

Uncovering the Reformation Roots of American Marriage and Divorce Law

Judith Areen†

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† Paul Regis Dean Professor of Law, Georgetown University Law Center. I am grateful to Norman Birnbaum, Jonathan Cooper, Richard Cooper, Nancy Cott, Daniel Ernst, William Eskridge, Heidi Li Feldman, John Kester, Erin Kidwell, James Oldham, René Pahud de Mortanges, Jedediah Purdy, Louis Michael Seidman, Jeffrey Shulman, Philomila Tsoukala, and Robin West for their very helpful comments on earlier drafts of this article; to Emily Poor and Kathryn Choate for their research assistance; and to Martina Oertling for her translation assistance.

INTRODUCTION

In 1639, Massachusetts Bay colonists pressed Governor John Winthrop to adopt a “body of laws” that would restrict the considerable power that “rested in the discretion of magistrates.”¹ Having survived both the transatlantic voyage and the rigors of the new world in their quest to establish a religious utopia away from the demands of church and state in England, the colonists were understandably loath to give their local officials unchecked power. Winthrop offered several reasons why the leaders of the colony opposed the request: the colonists did not yet have enough experience to develop laws appropriate for their new circumstances, and their charter forbid them from adopting laws repugnant to the laws of England.² He used marriage to buttress his second point by reminding the colonists that magistrates were performing marriages in the colony even though only ministers were authorized to do so in England. If they codified this nonconforming practice, the colonists risked being penalized for failing to comply with their charter.³ Winthrop lost the battle against codification—a *Body of Liberties*⁴ was adopted by the colony in 1641—but the colonists were persuaded to rely for the time being on judicial rather than legislative oversight of family matters; not only did magistrates continue to perform marriages in Massachusetts Bay without explicit legislative authorization, but colonial courts, in clear violation of the ecclesiastical laws of the Church of England, began granting divorces in 1643.⁵

The stamp of colonial divorce practice is still discernible in divorce today. It was the New England colonial courts, for example, that made proof of marital fault (meaning one spouse had committed adultery or desertion) a requirement for obtaining a divorce. If both spouses committed marital faults, a divorce would not be granted. The innocent-spouse requirement was so rigid that, well into the twentieth century, some courts, invoking what is termed the doctrine of recrimination, continued to deny divorces to couples when each spouse had committed a marital fault.⁶

Even after 1970, when California decided that couples could be divorced without proof of fault if they had “irreconcilable differences,”⁷ most states did

1. JOHN WINTHROP, 1 WINTHROP'S JOURNAL, HISTORY OF NEW ENGLAND, 1630-1649, at 323 (photo. reprint 2005) (James Kendall Hosmer ed., 1908).

2. *Id.* at 323-24.

3. *Id.* at 324 (“[I]n matters of marriage, to make a law that marriages should not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it, is no law made repugnant”).

4. *The Body of Liberties of 1641*, in THE COLONIAL LAWS OF MASSACHUSETTS: REPRINTED FROM THE EDITION OF 1660 (Fred B. Rothman ed., 1995) (1889).

5. The first recorded case in which a divorce was granted is *Clarke v. Clarke*, Ct. Asst. 1643/44, in 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY, 1630-1692, at 60 (John Noble & John Cronin eds., 1904) [hereinafter ASSISTANTS (volume):(page)].

6. *E.g.*, *McCullum v. McCullum*, 301 S.W.2d 565 (Ark. 1957).

7. CAL CIV. CODE ch. 8, §§ 4503-4509 (West 1970).

not abolish their fault grounds and defenses; they simply added a no-fault ground.⁸ Given the choice, some divorcing spouses prefer to rely on a fault ground, often to gain a strategic advantage in related disputes over custody or marital assets.⁹ Litigants and courts in most states thus still wrestle with how best to interpret and to apply divorce requirements that were formulated centuries ago.

Legal scholars have not paid sufficient attention to the distinctiveness of colonial family law. For example, Lawrence Friedman in his classic *A History of American Law*¹⁰ divides the colonies into three geographic groups, and reports that divorce was available in the New England region and in some colonies in the mid-Atlantic region, but not in colonies in the South.¹¹ His summary of the regional differences is accurate enough, but it sheds no light on *why* there were regional differences. Friedman also mentions that, until 1857, England was a “divorceless society”¹² (apart from a limited number of divorces granted to wealthy aristocrats in private bills by Parliament after 1660¹³) but he never discusses why judicial divorces were granted in New England more than two centuries before they were available in England. Friedman also acknowledges that all the colonies treated marriage as a civil matter despite the fact that marriage in England remained under the control of the Church until 1836,¹⁴ but, again, he never addresses the reasons for the difference.¹⁵

In this article I take up fundamental questions about the origins of American marriage and divorce law. Most American law derived from the law of England,¹⁶ but as this article will show, most of family law did not. Why not? In England, marriage was controlled by religious authorities and weddings

8. New York was the fiftieth state to adopt some form of no-fault divorce. In contrast to California, the New York legislature did not abolish the state’s fault grounds and defenses, but simply added a no-fault ground. N.Y. DOM. REL. LAW § 170(7) (Consol. 2011).

9. *See, e.g.*, *Arnoult v. Arnoult*, 690 So. 2d 101 (La. Ct. App. 1997) (couple filed for divorce on grounds of living separate and apart; husband later revised petition to allege wife had committed adultery).

10. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005).

11. *Id.* at 142.

12. *Id.*

13. *See* LAWRENCE STONE, *ROAD TO DIVORCE, ENGLAND 1530-1987*, at 309-46 (1990). Only sixteen divorces were granted by Parliament between 1670 and 1749. MERRY WIESNER-HANKS, *CHRISTIANITY AND SEXUALITY IN THE EARLY MODERN WORLD: REGULATING DESIRE, REFORMING PRACTICE* 99 (2d ed. 2010).

14. *See* THE ACT FOR MARRIAGES IN ENGLAND 1836, 6 & 7 Wm. 4, c. 85.

15. Some historians have acknowledged that the New England colonies did not follow English law on divorce. *See, e.g.*, CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, & SOCIETY IN CONNECTICUT, 1639-1789*, at 43 (1995) (“On the subject of divorce, Connecticut defiantly adhered to a liberal policy that took its inspiration from Martin Luther’s teachings and was in clear conflict with English law.”); Nancy Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 WM. & MARY Q. 586, 588 (1976) (“The petitioners had an easier time gaining divorce in provincial Massachusetts than they would have had in the mother country. In England, marital controversies were judged by the ecclesiastical courts, and these courts applied canon law under which a valid marriage was regarded as indissoluble.”).

16. *See* George L. Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. PA. L. REV. 842 (1949); FRIEDMAN, *supra* note 10, at xii.

were performed by ministers, but the colonies treated marriage as a civil matter and, at least in New England, magistrates performed marriages. Why? The Church of England firmly opposed judicial divorce before the nineteenth century. What source or sources did the New England colonies rely on when they began granting divorces, or conditioned divorce on proof of marital fault?

These questions are not easy to answer because marriage and divorce law sits at a contested intersection of civil society, law, and religion. Any study of this period is also handicapped by the shortage of intellectual history of the legal culture or law in early colonial history. More than twenty years ago Richard Ross noted that the colonial legal world recognized a hodgepodge of customs, including some from Holland and Germany, yet no one has accepted his implicit invitation to examine those influences.¹⁷ Many legal historians have also overlooked the role of sectarian differences in shaping colonial law. This article will show that the history of American marriage and divorce law turns not only on the struggle between church and state for control of marriage, but on religious differences between Protestants and Catholics in Reformation Europe. Those differences led to differences between Puritans and Anglicans in England and in its North American colonies.

To uncover the Reformation roots of American marriage and divorce law, it is necessary first to understand how the Reformation changed marriage law in Northern Europe. The article begins, therefore, with an analysis of Martin Luther's views on marriage and family life because the theological case he made in the early sixteenth century for preferring marriage (and divorce) to celibacy laid the conceptual foundation for civil marriage and fault-based divorce. Part I also examines the first Reformation marriage law and court. The Zurich Ordinance of 1525 was not only the first modern marriage and divorce law, but it also went further than Luther by recognizing no-fault as well as fault grounds for divorce.¹⁸ Part II chronicles the failure of efforts to bring the new Protestant marriage and divorce reforms to England even after Henry VIII broke with Rome in 1534 to establish a separate Church of England. The Part also analyzes the provisions of the *Reformatio Legum Ecclesiasticarum*,¹⁹ the 1553 attempt led by Thomas Cranmer, then Archbishop of Canterbury, to persuade Parliament to reform English family and church law. Finally, Part II focuses on the rise of Puritanism in England as well as Puritan support for civil

17. Richard Ross, *The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History*, 50 WM. & MARY Q. 28, 36 (1993).

18. Ordinance and Notice: How Matters Concerning Marriage Shall be Conducted in the City of Zurich, in ULRICH ZWINGLI, *SELECTED WORKS* 118 (Samuel Macauley Jackson ed., 1971) (1901) [hereinafter Zurich Ordinance of 1525]. Divorce was available in the West prior to the rise of Christianity. It was permitted, for example, under Roman law. THOMAS MAX SAFELY, *LET NO MAN PUT ASUNDER: THE CONTROL OF MARRIAGE IN THE GERMAN SOUTHWEST: A COMPARATIVE STUDY, 1550-1600*, at 25 (1984).

19. TUDOR CHURCH REFORM: THE HENRICIAN CANONS OF 1535 AND THE *REFORMATIO LEGUM ECCLESIASTICARUM* 150 (Gerald Bray ed., 2000) [hereinafter *THE REFORMATIO*].

marriage and divorce in the decades leading up to the colonization of British North America. Part III examines the reform marriage and divorce practices the Puritans adopted in New England, and identifies various modes by which knowledge of the theology and laws of marriage and divorce developed a century earlier in Wittenberg, Zurich, and Geneva was transmitted to the colonists. Part III also looks at Virginia to understand why civil marriage became the norm even in the colonies outside New England. Virginia, unlike the New England colonies, put its colonial government in charge of marriage, not as a result of sectarian differences, but because the Church of England failed to establish ecclesiastical courts that could oversee family matters as was done in England.²⁰ Part IV shows that succeeding generations maintained the marriage and divorce practices of the first New England Puritans despite repeated English efforts to impose the doctrines of the Anglican Church. The resulting variation from colony to colony in marriage and divorce law combined with the influx of a large number of non-English, Protestant immigrants during the eighteenth century to produce a distinctively American family law in the new nation.²¹

Two core concepts link the four parts of the Article. The first is civil marriage. Once Martin Luther identified scriptural support for treating marriage as a contract rather than a sacrament, support grew for giving secular authorities, rather than the church, control of marriage. The second core concept is divorce. After Luther opened the door to divorce for adultery or desertion, Zurich adopted an even greater number of grounds for divorce as early as 1525. Geneva in 1546, by contrast, passed a divorce ordinance that limited divorce grounds to adultery and desertion. Divorce was considered—but not adopted—by the English Parliament in 1553; it was recognized, however, in the Puritan courts of the New England colonies.

