is difficult to apply to the pre-sixteenth-century context[27] – at least not primarily and not as a matter of marriage *validity* (although our couple might have found themselves confronted with secular attempts to influence their marriage choice through fines and other punishments). Finally, an early sixteenth-century Georg and Katharina would have found that the substantive regime governing marriage formation and dissolution comprised an impressive array of marital bars (many of them dispensable, but at a price) and a doctrine of marital indissolubility grounded in the Christian Bible.

The law of marriage formation and dissolution in the West as it stood in the early sixteenth century – on the eve of the Protestant Reformation – was the canon law of the Catholic Church, which was enforced by a hierarchy of ecclesiastical tribunals with the Roman curia at its apex.[28] This law of marriage was a *ius commune*, or common law, that applied (with at most minor modifications[29]) throughout the Western[30] world. In Frederic Maitland's terse summary, there was no such thing as an "English [or, we might add, a German] law of

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[26] Already several decades before the passage of the Divorce, Dissolution and Separation Act 2020, England had introduced a special procedure for undefended petitions, which provided for minimal scrutiny by the court. Herring, *Family Law*, 164.

[27] For one thing, the "modern" nation-state is commonly dated from the Reformation. For another thing, even the church was, in a sense, a "state" in the medieval period. It had laws, lawgivers, law courts, sanctions, and troops. Frederic William Maitland, *Roman Canon Law in the Church of England: Six Essays* (London, 1898), 100. However, the medieval church did not exercise authority in all areas that we would today call governmental (except in the papal state) and frequently had to rely on secular authorities to enforce its judgments. Charles Donahue Jr., "Private Law without the State and during Its Formation," *American Journal of Comparative Law* 56, no. 3 (Summer 2008): 551–52.

[28] Charles Donahue Jr., *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts* (Cambridge, UK: Cambridge University Press, 2007), ch. 1; John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2012), 98; Andreas Thier, "§§ 1303–1312, 1588 – Eingehung der Ehe," in *Historisch-kritischer Kommentar zum BGB*, vol. 4, *Familienrecht*, ed. Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (Tübingen: Mohr Siebeck, 2018), 244–57.

[29] There was local law, both ecclesiastical and secular, that added to and changed the practical effect of some of the general law of the church.

[30] The Eastern Church, which began to divide from the Western Church after the seventh Ecumenical Council (787) and is commonly believed to have finally split over the conflict with Rome in the Great Schism (1054), had its own doctrine of marriage. While marriage is

marriage"[31] prior to the Reformation, and there had been no such thing since approximately the twelfth century.[32] Quoting Maitland again, if you wanted to know back then whether you were old enough to marry, whether you could marry your late wife's second cousin or your godmother's daughter, whether a religious ceremony was essential to marriage validity, or whether you could get a divorce, you would "find your answer in the *ius commune* of the church."[33] Maitland's unitary view has not gone unchallenged: in the nineteenth century, in the so-called Stubbs-Maitland dispute, an attempt was made to show that provincial and diocesan legislation, coupled with special local customs, gave the English church (and perhaps other local churches) a degree of independence from the papacy even before the Reformation.[34] However, modern historians of marriage law agree that, in the main, Maitland was undoubtedly correct[35] – at least as regards the canon law in the books. The picture might change once we look at the subject from the point of view not of canon-law theory, but of what actually occurred in the courts, which is a story that is only beginning to be gleaned from the surviving and scattered records of the ecclesiastical courts.[36] The validity of the conjugal bond was of paramount concern to the Roman Church, and the fundamental components of the church's law of marriage were the same everywhere. Although there was some room (perhaps more than Maitland believed to exist) for local churches to adopt special rules to deal with local problems, such variations as occurred only supplemented and added detail and did not go to the fundamentals of the general law.[37] By way of exam-

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also one of the seven sacraments of the Eastern Church, divorce and remarriage are permissible in certain circumstances.

[31] Maitland, *Roman Canon Law in the Church of England*, 39.

[32] Maitland has been criticized, but his chief argument remains uncontroverted. See, e.g., Arthur Ogle, *The Canon Law in Medieval England: An Examination of William Lyndwood's "Provinciale," in Reply to the Late Professor F. W. Maitland* (London: John Murray, 1912).

[33] Maitland, *Roman Canon Law in the Church of England*, 39–40 (quotation at 40).

[34] For a brief summary of the dispute, see R.H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, The Oxford History of the Laws of England, vol. 1 (Oxford: Oxford University Press, 2004), 161.