The history of marriage and divorce law has been clouded in part by confusion over terms. I will follow modern practice and use the term “divorce” to mean the complete termination of a marriage with the right to remarry, and “legal separation” (divorce *a mensa et thoro*) to mean the spouses are authorized to live apart, but may not remarry. I will use “annulment” (confusingly sometimes termed divorce *a vinculo matrimonii*) to mean an official declaration that a valid marriage was never contracted, typically made

20. Brent Tarter, *Evidence of Religion in Seventeenth Century Virginia*, in FROM JAMESTOWN TO JEFFERSON: THE EVOLUTION OF RELIGIOUS FREEDOM IN VIRGINIA 17, 26 (Paul Rasor & Richard E. Bond eds., 2011).

21. ALAN TAYLOR, WRITING EARLY AMERICAN HISTORY 97-98 (2005); MARK A. NOLL, CHRISTIANS IN THE AMERICAN REVOLUTION 30 (1977) (“[T]hree-fourths of the colonists at the time of the Revolution were identified with denominations that had arisen from the Reformed, Puritan wing of European Protestantism: Congregationalism, Presbyterianism, Baptists, German and Dutch Reformed.”); Patricia U. Bonomi, *Religious Dissent and the Case for American Exceptionalism*, in RELIGION IN A REVOLUTIONARY AGE 33 (Ronald Hoffman & Peter J. Albert eds., 1993) (“The single most important fact about colonial religion is that a majority of Americans were Dissenters. . . . [B]y the time of the Revolution three-quarters or more of Americans did not conform to the Church of England.”).

because there was some kind of impediment to the marriage, such as impotence or one of the parties lacked the capacity to contract a marriage because he or she was already married.

I. SIXTEENTH CENTURY EUROPEAN MARRIAGE AND DIVORCE LAW REFORM

Historians may no longer consider the Reformation to be the “hinge on which all modern history turns,”²² but it created a religious divide between Catholics and Protestants that influenced colonial America and still haunts Western Europe. Even scholars who are skeptical about whether the Reformation produced lasting political or social reforms acknowledge that it overturned settled views on celibacy, marriage, and divorce,²³ and elevated the status of family life.²⁴

Reform views of marriage took hold in a remarkably short time (particularly in comparison to the centuries it took the Catholic Church, guided by the teachings of Augustine of Hippo) to establish that celibacy is superior to marriage, that the primary purpose of marriage is procreation, and that marriage is a sacrament that may only be terminated by death.²⁵

This Part focuses on the Reformation origins of New England’s marriage and divorce laws. It begins with Martin Luther’s pronouncements on civil marriage and divorce. Luther began writing on marriage in 1519, not even two years after he posted his ninety-five theses on the Wittenberg church door.²⁶ He

22. James Froude, *quoted in* HERBERT W. PAUL, *THE LIFE OF FROUDE* 72 (1905).

23. *See, e.g.*, JOEL F. HARRINGTON, *REORDERING MARRIAGE AND SOCIETY IN REFORMATION GERMANY* 16-17 (1995).

24. PATRICK COLLINSON, *THE BIRTHPANGS OF PROTESTANT ENGLAND: RELIGIOUS AND CULTURAL CHANGE IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 62 (1988).

25. AUGUSTINE, *De Sancta Virginitate*, in *AUGUSTINE: DE BONO CONIUGALI AND DE SANCTA VIRGINITATE* 73-77 (P.G. Walsh ed., trans., Oxford Univ. Press 2001) (401). *See generally* JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 80-82, 95 (1987) (Augustine of Hippo (354-430), the most influential early authority on sexuality and marriage, believed that sex was “a shameful, sordid business” and considered celibacy superior to marriage). Augustine did not hold that procreation was the *only* purpose of marriage: “The explanation why marriage is a good lies, I think, not merely in the procreation of children, but also in the natural compact itself between the sexes. If this were not the case, we would not now speak of marriage between the elderly, especially if they had lost their children, or had not had any at all.” AUGUSTINE, *De Bono Coniugali*, in *AUGUSTINE: DE BONO CONIUGALI AND DE SANCTA VIRGINITATE*, *supra*, at 7. Augustine’s balanced view of the purposes of marriage was overturned over time, however. By the late nineteenth century, many of the Church’s doctrinal statements and legal texts treated procreation as the primary, and even as the exclusive, purpose of marriage. John Witte, Jr., *The Goods and Goals of Marriage*, 76 *NOTRE DAME L. REV.* 1019, 1030 (2000-01).

26. MARTIN LUTHER, *A Sermon on the Estate of Marriage*, in 44 *LUTHER’S WORKS: THE CHRISTIAN IN SOCIETY* 3 (James Atkinson ed., trans., Fortress Press 1966) (1519). The standard American source on Luther’s writing is the fifty-five volume *LUTHER’S WORKS* (Jaroslav Pelikan & Helmut T. Lehmann eds., 1957) [hereinafter cited as LW volume: page.] The story of Luther posting his theses on the church door may be apocryphal, DIARMAID MACCULLOCH, *REFORMATION: EUROPE’S HOUSE DIVIDED, 1490-1700*, at 123-24 (2003), but Luther did send a copy of his theses to the local archbishop, thereby informing the Church of his views. The Archbishop forwarded them to the pope. *Id.* at 124.

argued that marriage should be for love and companionship as well as procreative sex. One year later, he challenged the teachings of the Church more directly by preaching that, for most people, marriage is a better life choice than celibacy.²⁷ By 1525, Luther himself had given up celibacy for marriage and, three years later, he declared the family to be as important a social institution as church or state.²⁸ Luther at first was reluctant to accept divorce but, by 1522, he changed his mind and declared that there is scriptural support for divorce on the grounds of either adultery or desertion.²⁹

This Part then turns to the work of Hubert Zwingli in Zurich, which in 1525 enacted the first modern marriage and divorce law, established the first Reformation marriage court (*Ehegericht*), and gave the court jurisdiction over divorce as well as marriage. The Zurich Ordinance also put in place new procedural requirements for marriage, and authorized the *Ehegericht* to grant divorces not only for adultery and desertion, but also for “other such reasons, of which no rule can be made on account of their dissimilarity.”³⁰ By 1531, when Charles V, the Holy Roman Emperor, ordered all Protestant territories to return to traditional Catholic religious practices, it was already too late. Many cities and towns were predominantly, if not entirely, Protestant; hundreds of clergy had wives and children; scores of monasteries had been dissolved.³¹ The Part ends with a look at the work of Calvin in Geneva, where divorce was made legal, but only for adultery or desertion.

A. Luther Advocates Civil Marriage and Fault-Based Divorce

Diarmaid MacCulloch, author of the most comprehensive modern history of the Reformation, argues that there would have been some reform of the Church even without Luther: local princes and city councils were taking power from churchmen long before the Reformation;³² the widespread availability of new translations by Erasmus and other humanists was undermining the claim of

27. MARTIN LUTHER, *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate*, in 44 LUTHER'S WORKS: I THE CHRISTIAN IN SOCIETY 135, 174 (James Atkinson ed., Charles M. Jacobs trans., James Atkinson rev., Fortress Press 1966) (1520), LW 44:135, 174.

28. MARTIN LUTHER, *Confessions Concerning Christ's Supper: Part III*, in 37 LUTHER'S WORKS: III WORD AND SACRAMENT 360, 364 (Robert H. Fischer ed., trans., Fortress Press 1961) (1528), LW 37:360, 364.

29. MARTIN LUTHER, *The Estate of Marriage*, in 45 LUTHER'S WORKS: II THE CHRISTIAN IN SOCIETY 17, 30-33 (Walter I. Brandt ed., trans., Fortress Press 1962) (1522); LW 45:17, 30-33.

30. Zurich Ordinance of 1525, *supra* note 18, at 118, 122. The court was given very broad authority. The Zurich Ordinance, after authorizing divorce for “other such reasons,” provided that “these cases the judges can investigate, and proceed as God and the character of the cases shall demand.” *Id.*; see also HARRINGTON, *supra* note 23, at 138 (chart showing when various cities replaced ecclesiastical jurisdiction with reform marriage ordinances).

31. STEVEN OZMENT, *THE AGE OF REFORM 1250-1550: AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE* 256 (1980).

32. MACCULLOCH, *supra* note 26, at 51.

the Church to be the authoritative interpreter of Scripture,³³ and theologians had condemned the practice of granting indulgences as early as the fifteenth century.³⁴ It is unlikely, however, that there would have been either civil marriage or divorce in the sixteenth century without Luther. Celibacy may have been criticized from the time it was first imposed on all clergy (rather than on monks only) in the twelfth century,³⁵ but apart from Erasmus, little support had been expressed for marriage, much less divorce, before Luther.³⁶

It remains difficult to understand how an obscure theology professor was able to shake the foundations of the medieval church, and to do it so quickly. One reason is that most of his criticisms of the Church were shared by his listeners, many of whom were reading the Bible for themselves for the first time because of the development of the printing press³⁷ and the growing availability of vernacular translations.³⁸ Indeed, it was the increase in Bibles that supported the Reformation rather than the other way around.³⁹ Luther was also fortunate in the timing of his criticisms of the Church. Charles V faced aggressive military campaigns by the Ottoman Turks. He needed the support of the German nobles who supported Luther's cause, or he might have crushed the reform movement early on.⁴⁰ Finally, the content of Luther's religious message mattered. In particular, his doctrine of justification by faith alone rather than by good works struck a deep chord; "[p]eople responded to a teaching that promised a more personal relationship with God and was based directly on the text of Scripture."⁴¹ As this Part will show, Scripture was also the basis for Luther's writings on marriage and divorce. His views were shared by John Calvin whose writings most directly influenced the New England colonists.⁴²

33. *Id.* at 83.

34. *Id.* at 122-23.

35. *Id.* at 28.

36. An early supporter of marriage over celibacy was Jovian, a monk, who around 390-92 argued that virginity was not better than marriage. Although he won "considerable sympathy" in Rome, his writing was condemned by the pope and he was excommunicated. P.G. WALSH, *Introduction to AUGUSTINE*, *supra* note 25, at xix-xx. Erasmus wrote in favor of marriage over celibacy as early as 1498, 26 COLLECTED WORKS OF ERASMUS: LITERARY AND EDUCATIONAL WRITINGS 529 (J.K. Sowards ed., 1985), but his letter was not published until 1518. ERASMUS, *An Example of a Letter of Persuasion* (1518), in 25 COLLECTED WORKS OF ERASMUS: LITERARY AND EDUCATIONAL WRITINGS 129-45 (J.K. Sowards ed., 1985).

37. R. W. Scribner, *Print and Propaganda in the German Reformation*, in 1 THE MANY SIDES OF HISTORY 278 (Steven Ozment & Frank M. Turner eds., 1987).

38. PATRICK COLLINSON, *THE REFORMATION: A HISTORY* 42 (2004); MACCULLOCH, *supra* note 26, at 132-33.

39. BERNARD COTTRET, *CALVIN* 93 (M. Wallace McDonald trans., 2000).

40. MACCULLOCH, *supra* note 26, at 56-57; JOHN W. O'MALLEY, *TRENT: WHAT HAPPENED AT THE COUNCIL* 53 (2013).

41. O'MALLEY, *supra* note 40, at 49-50. Luther rejected the claim that only the Church could uncover the true meaning of Scripture. He embraced instead the principle that "Scripture is its own interpreter." Mark D. Thompson, *Biblical Interpretation in the Works of Martin Luther*, in 2 A HISTORY OF BIBLICAL INTERPRETATION: THE MEDIEVAL THROUGH THE REFORMATION PERIODS 299, 304 (2009), citing LW 39:164 ("God's sayings stand alone and need no human interpretation.")

42. See *infra* text accompanying notes 239-240.

1. *A Plague of Marriage Matters*⁴³

Luther's critique of Church positions on marriage had three prongs: he argued that (1) marriage is a better choice than celibacy for most people, including clergy; (2) marriage should be for love and companionship, not merely procreative sex; and (3) marriage is a civil contract rather than a sacrament—one that should be controlled by the state rather than the church.

a. Luther's Attack on Celibacy

Luther's first public statement on marriage, his 1519 *Sermon on the Estate of Marriage*,⁴⁴ revealed that he still accepted most of Augustine's teachings on sex and marriage. In the sermon, Luther asserted that married love is not pure because each "desires to have the other."⁴⁵ Marriage, he concluded, "may be likened to a hospital for incurables which prevents inmates from falling into graver sin."⁴⁶

Only a year later, Luther published two major treatises that revealed how favorable his opinion of marriage had grown in the intervening months. In *The Babylonian Captivity of the Church*,⁴⁷ he no longer described marriage as a hospital for incurables, but as a "divinely ordained way of life."⁴⁸ His *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate* included a lengthy critique of clerical celibacy, a phenomenon that Luther had lived, not merely analyzed.⁴⁹ He argued that Scripture did not command clerical celibacy, and added that it is not fair for the Church to require it because "chastity is given to very few."⁵⁰ He attempted to put the clergy and laity on a more equal footing by encouraging both to marry: "My

43. In 1530, in *On Marriage Matters*, Luther wrote to two pastors that that they were not the only ones having a great deal of trouble with marriage matters. He added "I myself am greatly plagued by them." MARTIN LUTHER, *On Marriage Matters*, in 46 LUTHER'S WORKS: III THE CHRISTIAN IN SOCIETY 259, 263 (Robert C. Schultz ed., Frederick C. Ahrens trans., Fortress Press 1967) (1530), LW 46:259, 263.

44. LUTHER, *A Sermon on the Estate of Marriage*, *supra* note 26, at 3, LW 44:3.

45. *Id.* at 8, LW 44:8. Luther here echoed Augustine's view that even marital sex was sinful if its purpose was to enjoy the pleasure of each other's body. BRUNDAGE, *supra* note 25, at 80.

46. LUTHER, *A Sermon on the Estate of Marriage*, *supra* note 26, at 8, LW 44:8.

47. MARTIN LUTHER, *The Babylonian Captivity of the Church*, in 36 LUTHER'S WORKS: II WORD AND SACRAMENT 3 (Abdel Ross Wentz ed., A.T.W. Steinhauser trans., Frederick C. Ahrens & Abdel Ross Wentz revs., Fortress Press 1959) (1520), LW 36:3.

48. *Id.* at 96, LW 36:96.

49. LUTHER, *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate*, *supra* note 27, at 115, LW 44:115. Luther became a monk in 1505 at the age of twenty-two. To the dismay of his father, he dropped out of law school that year to join the Order of Augustinian Hermits. Luther was ordained a priest in 1507 and, after earning his doctorate in theology five years later, was appointed to the faculty of Wittenberg University. MARTIN BRECHT, I MARTIN LUTHER: HIS ROAD TO REFORMATION: 1483-1521, at 46-51, 91, 120 (James L. Schaaf trans., 1985).

50. LUTHER, *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate*, *supra* note 27, at 174, LW 44:174 (citing Christ in *Matthew* 19:11-12 and St. Paul in *First Corinthians* 7:7).

advice is, restore freedom to everybody and leave every man free to marry or not to marry.”⁵¹ One year later, in his *Judgment on Monastic Vows*,⁵² Luther offered an even stronger critique of clerical celibacy. Celibacy violates Christian freedom, he argued, and is contrary to common sense and reason. He exhorted those who had taken vows of celibacy to break them.⁵³

Luther’s argument that, for most people, marriage is a better choice than celibacy reached its zenith in his 1523 *Commentaries on First Corinthians 7*.⁵⁴ He began by asserting that marriage is as much a gift from God as is celibacy.⁵⁵ After repeating his caution that celibacy is a gift reserved for only a few,⁵⁶ Luther suggested that marriage “should be termed religious and the religious orders secular” because “nothing should be called religious except that inner life of faith in the heart, where the Spirit rules.”⁵⁷ He denounced the monastic and clerical orders as “secular” rather than “religious” because they seemed primarily concerned with providing their members with a comfortable and secure bodily existence.

Luther’s favorable view of marriage only increased after his 1525 marriage to Katharina von Bora.⁵⁸ All indications are that the marriage was a happy one.⁵⁹ Bora also significantly improved Luther’s living arrangements, and

51. *Id.*

52. MARTIN LUTHER, *Judgment on Monastic Vows*, in 44 LUTHER’S WORKS: I CHRISTIAN IN SOCIETY 243 (James Atkinson ed. & trans., Fortress Press 1966) (1521), LW 44:243.

53. *Id.* at 254, LW 44:254.

54. MARTIN LUTHER, *Commentaries on First Corinthians 7*, in 28 LUTHER’S WORKS I (Hilton C. Oswald ed., trans., Fortress Press 1973) (1523), LW 28:1.

55. *Id.* at 17, LW 28:17.

56. Luther estimated that only one in a hundred thousand individuals has the gift of celibacy. *Id.* at 12, LW 28:12.

57. *Id.* at 8, LW 28:8.

58. Born to a noble family of modest means, Bora was sent to a Cistercian cloister when she was ten. In 1522, after a relative who was the prior of a nearby Augustinian monastery resigned to join the reform movement, Bora and a number of her religious sisters asked their families for permission to renounce their vows. Their families refused; most had sent their daughters to the convent in part to avoid paying a marital dowry, and some of what would have been their dowry had already been paid to the convent. When the nuns sought help from the reform movement, however, arrangements were made to assist them in escaping. RUDOLF K. MARKWALD & MARYILYNN MORRIS MARKWALD, KATHARINA VON BORA: A REFORMATION LIFE 11, 42-48 (2002).

In a letter to a friend, Luther reported that “[n]ine fugitive nuns, a wretched crowd, have been brought me by honest citizens of Torgau. . . . I pity them much, but most of all the others who are dying everywhere in such numbers in their cursed and impure celibacy.” Luther to George Spalatin in Altenburg, Apr. 10, 1523, in 2 LUTHER’S CORRESPONDENCE AND OTHER CONTEMPORARY LETTERS 179-80 (Preserved Smith & Charles M. Jacobs eds., trans., 1918), LW 2:179-80. Luther explained that his plan was to ask their relatives to support the women, and, if they would not, “I shall get [them] husbands if I can.” *Id.* at 180, LW 2:180. Arrangements were soon made for the entire group except Bora, who turned down a possible suitor. When a concerned Luther sent an intermediary to question Bora, she explained that she was not opposed to marriage, only to that particular suitor. In an answer that must have intrigued Luther, Bora added that she would be willing to marry the intermediary, or Luther himself. ROLAND H. BAINTON, WOMEN OF THE REFORMATION IN GERMANY AND ITALY 24 (1971).

59. MARTIN BRECHT, MARTIN LUTHER: THE PRESERVATION OF THE CHURCH: 1532-1546, at 235 (James L. Schaaf trans., 1993).

thereby freed him for his theological and pastoral work.⁶⁰ In 1531, Luther declared “I wouldn’t trade my Katie for France or Venice.”⁶¹

Three years into his marriage, Luther returned to the subject of marriage in *Confessions Concerning Christ’s Supper: Part III*.⁶² He wrote that God has established three basic social institutions or “orders” in the world: religion, the estate of marriage, and civil government. Those who are involved in ministry, the first order, “are engaged in works which are altogether holy in God’s sight.”⁶³ But family members are doing equally important work: “all fathers and mothers who regulate their household wisely and bring up their children to the service of God are engaged in pure holiness, in a holy work and a holy order.”⁶⁴

The significance of Luther’s statements on the relative value of marriage and celibacy was underscored in 1563 (seventeen years after his death) by the criticism made of his views by the Council of Trent.⁶⁵ In Canon 10, the Council explicitly “condemned the view that marriage was a more blessed state than virginity or celibacy.”⁶⁶ Canon 9 affirmed that clergy who took the vow of celibacy could not later marry.⁶⁷ The Council did not settle the more basic question, however, of whether all priests must be celibate—a topic that is still debated.⁶⁸

b. Marriage for Love as well as Procreative Sex

Luther agreed with the Church that marriage is an acceptable outlet for procreative sex, but he argued that marriage is also for love and companionship.⁶⁹ He advised that “[a] wife is easily taken, but to have abiding love, that is the challenge. . . . [A]sk God to give you a [wife], with whom you

60. She managed the former monastery that served as their home. It would eventually house their six children, six or seven orphaned nephews and nieces, four children of one of Luther’s widowed friends, Bora’s aunt, male and female servants, student boarders, guests, and refugees. BAINTON, *supra* note 58, at 30-32.

61. OFF THE RECORD WITH MARTIN LUTHER 36 (Charles Daudert ed., trans., 2009).

62. LUTHER, *Confessions Concerning Christ’s Supper: Part III*, *supra* note 28, at 360, LW 37:360.

63. *Id.* at 364, LW 37:364.

64. *Id.*

65. O’MALLEY, *supra* note 40, at 12 (“Luther set the agenda for the Council”). The Council, which faced the dual tasks of rebutting the doctrinal criticisms made by Luther and other “Lutherans,” as the various reformers were called, and of reforming the religious practices of the Church, met for three distinct periods, during 1545-47, 1551-52, and 1562-63, each convoked by a different pope. *Id.* at 2-4, 12.

66. *Id.* at 229.