[35] See, e.g., R.H. Helmholz, *Canon Law and the Law of England* (London: Hambledon Press, 1987), 145; T.A. Lacey, *Marriage in Church and State* (New York: Samuel R. Leland, 1912), 143; Mia Korpiola, "Introduction: Regional Variations and Harmonization in Medieval Matrimonial Law," in *Regional Variations in Matrimonial Law and Custom in Europe, 1150–1600*, ed. Mia Korpiola (Leiden: Brill, 2011), 20. Korpiola notes that "it is undoubtedly true that the common supraregional law of the Church as taught in the medieval universities and applied in the courts was largely uniform."

[36] Having said that, Charles Donahue's pioneering comparative study of marriage litigation finds a basic uniformity in the canon-law rules that were being applied. According to him, what was different was not so much the rules that were being applied as the kind of claims that were made before the courts. Donahue, *Law, Marriage, and Society*, 600.

[37] Local legislation and custom could alter the accidental elements of marriage (e.g. the personal extent of the impediment of spiritual affinity), but they could not change the church's general law. James A. Brundage, "*E Pluribus Unum*: Custom, the Professionalization of

ple,[38] local churches might adopt different solemnity provisions and they might deal differently with "clandestine" marriages that flouted them. The French church, for instance, automatically excommunicated those who married without the prescribed solemnities, while the English church did not. However, all local churches accepted the basic canon-law rule that clandestine marriages were valid.[39]

The Roman Church and its courts did not enjoy a *complete* monopoly over matrimonial matters. Their exclusive competence was confined to all matters that essentially concerned the existence of the marriage *bond*, i. e. marriage formation, impediments, and dissolution. Secular law and secular courts dealt with the more mundane legal *consequences* of marriage, in particular the property and inheritance rights arising from it, and they might not allow full legal rights to flow from a canonically valid marriage unless certain further requirements, compatible with and complementary to those of the church, were satisfied. Secular requirements that added to the canon law for property purposes were common throughout Europe in the later Middle Ages and, apart from Bishop Grosseteste's objection to the English law regarding legitimation by subsequent marriage,[40] the medieval church did not object to a stricter definition of marriage for marital property purposes than the church required for the sacrament itself.[41] In England, essentially, a marriage not solemnized *in facie ecclesiae* carried with it no rights in land.[42] Similarly, in the pre-Reformation German territories, the property consequences of marriage were not triggered by every canonically valid marriage, but only by the additional requirement of church

Medieval Law, and Regional Variations in Marriage Formation," in Korpiola, *Regional Variations*, 36–39.

[38] For further examples, see Richard Helmholz's description of the English practice, introduced by a series of synodal statutes in the thirteenth and largely defunct by the fifteenth century, of requiring those convicted in a church court of (usually aggravated) fornication to abjure each other under penalty of marriage. Helmholz, *Canon Law and the Law of England*, 145–55. A similar practice may have obtained in parts of Germany. Instances are known for Regensburg. Korpiola, "Introduction," 14.

[39] Donahue, *Law, Marriage, and Society*, 32–33, 633.

[40] England restricted the application of the canon-law principle of legitimation by subsequent marriage. Adoption of the rule was rejected by the English barons, against the urging of the bishops, at the Council of Merton (1235). As a result, the church and the secular courts in England no longer applied the same definition of legitimacy. The common law would not permit the church to decide questions that affected the inheritance of land, and the secular courts began to stop referring the question of legitimacy to the ecclesiastical courts for determination where the bastardy arose from the fact that the child had been born before his parents' marriage (special bastardy) and where the subject of the ultimate dispute (inheritance of a lay fee) was, by the canon law's own principles, within the jurisdiction of the secular courts. See Helmholz, *Canon Law and the Law of England*, 187–210.

[41] Charles Donahue Jr., "Was There a Change in Marriage Law in the Late Middle Ages?" *Rivista internationale di diritto comune* 6 (1995): 56.