67. *Id.*

68. *Id.* at 228-29, 252-53. See also Hans Küng, *A Vatican Spring?* N.Y. TIMES, Feb. 28, 2013, at A23 (There is a gap between the Catholic hierarchy and lay people on important reform questions. “A recent poll in Germany shows 85 percent of Catholics favor letting priests marry. . . .”). In 2012, the Vatican established the Personal Ordinariate of the Chair of Saint Peter, a new division of the Roman Catholic Church. Episcopal congregations and their priests, including married priests, may enter en masse. Sara Ritchey, *For Priests’ Wives, a Word of Caution*, N.Y. TIMES, Jan. 13, 2012, at A19.

69. See LUTHER, *A Sermon on the Estate of Marriage*, *supra* note 26, at 10.

can spend your life in mutual love. For sex [alone] establishes nothing in this regard; there must also be agreement in values and character.”⁷⁰ In his *Sermon on the Estate of Marriage*, Luther quoted God’s words in Genesis to demonstrate that marriage should be for more than procreative sex: “It is not good that Adam should be alone. I will create a helpmeet for him to be with him always.”⁷¹

Three years later, in *The Estate of Marriage*, Luther urged Christians to respect both sexes as the work of God and to ignore “pagan” books that disparaged women and married life.⁷² They should find in marriage “delight, love and joy without end” because God had instituted it, and brought husband and wife together.⁷³

Luther’s praise of family life was pathbreaking not only because it challenged core Church teachings, but also because he wrote at a time of crisis for women, marriage, and family life. It has been estimated that forty percent of women in his region of Northern Europe were single (half had never married, and most of the rest were widows).⁷⁴ Women also had been targeted by witch hunters; as many as eighty percent of the estimated 100,000 people executed for witchcraft in Europe between 1400 and 1700 were women.⁷⁵

c. Marriage Is a Contract, Not a Sacrament, and Should Be Controlled by the State Rather Than the Church

In *The Babylonian Captivity of the Church*,⁷⁶ where Luther asserted that marriage is a contract, not a sacrament, he did so not to question the value of marriage, but as part of his broader argument that five of the seven sacraments recognized by the Church are not supported by Scripture.⁷⁷ He believed that the Church’s claim that marriage is a sacrament was based on a translation error.⁷⁸

70. MARTIN LUTHER, LUTHERS WERKE IN AUSWAHL 3:318-19 (1542-43), in STEVEN OZMENT, PROTESTANTS: THE BIRTH OF A REVOLUTION 162 (1993).

71. LUTHER, *A Sermon on the Estate of Marriage*, *supra* note 26, at 7, LW 44:7, citing *Genesis* 2:18-24.

72. LUTHER, *The Estate of Marriage*, *supra* note 29, at 35, LW 45:35.

73. *Id.* at 38, LW 45:38.

74. STEVEN OZMENT, WHEN FATHERS RULED: FAMILY LIFE IN REFORMATION EUROPE 1 (1983).

75. *Id.*

76. LUTHER, *The Babylonian Captivity of the Church*, *supra* note 47, at 3, LW 36:3.

77. *See id.* at 18, LW 36:18. Luther concluded that only two sacraments were supported by Scripture (baptism and communion). He may also have wanted secular authorities to oversee marriage because he felt so personally burdened by the marital counseling he was called upon to provide. He complained in 1524 that questions about marriage were keeping him busier than the reform movement as a whole. MARTIN LUTHER, *That Parents Should Neither Compel Nor Hinder the Marriage of Their Children, and that Children Should Not Become Engaged Without Their Parents’ Consent*, in 45 LUTHER’S WORKS: II THE CHRISTIAN IN SOCIETY 379, 383 (Walther I. Brandt ed., Fortress Press 1962) (1524), LW 45: 379, 383.

78. In the Vulgate translation used by the Church, the word *sacramentum* sometimes served as the translation of the Greek word, *mysterion*. After consulting the Greek text, Luther concluded that it was more accurate to translate the discussion of marriage in Ephesians 5:31-32 as “The two shall become

Luther also warned that marriage was being tossed to and fro by “Roman despots, who both dissolve and compel marriages as they please”;⁷⁹ he was referring to the burgeoning market in impediments to marriage which could be used to obtain annulments, and thus were a valuable commodity in a society that did not permit divorce.⁸⁰ Just as he had criticized the sale of indulgences in his ninety-five theses, Luther now criticized the Church for selling marriage impediments, and he used characteristically blunt language:

What is it they sell? Vulvas and genitals—merchandise indeed most worthy of such merchants, grown altogether filthy and obscene through greed and godlessness. For there is no impediment nowadays that may not be legalized through the intercession of mammon. These laws . . . seem to have sprung into existence for the sole purpose of serving those greedy men. . . .⁸¹

Because of his opposition to the sale of impediments, Luther thought it would be best if marriage were controlled by secular rather than religious authorities.⁸² He also opposed Church control because he was against clandestine marriage (marriage without witnesses), which the Church recognized as long as the boy was at least fourteen, and the girl at least twelve.⁸³ Once the parties agreed to marry and consummated the marriage, no witnesses were required.⁸⁴ The Church’s recognition of clandestine marriages had produced widespread concern about young people being blinded by infatuation or seduced by fortune hunters who were primarily interested in marrying for money.⁸⁵ Concern about infatuation was at the heart of the fifteenth century legend of Romeo and Juliet, later used by Shakespeare, which warned of the disastrous consequences that could follow from marrying without parental permission.⁸⁶ To avoid such problems, Luther recommended that marriages be announced publicly in advance, and parental consent required,

one. This is a great mystery,” rather than as “This is a great ‘sacrament.’” LUTHER, *The Babylonian Captivity of the Church*, *supra* note 47, at 93, LW 36:93.

79. *Id.* at 95, LW 36:95.

80. If there were impediments to a marriage, such as marrying a close relative or impotency, the parties were entitled to have the marriage declared a nullity (annulled). Over time the Church expanded the degrees of relatedness that could nullify a marriage, and included even spiritual relatives (one’s godparent, for example). A result was enough uncertainty that the Church was able to sell opinions about whether there were impediments to a particular marriage. S.B. KITCHEN, *A HISTORY OF DIVORCE* 72-74 (1912).

81. LUTHER, *The Babylonian Captivity of the Church*, *supra* note 47, at 97, LW 36:97.

82. LUTHER, *On Marriage Matters*, *supra* note 43, at 318, LW 46:318 (“[I] advise my dear brothers, the pastors and clergy, to refuse to deal with marriage matters as worldly affairs covered by temporal laws and to divest themselves of them as much as they can. Let the authorities and officials deal with them, except where their pastoral advice is needed in matters of conscience.”).

83. OZMENT, *supra* note 74, at 25.

84. *Id.*

85. HARRINGTON, *supra* note 23, at 29.

86. *Id.*

although he also recommended that civil authorities should override the opposition of parents who refused consent for selfish reasons.⁸⁷

The Church changed its views on clandestine marriage before the end of the sixteenth century, but not its views on parental consent. In 1563, the final Council of Trent acknowledged that clandestine marriages presented problems. Particularly troublesome were situations where one of the partners later denied there had been an exchange of vows. The Council decided that henceforth, valid marriages between Catholics would require the presence of a priest.⁸⁸ Parental consent, however, was not required.⁸⁹

2. Luther Opens the Door to Divorce

Just as Luther's preference for marriage over celibacy developed in a relatively brief time, so did his acceptance of divorce. Luther never favored divorce, but he came to accept it as necessary for the same reason he opposed clerical celibacy. Couples granted a legal separation by the Church were not permitted to remarry, which meant they were condemned to lifelong celibacy. Given his opposition to mandatory celibacy, Luther concluded that when a marriage is beyond repair, divorce is better than legal separation because it permits the spouses to marry others.

Luther's initial reluctance to accept divorce was apparent in 1520, in *The Babylonian Captivity*, where he announced that adultery was the only ground for divorce with a basis in Scripture,⁹⁰ but added that he was not sure even of that.⁹¹ He considered divorce preferable to legal separation, however, reasoning that, "if Christ permits divorce on the ground of unchastity and compels no one to remain unmarried, and if Paul would rather have us marry than burn, then he certainly seems to permit a man to marry another woman in the place of the one who has been put away."⁹²

By 1522, in his sermon on *The Estate of Marriage*, Luther had overcome his initial aversion to divorce. He identified both adultery and desertion as acceptable grounds for divorce.⁹³ Luther considered impotence as well, but concluded that the Church was right to categorize impotence as an impediment to marriage and thus as a basis for annulment, rather than as a ground for divorce.

87. LUTHER, *On Marriage Matters*, *supra* note 43, at 308, LW 46:308 ("[I]f the marriage is honorable and advantageous for the child and the child's parents or their deputies are seeking their own advantage or caprice, then the authorities should adopt the child in the father's stead, as they do with abandoned children and orphans, and compel the father.").

88. O'MALLEY, *supra* note 40, at 226.

89. *Id.*

90. LUTHER, *The Babylonian Captivity of the Church*, *supra* note 47, at 104, LW 36:104.

91. *Id.* at 104, LW 36:104 ("For my part I so greatly detest divorce that I should prefer bigamy to it, but whether it is allowable, I do not venture to decide.").

92. *Id.* at 104-05, LW 36:104-05 (citing *Matthew* 19:9).

93. LUTHER, *The Estate of Marriage*, *supra* note 29, at 30-33, LW 45:30-33 (emphasis added).

Luther cited scriptural support for recognizing adultery as a ground for divorce: “And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery.”⁹⁴ He preferred, nonetheless, that Christians not resort to divorce.⁹⁵ He also recommended procedural conditions. Divorce should be public, Luther advised, and it should take place “through the investigation and decision of the civil authority.”⁹⁶ He also urged that wives as well as husbands should be able to obtain divorces.⁹⁷

Desertion, the second divorce ground accepted by Luther, arose in his view when “one of the parties deprives and avoids the other, refusing to fulfill the conjugal duty or to live with the other person.”⁹⁸ For Luther, desertion thus encompassed more than physical desertion; it included refusal to have sex with a spouse. He cited for support the words of the Apostle Paul, in First Corinthians 7:4-5, that a husband and wife should not deprive each other of their bodies “for by the marriage vow each submits his body to the other in conjugal duty.” Luther also recommended procedural requirements when a divorce was sought on the basis of desertion; a husband with a “stubborn” wife should admonish and warn her two or three times.⁹⁹ If that did not change her mind, the husband should “let the situation be known to others so that her stubbornness becomes a matter of common knowledge and [she] is rebuked before the congregation.”¹⁰⁰ Only after these remedies were exhausted was divorce justified. Luther reasoned that, because society would permit a husband to remarry if his wife were killed, “why then should we not also accept it if a wife steals herself away from her husband?”¹⁰¹

Luther was not able to point to specific language in Scripture that authorized desertion as a ground for divorce. He instead constructed an argument based on the purposes of marriage. Because Paul had established that sex was a primary purpose of marriage, failing to meet that marital duty must be a ground for divorce. The structure of Luther’s argument is significant because it would be used later by Martin Bucer and other reformers to argue that there is scriptural support for additional grounds for divorce.¹⁰²

Thus in only two years (1520 to 1522), Luther moved from uncertainty about whether divorce was ever appropriate to accepting it when a spouse committed adultery or deserted. The door to divorce was now firmly open.¹⁰³

94. *Id.* at 30, LW 45:30 (quoting *Matthew* 19:3-6).