[42] Eric Josef Carlson, *Marriage and the English Reformation* (Oxford: Blackwell Publishers, 1994), 29.

solemnization (*Trauung*).[43] However, it was firmly established by the later Middle Ages that all suits concerning the bond itself, either to enforce it or to dissolve it, would be governed by the canon law and were cognizable only in the ecclesiastical courts.[44] This law of marriage formation and dissolution was a substantially unified ecclesiastical law in the later Middle Ages, unlike the secular law of marital property and succession, which continued to be marked by considerable regional variation.[45]

That all matters concerning the formation and dissolution of marriage should have been within the exclusive legislative and jurisdictional competence of the Catholic Church in the early sixteenth century (as indeed they had been from the late Middle Ages) was the result of an evolutionary process.[46] In the early days of the Christian church, Christian marriage laws stood beside secular ones, and the church could exact obedience to them only from its faithful. With the fourth-century conversion of temporal rulers to Christianity,[47] the church became able to influence the substance of secular marriage legislation, although its influence remained incomplete, as temporal rulers did not go as far as the church would have wanted them to go, particularly in the prohibition of divorce.[48] It was not until around 1200 that the church was no longer merely influencing, but was itself framing and applying the formation and dissolution rules that governed marriage throughout Western Christendom.

The church's acquisition of complete formal and substantive control was the result of two protracted and almost certainly interlocking developments, both

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[43] Rudolph Sohm, *Das Recht der Eheschließung aus dem deutschen und kanonischen Recht geschichtlich entwickelt: Eine Antwort auf die Frage nach dem Verhältnis der kirchlichen Trauung zur Zivilehe* (1875; repr., Aalen: Scientia Verlag, 1966), 95–96.

[44] Martin Ingram, "Spousal Litigation in the English Ecclesiastical Courts *c.*1350–*c.*1640," in *Marriage and Society: Studies in the Social History of Marriage*, ed. R.B. Outhwaite (London: Europa Publications, 1981), 35.

[45] Charles Donahue Jr., "Conclusion: Comparative Approaches to Marriage in the Later Middle Ages," in Korpiola, *Regional Variations*, 310.

[46] For an account of the gradually expanding influence of Christianity upon marriage in the West from the times of the early Christian church until the emergence of a systematized canon law of marriage in the twelfth and thirteenth centuries, see Adhémar Esmein, *Le mariage en droit canonique*, 2nd ed., vol. 1 (Paris: Recueil Sirey, 1929), 1–31; Philip Lyndon Reynolds, *Marriage in the Western Church: The Christianization of Marriage during the Patristic and Early Medieval Periods* (Leiden: E.J. Brill, 1994); Mathias Schmoeckel, "Vor §§ 1313–1320 – Auflösung der Ehe," in Schmoeckel, Rückert, and Zimmermann, *Historisch-kritischer Kommentar*, 309–40.

[47] Christianity became the dominant religion of the Roman Empire during the reign of Constantine the Great (ruled 306–37), who gradually converted to Christianity. Under Constantine's successors, the Christianization of the Roman Empire advanced in fits and starts, as John Curran has shown in detail. John Curran, *Pagan City and Christian Capital: Rome in the Fourth Century* (Oxford: Clarendon Press, 2000).

[48] Esmein, *Le mariage en droit canonique*, 1:5–11; Ernst Troeltsch, *The Social Teaching of the Christian Churches*, trans. Olive Wyon (Louisville, KY: Westminster John Knox Press, 1992), 1:131.

of which came to a head in the twelfth century (and did not come in for serious challenge until the beginning of the sixteenth). The first was the Roman Church's distillation, fuelled by the Gregorian reform movement of the eleventh century and the twelfth-century revival of Roman- and canon-law studies in the nascent European universities, of an integrated system of canon law (including a comprehensive canon law of marriage) from a welter of diversified authorities. These were of biblical, Roman, customary, and church origins, culminating in Gratian's *Concordance of Discordant Canons* (1140),[49] Gregory IX's *Decretales* (1234),[50] and ultimately the *Corpus Iuris Canonici* (ca. 1586).[51] The second was the articulation, usually associated with Peter Lombard's *Sentences* (ca. 1155–58),[52] of a full sacramental theology of marriage as a union symbolizing the eternal union between Christ and the church and a channel of sanctifying grace. These twin developments supplied the later medieval church with both a sophisticated law of marriage (including a transnational hierarchy of tribunals[53]) and a powerful ideological justification for regarding the marital bond,

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[49] *Decretum Magistri Gratiani*, in *Corpus Iuris Canonici*, ed. Emil Friedberg, 2nd ed., vol. 1 (Leipzig, 1879).

[50] *Decretalium D. Gregorii Papae IX Compilatio*, in *Corpus Iuris Canonici*, ed. Emil Friedberg, 2nd ed., vol. 2 (Leipzig, 1881), cols. 1–928.