95. *Id.* at 31, LW 45:31.

96. *Id.*

97. *Id.*

98. LUTHER, *The Estate of Marriage*, *supra* note 29, at 32, LW 45:32. Luther also listed impotence as a ground for divorce, but it is classified in law as a ground for annulment.

99. *Id.*

100. *Id.*

101. *Id.*

102. See *infra* notes 196-197 and accompanying text for a discussion of Bucer’s views.

103. In 1530, in Part II of *On Marriage Matters*, Luther reaffirmed that when one spouse committed adultery and it was publicly proven, the innocent spouse could obtain a divorce and remarry.

B. Zwingli Inspires Zurich to Enact the First Modern Marriage and Divorce Law

Luther may have been the first theoretician of the Reformation, but it was Huldrych Zwingli who first turned reform views of marriage (and divorce) into law. Just as the Reformation cleared the way for multiple Protestant denominations to develop, once Luther rejected the Church's absolute prohibition on divorce, the door was opened for other reformers to endorse additional grounds for divorce. Almost immediately, Zwingli and the city of Zurich did just that.

Confident and charismatic, Zwingli led the Reformation in Zurich.¹⁰⁴ His name is not as well known today as Luther's or Calvin's, in part because no confessional tradition is named for him. Moreover, he did not leave much written work because, unlike Luther, he never held an academic position. Finally, Zwingli was killed in a battle against Catholic forces when he was only forty-six. His views on marriage and divorce were very influential, nonetheless, because he helped to establish the first Reformation marriage court, the *Ehegericht*, in Zurich in 1525. It is also likely that he wrote the ordinance that established the court and guided its rulings.¹⁰⁵ The Zurich Ordinance was the first modern divorce law, and it served as a model for most of the marriage courts established in other cities in the region.¹⁰⁶

Although Zwingli's views on marriage and celibacy were close to Luther's, he insisted that his theological views were based solely on Scripture.¹⁰⁷ The extent of his reliance on Luther remains a matter of dispute: many German historians argue that Zwingli's theology was derivative, while Swiss scholars disagree.¹⁰⁸ The truth, no doubt, lies somewhere in between.¹⁰⁹

LUTHER, *On Marriage Matters*, *supra* note 43, at 311, LW 46:311. He preferred that the parties be reconciled if possible, but reaffirmed that, "if the innocent partner does not wish to do this, then let him in God's name exercise his right." *Id.* He also recommended one additional procedural requirement: an innocent spouse should wait at least six months or a year before remarrying so as to avoid the "appearance that he was happy that his spouse had committed adultery." *Id.*

104. See generally ULRICH GABLER, HULDRYCH ZWINGLI: HIS LIFE AND WORK (Ruth C. L. Gritsch trans., Fortress Press 1986) (1983); BRUCE GORDON, THE SWISS REFORMATION (2002).

105. GABLER, *supra* note 104, at 103; Zurich Ordinance of 1525, *supra* note 18, at 118.

106. I THE OXFORD ENCYCLOPEDIA OF THE REFORMATION 440-41 (Hans J. Hillerbrand ed., 1996) ("[T]he authorities in Basel and Bern copied broad sections [of the Zurich law] verbatim and referred to the magistrates and clergy of Zurich as experts in marital law.").

107. HULDRYCH ZWINGLI, WRITINGS 116-20 (E. J. Furcha ed., 1984) *quoted in* THE EUROPEAN REFORMATIONS SOURCEBOOK 112 (Carter Lindberg ed., 2000) ("Before anyone in this area had even heard of Luther, I began to preach the gospel of Christ in 1516. . . . Luther, whose name I did not know for at least another two years, had definitely not instructed me. I followed holy scripture alone. . . . I do not want the papists to call me Lutheran, for I did not learn the teachings of Christ from Luther but from the very word of God . . .").

108. EUAN CAMERON, THE EUROPEAN REFORMATION 128 (1991).

109. See *id.* Zwingli's correspondence makes clear that he read Luther before assuming his post in Zurich, and that he very much admired Luther's courage in speaking against the abuses of the Church. PHILIP BENEDICT, CHRIST'S CHURCHES PURELY REFORMED: A SOCIAL HISTORY OF CALVINISM 24 (2002). There is even evidence that Zwingli copied some phrases verbally from Luther. CAMERON,

Like Luther, Zwingli believed that few are granted the gift of celibacy,¹¹⁰ and he approved of clerical marriage. Indeed, in 1522, he and ten other priests petitioned their local bishop for permission to marry.¹¹¹ They cited Matthew 19:11-12¹¹² in support of their claim that celibacy is not required by Scripture, and the directive in First Corinthians 7:2 that, “to avoid fornication, let every man have his own wife, and let every woman have her own husband,” and added, “he who said ‘every man’ made exceptions of none, neither priest nor monk nor layman.”¹¹³

Although Zwingli and Luther held similar views about marriage, they had very different ideas about the appropriate roles for church and state. Luther wanted secular authorities to set the rules for marriage and divorce and to keep clergy out of divorce cases unless a matter of conscience was involved. Zwingli, by contrast, believed in close cooperation between church and state. In Zurich, magistrates as well as clergy were given responsibility for monitoring religious behavior, and both served as judges on the *Ehegericht*.¹¹⁴

The Reformation developed at a particularly rapid pace in Zurich under Zwingli, who was able to channel the widespread desire for change into formation of the first civic reformation. In 1524, the city council banned pictures and statues in churches in order to comply with the Biblical commandment to make no graven images; the following year, the council decided that pastors would no longer be required to celebrate mass.¹¹⁵ These were the first official statements of doctrine produced anywhere during the Reformation.¹¹⁶ In 1525, the council established the *Ehegericht*, or marriage court (although it would be more accurate to call it a morals court), together with an ordinance to govern its work.¹¹⁷

supra note 108, at 128. Efforts were made in 1529 in Marburg to resolve the theological disagreements that had developed between Luther and Zwingli. Although they were able to agree on fourteen major points, they could not reach agreement on the Eucharist; Luther believed that the bread and wine contained the body of Christ, Zwingli viewed them as symbols only. MACCULLOCH, *supra* note 26, at 172-73. Their disagreement would continue to divide the Protestant world. BENEDICT, *supra*, at 24.

110. MACCULLOCH, *supra* note 26, at 137-38.

111. ULRICH ZWINGLI, *SELECTED WORKS*, *supra* note 18, at 25-39.

112. “But he said to them, ‘Not all men can receive this precept, but only those to whom it is given. For there are eunuchs who have been so from birth, and there are eunuchs who have been made eunuchs by men, and there are eunuchs who have made themselves eunuchs for the sake of the kingdom of heaven. He who is able to receive this, let him receive it.’”

113. GABLER, *supra* note 104, at 34.

114. Zurich Ordinance of 1525, *supra* note 18, at 119.

115. GABLER, *supra* note 104, at 105.

116. MACCULLOCH, *supra* note 26, at 147. Luther, by contrast, believed that the purpose of secular government was to maintain peace and order in the world, not to enforce Scripture. BENEDICT, *supra* note 109, at 28. He opposed legislation in Wittenberg changing the forms of worship, saying it risked upsetting those who did not yet agree with reform views. *Id.* at 17.

117. Norman Bimbaum, *The Zwinglian Reformation in Zurich*, in *PAST AND PRESENT* 27, 34 (1959). In March 1526, a new ordinance of the city council directed the judges of the *Ehegericht* to take notice of the moral behavior of citizens. GABLER, *supra* note 104, at 104.

The Zurich Ordinance mandated that two of the six judges on the *Ehegericht* should be clergy, and that the remaining four should be magistrates.¹¹⁸ The Ordinance prohibited clandestine marriages by providing that no one could marry without the testimony and presence of at least two “pious, honorable citizens in good standing.”¹¹⁹ It also required marriages to be “publicly witnessed in a church.”¹²⁰ No young people could marry without parental consent,¹²¹ and “neither father, mother, legal representative or any one shall force or compel their children to a marriage against their will at any time.”¹²²

The Ordinance authorized the *Ehegericht* to grant divorces on the basis of any of several grounds, including adultery.¹²³ It mentioned the Old Testament punishment of stoning adulterers to death, but directed ministers merely to “ban and exclude such sinners from the Christian parish” and to leave any further punishment to the civil authorities.¹²⁴ The Ordinance included a list of additional grounds that the judges on the court were authorized to investigate and, if appropriate, to use as the basis for a divorce. They could grant a divorce for “greater reasons than adultery, as destroying life, endangering life, being mad or crazy, offending by whorishness, or leaving one’s spouse without permission, remaining abroad a long time, having leprosy, or such other reasons, of which no rule can be made on account of their dissimilarity.”¹²⁵

The list of grounds is noteworthy for several reasons. Adultery and desertion, the two fault grounds endorsed by Luther, are on the list. Both are intentional acts. “Being mad,” by contrast, because it is not an intentional act, cannot be classified as a “fault” ground. Neither can having leprosy. The omnibus clause of “such other reasons,” moreover, is not confined to intentional acts. The Zurich Ordinance, in short, was not only the first modern divorce law, it was the first to contain no-fault as well fault grounds.

The Zurich Ordinance also authorized divorce for people “who are not fitted for the partners they have chosen,” but only after they lived together for a year.¹²⁶ The language is broad enough that it could be read to encompass mere incompatibility, which would make the Ordinance a direct precursor of modern no-fault divorce statutes. Read in context, however, the language almost certainly was intended to apply only to impotence because it followed an introductory clause that emphasized that the purpose of marriage was to avoid the need for sex outside of marriage:

118. Zurich Ordinance of 1525, *supra* note 18, at 119.

119. *Id.* at 120.

120. *Id.*

121. *Id.*

122. *Id.*

123. Zurich Ordinance of 1525, *supra* note 18, at 121.

124. *Id.* at 122.