[51] The title first appears in multi-volume editions published in Frankfurt and Paris, 1586–87. On the development, see Stephan G. Kuttner, *Harmony from Dissonance: An Interpretation of Medieval Canon Law* (Latrobe, PA: Archabbey Press, 1960); Pierre Daudet, *Etudes sur l'histoire de la juridiction matrimoniale: Les origines carolingiennes de la compétence exclusive de l'église (France et Germanie)* (Paris: Recueil Sirey, 1933); Pierre Daudet, *Etudes sur l'histoire de la juridiction matrimoniale: L'établissement de la compétence de l'église en matière de divorce et de consanguinité (France – Xième – XIIième siècles)* (Paris: Recueil Sirey, 1941); Charles Donahue Jr., "Popes Alexander III and Innocent III," in *Christianity and Family Law: An Introduction*, ed. John Witte Jr. and Gary S. Hauk (Cambridge, UK: Cambridge University Press, 2017), 161–78.

[52] Peter Lombard, *The Sentences, Book 4: On the Doctrine of Signs*, trans. Guilio Silano (Toronto: Pontifical Institute of Mediaeval Studies, 2010), dist. 26–42. The sacramental model of marriage derives from Ephesians 5:21–33 and was experimented with by church fathers like Augustine of Hippo in the fifth century. Lombard's *Sentences*, which unequivocally classed marriage as one of the sacraments, exerted a persuasive influence throughout the Middle Ages and into the early modern period. Philipp W. Rosemann, *The Story of a Great Medieval Book: Peter Lombard's Sentences* (Peterborough, ON: Broadview Press, 2007). The notion that marriage is a sacrament was accepted as Catholic dogma at the Council of Trent (1545–63) and represents the Catholic position to this day. On the development generally, see Philip Lyndon Reynolds, *How Marriage Became One of the Sacraments* (Cambridge, UK: Cambridge University Press, 2016) and Schmoeckel, "Vor §§ 1313–1320 – Auflösung der Ehe," 334–40.

[53] On the importance of the acquisition of jurisdiction, see Mathias Schmoeckel, *Kanonisches Recht: Geschichte und Inhalt des Corpus iuris canonici* (Munich: C.H. Beck, 2020), 252. On church courts and canon-law procedure, see James A. Brundage, *Medieval Canon Law* (London: Longman, 1995); Knut Wolfgang Nörr, *Römisch-kanonisches Prozessrecht* (Heidelberg: Springer, 2012); Wilfried Hartmann and Kenneth Pennington, eds., *The History of Courts and Procedure in Medieval Canon Law* (Washington: Catholic University of America Press, 2016).

its legal regulation, and its adjudication as central concerns for the church to the exclusion of secular rivals.[54] The sacramentality of marriage also influenced the *content* of at least some canon-law rules (formation by the parties' present consent alone, indissolubility of a marriage validly contracted, etc.), although it may not provide a full explanation for these doctrines.[55]

However, this book is not about how the church acquired control of marriage formation and dissolution and why it did so: it tells the story not of the consolidation, but of the decline of church influence in this area. It is a familiar observation in the historiography of Western marriage that from the early sixteenth century, the legal regulation of the marriage bond began to pass out of the hands of the universal church into those of particular nation-states;[56] and that those states, especially since the late twentieth century, have allowed increasing sway to the wishes (or some might say the whims) of the couple.[57] I tell that story for England and a precursor of modern-day Germany – the territory of (Brandenburg-)Prussia – from the early sixteenth until the close of the nineteenth century. I should perhaps point out that – since the church's exclusive control had been limited to the marriage bond – my focus is limited to the law of marriage formation, impediments, and dissolution. In what follows, whenever I use the term *marriage law*, I generally use it in this restricted sense.

In its broad outlines, this is a story about marriage law's "secularization," although the validity of this claim depends on how one defines that difficult

[54] There is widespread consensus that the notion of marriage as a sacrament and the Roman Church's legislative and jurisdictional claims are related. See, e.g., Hartwig Dieterich, *Das protestantische Eherecht in Deutschland bis zur Mitte des 17. Jahrhunderts* (Munich: Claudius Verlag, 1970), 21; Dieter Giesen, *Grundlagen und Entwicklung des englischen Eherechts in der Neuzeit bis zum Beginn des 19. Jahrhunderts [...]* (Bielefeld: Verlag Ernst und Werner Gieseking, 1973), 39; Stephan Buchholz, "Einzelgesetzgebung," in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 3, bk. 2, *Das 19. Jahrhundert: Gesetzgebung zum allgemeinen Privatrecht und Verfahrensrecht*, ed. Helmut Coing (Munich: C.H. Beck, 1982), 1627; Dieter Schwab, *Grundlagen und Gestalt der staatlichen Ehegesetzgebung in der Neuzeit bis zum Beginn des 19. Jahrhunderts* (Bielefeld: Verlag Ernst und Werner Gieseking, 1967), 20–21; Witte, *From Sacrament to Contract*, 5, 78–79.