125. *Id.*

126. *Id.*

Since, now, marriage was instituted by God to avoid unchastity, and since it often occurs that some, by nature or other shortcomings, *are not fitted for the partners they have chosen*, they shall nevertheless live together as friends for a year, to see if matters may not better themselves by the prayers of themselves and of other honest people. If it does not grow better in that time, they shall be separated and allowed to marry elsewhere.¹²⁷

Although the Ordinance authorized the court to recognize additional grounds for divorce, the Zurich *Ehegericht* granted a divorce on grounds other than adultery or desertion in only two instances. Because of the meticulous work of Walter Köhler, we know that, between 1525 and 1531, the court heard from 1,116 complainants, most of whom were women and under the age of 30.¹²⁸ Of the 72 cases of adultery heard during this six-year period, the wife was found to be at fault in 42 and the husband in 33 (in 3 cases, the husband and the wife were both found to be at fault).¹²⁹ Convicted adulterers could be sentenced by the criminal courts to three days in jail on bread and water; the penalty was doubled for a second offense, and tripled for a third. A fourth offense could bring exile, and a fifth meant possible execution by drowning in the Limmat River.¹³⁰

An innocent spouse who divorced could remarry after six months. A guilty spouse could remarry, too, but only if the *Ehegericht* determined that he or she had repented.¹³¹ Until then, the guilty party was banned from church and, if the guilty party was a man, he was stripped of his right to hold public office or membership in city guilds and societies.¹³² The recommended probation period for adulterers was one year for men and three for women. In practice, the probationary period varied from one to five years. The court would not approve remarriage for second-marriage adulterers of either sex.¹³³

The *Ehegericht* heard 107 cases involving desertion during the six years studied, 44 in which the wife abandoned her husband and 63 in which the husband abandoned his wife. Abandoned spouses were required to make every effort to confirm the absent spouse's whereabouts. Remarriage was possible after one year.¹³⁴ The court would not grant divorce for what it considered

127. *Id.* (emphasis added).

128. WALTHER KÖHLER, I ZÜRCHER EHEGERICHT UND GENFER KONSISTORIUM 35-40 (1932) (Switz.). Of 537 sessions of the court from 1525 to 1531, involving 1116 individuals whose ages ranged from twelve to seventy-two, only twenty-nine decisions were appealed. *Id.* at 66.

129. *Id.* at 109.

130. *Id.* at 111-12.

131. *Id.* at 94.

132. *Id.* at 111.

133. KÖHLER, *supra* note 128, at 113-14.

134. *Id.*

bearable incompatibility. "General quarrelsomeness" (*widerwillen*) was put in this category.¹³⁵ The court did grant two divorces for extreme physical cruelty, however. In one, a medical examination found that the wife had a broken hip as a result of her husband's beatings, so that she was "not of much use for any man." In the second, the wife had been beaten almost to death. The court explained that the reason they granted her a divorce in the absence of proof of adultery or desertion by her husband was to protect her life.¹³⁶

The Zurich Ordinance became a model for courts in nearby cities, although not all of its sections were copied. Zurich, for example, permitted even guilty spouses to remarry, whereas the courts in Basel and most other cities did not.¹³⁷ The Zurich *Ehegericht* was also unusual in its willingness to treat the sexes equally in granting divorces. As the data demonstrate, more than forty percent of Zurich's divorces were granted to women. Finally, the Zurich experience showed how much power over divorce the city council was willing to cede to the court, but also how rarely the judicial authorities made use of that power to grant divorces on any grounds other than adultery or desertion.

In addition to granting divorces, the Zurich *Ehegericht* took very seriously its obligation to preserve marriages whenever possible; it spent significant amounts of time on the effort, as did the courts in nearby cities, because they saw marriage as contributing to the stability of the community.¹³⁸ As explained by Albrecht von Eyb, a contemporary German humanist, "by creating families, marriage filled a land with homes and communities, instruments of civil peace, and by turning strangers into relatives, it reduced enmity, war, and hostility."¹³⁹ Marriage was also a cheaper way of providing for single women who otherwise would have to be supported by the community.¹⁴⁰ In one dispute, the Bern court put a husband and wife in prison with one bowl and one spoon on the theory that, if they could come to some sort of arrangement for eating, they could manage the rest of their conflicts. A shared meal, the court observed, is an essential part of married life.¹⁴¹ In other cases, couples were locked in rooms with only one bed.¹⁴² In another dispute, the marriage court in Basel, at the request of the court in Zurich, contacted a wife who had left her husband. She agreed to return, but only if her husband promised friendship (*Freundschaft*), love (*Liebe*), and to fulfill his marital duty (*eheliche Pflicht*). The courts

135. OZMENT, *supra* note 74, at 96.

136. KÖHLER, *supra* note 128, at 110, 119.

137. Thomas Max Safley, *Protestantism, Divorce, and the Breaking of the Modern Family*, in *PIETAS ET SOCIETAS: NEW TRENDS IN REFORMATION SOCIAL HISTORY: ESSAYS IN MEMORY OF HAROLD J. GRIMM* 42 (Kayle C. Sessions & Phillip N. Bebb eds., 1985).

138. GORDON, *supra* note 104, at 264.

139. OZMENT, *supra* note 74, at 8 (citing Albrecht von Eyb, *Ob einem mannen sey zu nemmen ein eelichs weyb oder nicht*, in *EHEBÜCHLEIN* 80-81 (Weisbaden 1979) (1472)).

140. OZMENT, *supra* note 74, at 8.

141. *Id.*

142. *Id.*

arranged for a letter confirming the husband's promises to be delivered to the wife.¹⁴³

C. Calvin's Geneva Adopts a Civil Marriage and Divorce Ordinance

In contrast to the ordinance in Zurich but in keeping with the theology of Martin Luther, the marriage and divorce ordinance adopted two decades later in Geneva, which was then under the influence of John Calvin, recognized only adultery and desertion as grounds for divorce.¹⁴⁴ Brilliant, demanding, and stern, Calvin—born Jean Cauvin in 1509, in Noyon, France, sixty miles north of Paris—was part of the second generation of sixteenth-century reformers.¹⁴⁵ He came to Geneva in 1536 to escape the persecution of Protestants in France, and was planning to spend only one night. Instead, he was hired by the city as a public lecturer, only to be expelled two years later as part of a general political upheaval over reform. When Geneva invited him back in 1541, Calvin was canny enough to negotiate in advance for the right to establish a new governing structure.¹⁴⁶

The new structure included a Consistory, or standing committee made up of pastors, which Calvin led, and an equal number of “elders” chosen by the governing council of the city. The pastors were a self-perpetuating body, which gave them considerable independence from the public authorities.¹⁴⁷ The authority of the Consistory included overseeing marriage and divorce, but was much broader. It is estimated that, in 1569 alone, one out of every twenty-five adults in Geneva was summoned before the Consistory.¹⁴⁸

Calvin's views on marriage and divorce were virtually identical to those of Luther. In his primary work, *Institutes of the Christian Religion*,¹⁴⁹ Calvin wrote that there is no scriptural basis for treating marriage as a sacrament.¹⁵⁰ He, however, considered it a “good and holy ordinance of God.”¹⁵¹ Calvin, like Luther and Zwingli, believed that celibacy was a gift given by God to only a

143. KÖHLER, *supra* note 128, at 253.

144. Geneva Marriage Ordinance of 1546, in JOHN WITTE, JR. & ROBERT M. KINGDON, *SEX, MARRIAGE AND FAMILY IN JOHN CALVIN'S GENEVA: COURTSHIP, ENGAGEMENT, AND MARRIAGE 57* (2005) [hereinafter Geneva Marriage Ordinance of 1546].

145. BENEDICT, *supra* note 109, at 77. Luther was among the authors Calvin read that led to his conversion to the reform movement. BRUCE GORDON, *CALVIN 37* (2009).

146. GORDON, *supra* note 145, at 124. See also JEAN-FRANCOIS GILMONT, *JOHN CALVIN AND THE PRINTED BOOK* (Karin Maag trans., 2005); ROBERT M. KINGDON, *ADULTERY AND DIVORCE IN CALVIN'S GENEVA* (1995); DAVID C. STEINMETZ, *CALVIN IN CONTEXT* (1995).

147. See MACCULLOCH, *supra* note 26, at 239-40.

148. E. William Monter, *The Consistory of Geneva, 1559-1569*, in 38 *BIBLIOTHÈQUE D'HUMANISME ET RENAISSANCE* 484 (1976).

149. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION: 1536 EDITION* (Ford Lewis Battles trans., William B. Eerdmans Pub. Co. rev. ed. 1986) (1536). Calvin saw himself as a defender of Luther's fundamental theological principles. BENEDICT, *supra* note 109, at 84.

150. Like Luther, Calvin attributed the claim of the Church that marriage was a sacrament to a translation error. CALVIN, *supra* note 149, at 174.

151. *Id.* at 173.

few, and warned that those who did not have the gift should marry or they would “contend against God. . . .”¹⁵² For Calvin, calling mandatory celibacy an “angelic life,” did “particular injustice to the angels of God. . . .”¹⁵³ He also complained that, when it made marriage a sacrament and took jurisdiction of matrimonial cases away from the magistrates, the Church used the power to “strengthen . . . their tyranny” by recognizing marriages between minors without parental consent and by not permitting the innocent spouse of an adulterous spouse to remarry after a divorce.¹⁵⁴

The Geneva Marriage Ordinance of 1546, like the Zurich Ordinance of 1525, established new requirements for marriage. Young people needed parental permission to marry, but parents could not force young people into marriage without their consent. Marriages were to be announced three Sundays before the wedding. If one spouse left the common household, both spouses were to be “summoned to be admonished” by the Consistory and “compelled to return to each other.”¹⁵⁵

Adultery proven “by sufficient testimony or evidence” justified a divorce.¹⁵⁶ As in Zurich, wives as well as husbands could seek a divorce on the ground of adultery. The Ordinance attributed that equal access to Scripture:

Formerly the rights of the wife were not equal to those of the husband in cases of divorce. But, according to the testimony of the apostle [Paul], the obligation is mutual and reciprocal with respect to cohabitation of the bed and in this the wife is no more subject to the husband than the husband to the wife. Thus, if a man is convicted of adultery and the wife asked to be separated from him, let it also be granted to her, unless by strong admonition they can be reconciled with each other.¹⁵⁷

The Ordinance provided that no divorce could be granted if “the wife fell into adultery through the evident fault of her husband,” or vice versa.¹⁵⁸ In Calvin’s Geneva, only innocent spouses could obtain a divorce; the legal doctrine of recrimination was born.¹⁵⁹ Divorces were also denied if there was fraud in connection with the petition for divorce.¹⁶⁰ Adulterers faced criminal punishments ranging from imprisonment to banishment or, in particularly

152. *Id.* at 26.

153. *Id.*

154. *Id.* at 174-75.

155. Geneva Marriage Ordinance of 1546, *supra* note 144, at 51-56.

156. *Id.* at 57.