[55] For an argument that the sacramentality of marriage determined the content of the chief canon-law rules like formation by the parties' present consent alone and the indissolubility principle, see Witte, *From Sacrament to Contract*, esp. at 94–95. Charles Donahue, on the other hand, is doubtful that "the sacramentality of marriage provides a full explanation for these doctrines." See Charles Donahue Jr., "What Difference Does It Make If Marriage Is a Sacrament? An Historical Approach," in *Jurisprudence of Marriage and Other Intimate Relationships*, ed. Scott FitzGibbon, Lynn D. Wardle, and A. Scott Loveless (Buffalo, NY: William S. Hein, 2010), 27.

[56] Witte's *From Sacrament to Contract* is probably the key text.

[57] Scott Yenor, *Family Politics: The Idea of Marriage in Modern Political Thought* (Waco, TX: Baylor University Press, 2011), 4. Yenor calls marriage a "limited joint venture for ends determined by the individuals." For a detailed comparative argument that Western marriage has become increasingly "dejuridified," see Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1989), esp. chs. 2, 4, 7.

term. John Witte, for instance, although he describes the "grand movement of Western marriage law" since the Reformation as a movement "from sacrament to contract," has denied that this was a move towards secularization. And if, like him, we treat the modern ideals governing marriage law – i.e. the values of "liberty, equality, autonomy, and more" – as "faith-like beliefs,"[58] then Witte is undoubtedly correct. We can certainly rule out the possibility of secularization on a conceptual level by subsuming an increasing number of phenomena (like Witte's "liberty, equality, autonomy, and more") under the term *religion*.[59] However, the German sociologist Hans Joas has warned that it would be a mistake to do that.[60] If, therefore, we do not want to exclude the very possibility of secularization by simply extending the meaning of religion, we still need to define what we mean when we use the term.

The term *secularization* has many levels of meaning, which it would be well to acknowledge upfront. It has distinct uses in different disciplines, and even within its master discipline – that of sociology and in particular the sociology of religion – it means different things to different theorists. Larry Shiner noted back in 1967 that in "both the empirical and interpretive work on secularization today, the lack of agreement on what secularization is and how to measure it stands out above everything else."[61] Etymologically, the term derives from the Latin word *saeculum*, which can mean a generation, age or great span of time (e.g. *in saecula saeculorum*, 1 Timothy 1:17), but also, especially in ecclesiastical Latin, the secular "world" or "worldliness" (e.g. *et nolite conformari huic saeculo*, Romans 12:2).[62] This semantic connotation points to the fact that social reality in early Christendom was structured through a system of classification that divided the world into two heterogeneous spheres: what today we might call "the religious" and "the secular." The term *secularization* was first used in canon law to refer to the process whereby a monk left the "religious sphere" of the cloister to return to the "worldly sphere" as a secular priest.[63] In reference to

[58] Witte, *From Sacrament to Contract*, 12.

[59] Hans Joas, *Faith as an Option: Possible Futures for Christianity*, trans. Alex Skinner (Stanford: Stanford University Press, 2014), 39.

[60] Joas, *Faith as an Option*, 39.

[61] Larry Shiner, "The Concept of Secularization in Empirical Research," *Journal for the Scientific Study of Religion* 6, no. 2 (Autumn 1967): 208. C. John Sommerville and Martin Heckel have also noted several ambiguities. C. John Sommerville, "Secular Society/Religious Population: Our Tacit Rules for Using the Term 'Secularization,'" *Journal for the Scientific Study of Religion* 37, no. 2 (June 1998): 249–53; Martin Heckel, "Säkularisierung: Staatskirchenrechtliche Aspekte einer umstrittenen Kategorie," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 66 (1980): 4–7. For book-length discussions of the history of the concept, see Martin Stallmann, *Was ist Säkularisierung?* (Tübingen: J.C.B. Mohr, 1960) and Hermann Lübbe, *Säkularisierung: Geschichte eines ideenpolitischen Begriffs*, 2nd ed. (Munich: Karl Alber, 1965).

[62] See, e.g., Charlton Thomas Lewis and Charles Short, *A Latin Dictionary* (Oxford: Clarendon Press, 1879), 1613–14.

[63] *Codex Iuris Canonici*, canon 638.

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