157. *Id.*

158. *Id.*

159. See *supra* text accompanying note 6.

160. Geneva Marriage Ordinance of 1546, *supra* note 144, at 57.

egregious cases, to execution by drowning.¹⁶¹ Criminal actions were not handled by the Consistory, however, but by the regular criminal courts.¹⁶²

The Geneva Ordinance recognized desertion as a second ground for divorce, but established a number of limitations on when it could be used.¹⁶³ Cruelty was not made a ground for divorce, although the Ordinance provided other remedies for it, including an early version of a restraining order:

If a husband does not live in peace with his wife, but they have conflicts and quarrels with each other, let them be summoned to the Consistory to be admonished to live in good concord and unity and each be remonstrated with for his faults according to the needs of the case.

If it is known that a husband mistreats his wife, beating and tormenting her, or that he threatens to do her an injury and is known to be a man of uncontrolled anger, let him be sent before the Council to be expressly forbidden to beat her, under pain of certain punishment.¹⁶⁴

The Consistory and the Council soon confronted the limits of their ability to respond to domestic violence. On August 2, 1542, Ladite Martinaz, the wife of Claude Soutiez, a butcher, was asked by the Consistory “when she got a bad eye and who did it.”¹⁶⁵ She answered that her husband beat her so much that she lost the eye. Then she asked for mercy and said she “did not dare to say it because of her husband who, if anyone opposed him at all, would go away and leave behind his wife and children and her mother.”¹⁶⁶ Her fears were understandable; if her husband were to leave, she and her children would be left without a source of support. “Then she said she was wrong and asks that he might be pardoned so he will not go, because he will leave great misery in his household.”¹⁶⁷ The Consistory decided to give the husband only “remonstrances of correction,” and explained that it was “*at his wife’s request that nothing be done to him.*”¹⁶⁸ The Council decided that both the husband and wife should be summoned before the Council “to be admonished to live in peace.”¹⁶⁹ The actions of the Consistory and the Council were not so much the

161. *Id.* at 47.

162. See E. WILLIAM MONTER, 1 ENFORCING MORALITY IN EARLY MODERN EUROPE 191 (1987).

163. Geneva Marriage Ordinance of 1546, *supra* note 144, at 57-58.

164. *Id.* at 56.

165. 1 REGISTERS OF THE CONSISTORY OF GENEVA IN THE TIME OF CALVIN: 1542-1544, at 111 (Robert M. Kingdon gen. ed., Thomas A. Lambert & Isabella M. Watt eds., M. Wallace McDonald trans., William B. Eerdmans Pub. Co. 2000) (1996) [hereinafter REGISTERS OF THE CONSISTORY OF GENEVA].

166. *Id.*

167. *Id.*

168. *Id.* (emphasis added).

169. *Id.*

result of indifference to the seriousness of domestic violence¹⁷⁰ as they were examples of the limits of what government was authorized to do in sixteenth-century Europe.

The case also demonstrates the broad authority the Consistory had been given to delve into the lives of petitioners when they were investigating the facts of a case. Unlike the *Ehegericht* in Zurich, the Consistory did not have the power to grant divorces; it could only report its findings to the secular Small Council of Geneva.¹⁷¹ Whether it was because of this bifurcated process, or simply a general reluctance to grant divorces, during the twenty-three years of Calvin's ministry in Geneva, from 1541 to 1564, only some twenty-six divorces for adultery were granted: six to wives, and roughly twenty to husbands.¹⁷² The possibility that a wife could obtain a divorce, nonetheless, encouraged more equal gender relations in marriage. The Consistory was also very active in other ways to improve public behavior, investigating "drunkards, blasphemers, usurers, wastrels, beggars, dancers, singers of 'improper songs,' healers, magicians, gamblers and other 'evil livers.'"¹⁷³ In its first two years, the Consistory summoned nearly 850 people from a population of fewer than 13,000.¹⁷⁴ It devoted much of its docket to broken promises to marry, which was a particularly important function in a society where sexual relations commonly took place immediately after the promise to marry. The Consistory, after investigating, could either require the parties to marry or, if it found that there had been no promise, find the couple guilty of fornication.¹⁷⁵

Luther may have been the first theoretician of the Reformation, but it was Zwingli and Calvin who turned Reformation theology into law, and thereby furthered the success of the Reformation. As Steven Ozment has observed, reform that exists only in pamphlets and sermons, but not in laws and institutions, "would remain a private affair, confined to all intents and purposes within the minds of preachers and pamphleteers."¹⁷⁶

Theological differences among the reformers as well as among the marriage laws were apparent from the earliest days. The Geneva Ordinance was closer to Luther's views on divorce than was the Zurich Ordinance because it

170. Cf. Jeffrey R. Watt, *The Impact of the Reformation and CounterReformation*, in 1 *FAMILY LIFE IN EARLY MODERN TIMES: 1500-1789*, at 125 (David I. Kertzer & Marzio Barbagli eds., 2001) (criticizing the Consistory for failing to punish husband more severely).

171. Geneva Ordinance of 1546, *supra* note 144, at 61 ("Let all matrimonial cases concerning personal relationships, not property, be handled in the first instance in the Consistory, and there, if a friendly settlement can be reached, let it be made in the name of God. If it is necessary to pronounce a judicial sentence, let the parties be remanded to the Council with a statement of the decision of the Consistory, to give the definitive sentence about it.")

172. CORNELIA SEEGER, *NULLITE DE MARIAGE, DIVORCE ET SEPARATION DE CORPS A GENEVE, AU TEMPS DE CALVIN: FONDEMENTS DOCTRINAUX, LOI ET JURISPRUDENCE* 417 (1989).

173. 1 *REGISTERS OF THE CONSISTORY OF GENEVA*, *supra* note 165, at xix.

174. *Id.* at xvii-xviii.

175. *Id.* at xix.

176. OZMENT, *supra* note 70, at 23.

recognized only adultery and desertion as grounds for divorce. The Zurich Ordinance, by contrast, with its broader grounds for divorce, was closer to the views that would be defended eight years later by theologian Martin Bucer.¹⁷⁷ Bucer would also influence reform in England through his correspondence with Thomas Cranmer, the Archbishop of Canterbury. There were also jurisdictional differences among the new courts. The Zurich *Ehegericht* was authorized to grant divorces, while the Geneva Consistory was not. Both, however, became deeply involved in efforts to regulate the personal lives and religious practices of citizens.

The next Part will show that, despite close ties between many of the continental reformers and influential figures in England, the English Reformation did not extend to marriage law until the English Civil War and even that limited reform was repealed a few years later. Although the Puritans failed to reform English marriage and divorce law, Part III will show that they succeeded in colonial New England where magistrates rather than ministers performed marriages from the early 1620s and divorces were available beginning in 1643.

II. REFORMATION IN ENGLAND

English marriage and divorce law, in contrast to the law in Protestant Europe, remained firmly under the control of religious authorities. Divorce was forbidden until well into the nineteenth century. This Part will show how close the reformers came to succeeding in 1534 when Thomas Cranmer, the Archbishop of Canterbury presented the *Reformatio Legum Ecclesiarum* to Parliament.¹⁷⁸ The *Reformatio* would have put civil authorities in charge of marriage and granted divorce not only for adultery and desertion, but also for “ill treatment of a wife.” The Part ends by examining the rise of Puritanism in England as well as Puritan support for civil marriage and divorce in the years leading up to the colonization of British North America.

A. Henry VIII Opposes Divorce

The English Reformation, unlike its continental counterpart, did not begin as a grassroots religious movement; rather, it was imposed from the top by Henry VIII in 1534 after he was denied papal support for ending his marriage to Catherine of Aragon.¹⁷⁹ The assets he acquired from confiscating monasteries and other Church property only sweetened his decision to separate

177. See *infra* notes 196-197 and accompanying text.

178. See THE *REFORMATIO*, *supra* note 19.

179. ACT OF SUPREMACY OF 1534, 26 Hen. 8, c.1 (declaring Henry “the only supreme head on earth, under God, of the Church of England”). MACCULLOCH, *supra* note 26, at 198-99.

the English Church from Rome. Because Henry was not motivated by substantive disagreements with Church doctrine, he saw no reason to change most doctrine, including the canon law on marriage.

Henry, who never challenged the Church's position that marriage is a sacrament and divorce forbidden, sought an annulment to end his marriage to Catherine, not a divorce. This is an important legal distinction that some scholars have missed.¹⁸⁰ Henry's support for Catholic canon law on marriage had been first made public a decade earlier. Henry published the *Assertio Septem Sacramentorum* (A Defense of the Seven Sacraments),¹⁸¹ a detailed rebuttal to Luther's *Babylonian Captivity of the Church*,¹⁸² in which Luther argued that marriage and four of the other seven sacraments recognized by the Church were not supported by Scripture. Henry's response was so well argued that the pope awarded him (and his successors) the title Defender of the Faith (*Fidei Defensor*).¹⁸³

B. Archbishop Cranmer Proposes the Reformatio Legum Ecclesiasticarum

Thomas Cromwell, Henry's chief minister, steered through Parliament an Act of Supremacy that declared Henry to be the head of the newly separate Church of England.¹⁸⁴ Cromwell was assisted in his efforts to end Henry's marriage by Thomas Cranmer, a taciturn diplomat and Cambridge don, whom Henry chose in 1532 to be the new Archbishop of Canterbury.¹⁸⁵ As the first Archbishop of the newly-independent Church of England, Cranmer made it one of his first official acts to annul Henry's marriage to Catherine.¹⁸⁶

When Cranmer was selected to be Archbishop of Canterbury, however, he failed to tell Henry that he had recently married the niece of Andreas Osiander, a leading Lutheran theologian in Nuremberg.¹⁸⁷ Cranmer thus had strong personal, if secret, reasons for joining Cromwell in his efforts to bring more of the continental Reformation to England. They had only limited success. In

180. See, e.g., FRANCIS J. BREMER, *THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS* 113 (rev. ed. 1995) ("In some respects the Anglican Church had carried forth the spirit of the Reformation, allowing divorce in cases of desertion or adultery. It would be hard to imagine Henry VIII's church doing less."); FRIEDMAN, *supra* note 10, at 142 ("Henry VIII had gotten a divorce; but ordinary Englishmen had no such privilege.").

181. HENRY VIII, *ASSERTIO SEPTEM SACRAMENTORUM* [A DEFENSE OF THE SEVEN SACRAMENTS] (T. W. Gent trans., 1746) (1521), cited in 36 LUTHER'S WORKS: II WORD AND SACRAMENT 9 (Abdel Ross Wentz ed., Fortress Press 1959). The authorship of the Defense is disputed. University theologians probably drafted the sections, and Thomas More organized them. CHRISTOPHER HAIGH, *ENGLISH REFORMATIONS: RELIGION, POLITICS AND SOCIETY UNDER THE TUDORS* 57 (1993).

182. See *supra* notes 47, 76-78 and accompanying text.

183. MACCULLOCH, *supra* note 26, at 135.

184. *Id.* at 199. Cromwell ultimately lost Henry's favor—and his life—in large part for his role in arranging Henry's fourth marriage to Anne of Cleves, a German princess who proved sexually repulsive to the king. *Id.* at 201.

185. DIARMAID MACCULLOCH, *THOMAS CRANMER* 75-76 (1996).

186. *Id.* at 93-94.

187. MACCULLOCH, *supra* note 26, at 199.

1537, for example, Cromwell persuaded Henry to order every parish church to have an English Bible.¹⁸⁸ There was so much popular interest in the Bible, however, that Henry grew fearful that it might lead to a rebellion, much as the peasants had risen in 1524-1525 in Germany.¹⁸⁹ In 1543, a concerned Parliament limited the reading of the Bible to the upper ranks of society.¹⁹⁰

After Henry's death in 1547, and the accession of his son, nine-year-old Edward VI, official England became more Protestant, in part because Edward's uncle, Edward Seymour, duke of Somerset, was named protector. Somerset, who was in direct contact with Calvin, favored more reform of the Church of England.¹⁹¹ Cranmer publicly acknowledged his wife and children for the first time, a secret he had kept for sixteen years.¹⁹² His correspondence with continental Protestants increased, and he tried to bring more of them to England. When Charles V won an important battle in 1547 against reform forces at Mühlberg, for example, it was Cranmer who arranged for Martin Bucer, a leading continental theologian, to join the faculty at Cambridge.¹⁹³

Bucer had met Luther in 1518, when Luther spoke at the University of Heidelberg, where Bucer was then a lecturer. He was sufficiently impressed by Luther's views that he returned home to Strasbourg determined to promote reform.¹⁹⁴ By 1521, concerned that he might be targeted for punishment by the Church, Bucer requested, and was given, permission to be released from his clerical vows. In 1522, he became one of the first former priests to marry.¹⁹⁵

In 1533, Bucer completed a two-hundred-page treatise *On Marriage and Divorce According to Divine and Roman Law*.¹⁹⁶ Like Luther, Bucer thought divorce should be only a last resort. Because he considered a good relationship between husband and wife to be a more important purpose of marriage than procreative sex, however, Bucer thought that incompatibility also should be a ground for divorce. He argued that having an appropriate law of divorce was a necessary part of an effective civil society. Civil government had the task of reforming public life, Bucer reasoned, and that could be done only if the public

188. *Id.* at 203.

189. *See id.* at 158-62.

190. ACT FOR THE ADVANCEMENT OF TRUE RELIGION, 34 & 35 Hen. 8, c.1. The Act provided that "no women, nor artificers, prentices, journeymen, serving men of the degree of yeomen or under, husbandmen, nor labourers" were to read the Scriptures, on pain of a month's imprisonment, although a provision permitted noble and gentry women to read the Scriptures privately. *Id.*

191. LEWIS W. SPITZ, THE PROTESTANT REFORMATION: 1517-1559, at 248-49 (2001).

192. MACCULLOCH, *supra* note 185, at 361; JASPER RIDLEY, THOMAS CRANMER 146 (1962).

193. MACCULLOCH, *supra* note 185, at 380-81. *See also* H.J. SELDERHUIS, MARRIAGE AND DIVORCE IN THE THOUGHT OF MARTIN BUCER 111 (John Vriend & Lyle D. Bierma trans., Thomas Jefferson Univ. Press 1999) (1994).

194. MARTIN MARTY, MARTIN LUTHER 40-41 (2004).

195. MACCULLOCH, *supra* note 26, at 648.

196. *Id.* at 110. John Milton provided an English translation of Bucer's book in 1644. THE JUDGEMENT OF MARTIN BUCER, CONCERNING DIVORCE (John Milton trans., 1644), reprinted in THE DIVORCE TRACTS OF JOHN MILTON: TEXTS AND CONTEXTS 195, 474 (Sara J. van den Berg & W. Scott Howard eds., 2010).

honor of marriage was restored. Restoring the honor of marriage required expanding the grounds for divorce, so that bad marriages could be dissolved, and good ones contracted.¹⁹⁷

In 1549, Strasbourg turned against the evangelicals, and forced Bucer to leave.¹⁹⁸ He decided to accept Cranmer's invitation to come to England; the two met that April for the first time after some eighteen years of correspondence.¹⁹⁹ Although he lived for only two more years, Bucer was a popular teacher at Cambridge where he trained many future leaders of the Anglican Church.²⁰⁰

During Edward's reign (1547-53), Cranmer undertook a revision of the national prayer book and of canon law. His 1549 Book of Common Prayer provided the English Church with its first official marriage service.²⁰¹ It was also the first marriage service in Christian history that reflected the Protestant view that marriage is for love and companionship as well as procreative sex:

Deerely beloved frendes, we are gathered together here in the syght of God, and in the face of his congregacion, to joyne together this man and this woman in holy matrimonie. . . . [d]uely consideryng the causes for whiche matrimonie was ordeined. One cause was the procreacion of children, to be brought up in the feare and nurture of the Lord, and prayse of God. Secondly it was ordeined for a remedie agaynst sinne, and to avoide fornicacion, that suche persones as bee married, might live chastlie in matrimonie, and kepe themselves undefiled membres of Christes bodye. Thirdelye for the mutuall societie, helpe, and coumfort, that the one oughte to have of the other, both in prosperitie and adversitie.²⁰²

At the same time, the service retained aspects of Roman canon law. For example, Anglican priests were directed to say, "Those whome god hath joyned together, let no man put a sundre."²⁰³

Cranmer's Book of Common Prayer was widely accepted in England, but his attempt to reform English ecclesiastical law did not fare as well. Parliament had first tried to promote a revision in 1534 when it authorized a commission of thirty-two members—half clerical, half lay—to compile such ecclesiastical

197. SELDERHUIS, *supra* note 193, at 272.

198. MACCULLOCH, *supra* note 185, at 421-22.

199. *Id.* at 422.

200. D.G. HART, CALVINISM: A HISTORY 37 (2013). Among his protégés were two future archbishops of Canterbury. JOHN GUY, TUDOR ENGLAND 221 (1988).

201. ERIC JOSEF CARLSON, MARRIAGE AND THE ENGLISH REFORMATION 45 (1994).

202. THE BOOK OF COMMON PRAYER: THE TEXTS OF 1549, 1559, AND 1662, at 64 (Brian Cummings ed., 2011). Bucer strongly approved of the addition of "for the mutuall societie, helpe, and coumfort," although he was not able to persuade Cranmer to put it first in the list of the three purposes of marriage. MACCULLOCH, *supra* note 185, at 421.

203. THE BOOK OF COMMON PRAYER, *supra* note 202, at 67.

laws as should be “adjudged worthy to be continued.”²⁰⁴ Henry VIII never appointed any commission members, however, even after the authorizing legislation was extended in 1536 and again in 1544.²⁰⁵ In 1550, the first Parliament of Edward VI again authorized a canon law commission, but this time the king appointed members.²⁰⁶ By law, the commission members came from four groups: bishops, academic theologians, civil lawyers (who practiced in the ecclesiastical courts), and common law lawyers. It was dominated by close associates of Cranmer, and even included two distinguished continental theologians: Jan Laski and Peter Martyr Vermigli.²⁰⁷

In 1553, seven years after the Geneva Marriage Ordinance was adopted, Cranmer presented the commission’s proposal to the House of Lords. The *Reformatio Legum Ecclesiasticarum*²⁰⁸ was the most comprehensive of the various efforts made during the sixteenth century to bring continental reforms of marriage and divorce law to England. Ultimately, all the efforts failed but one: English law was modified to permit clergy in the Church of England to marry. Even that change was agreed to only after years of struggle.²⁰⁹

The *Reformatio*, although it never became law,²¹⁰ shows the extent to which its drafters accepted the marriage and divorce views developed by Luther, Zwingli, and Calvin. According to the *Reformatio*, marriage should be considered a contract, not a sacrament;²¹¹ marriage is for love as well as procreative sex;²¹² clergy should be able to marry;²¹³ and, to prevent clandestine marriages, marriages should be announced at least three days in advance and take place “in front of the church.”²¹⁴ Parental consent was required for a marriage of young people to be valid.²¹⁵ Finally, married couples could be ordered to perform their “godly duties”:

Once a marriage has taken place, if quarrels, disputes, insults, controversies, bitterness, abuses, debaucheries and depravities of different kinds boil up to the point that the married couple do not wish to live together in the same house, and the other duties of marriage are not being performed for each other, they shall be

204. 25 Hen. 8, c. 19 (1534), 3 STATUTES OF THE REALM III, 461.

205. 35 Hen. 8, c. 16 (1543-44).

206. 3-4 Ed. 6, c. 11 (1549-50).

207. MACCULLOCH, *supra* note 185, at 501; THE *REFORMATIO*, *supra* note 19, at xlvi-xlviii.

208. THE *REFORMATIO*, *supra* note 19.

209. In 1563, after most of the Marian bishops had refused to take the Supremacy oath and were replaced by Protestants, clerical marriage was finally accepted by the Anglican Church, although it was not given a statutory basis until 1571. 13 Eliz. cap. 12. *See generally*, Eric Joseph Carlson, *Marriage and the English Reformation*, 31 J. BRIT. STUD. 1 (1992).

210. THE *REFORMATIO*, *supra* note 19, at xlvi.

211. *Id.* at 227, 247.

212. *Id.* at 247.

213. *Id.* at 209.

214. *Id.* at 231, 247.

215. THE *REFORMATIO*, *supra* note 19, at 249.

subject to ecclesiastical penalties and forced to live in the same house, and they shall also be called back to the godly duties of marriage which they are meant to share with one another, as long as nothing has occurred which would constitute lawful grounds for divorce.²¹⁶

Although the *Reformatio* treated marriage as a contract rather than a sacrament, it would not have given secular authorities control of marriage as Luther favored, but would have left marriage under the control of ecclesiastical authorities.²¹⁷

The *Reformatio* would have abolished legal separation entirely²¹⁸ and recognized five grounds for divorce: (1) adultery; (2) desertion; (3) two or three years of “unduly protracted absence of the husband”;²¹⁹ (4) “deadly hostility,” defined as a situation in which one spouse attacks the other “by treacherous means or by poison” with the intent of taking his or her life; and (5) “ill treatment” of a wife.²²⁰ The last two grounds would have provided more protection for wives than Luther or the Geneva Ordinance.

To enforce the fifth ground, the *Reformatio* provided that, if “a man is cruel to his wife and displays excessive harshness of word and deed towards her, as long as there is any hope of improvement,” the judges might reason with him, but, if he cannot be restrained by bail and refuses to abandon his cruelty, then “he must be considered his wife’s mortal enemy and a threat to her life.”²²¹ “[I]n her peril, recourse must be had to the remedy of divorce.”²²² A divorce could not be granted, however, if the wife was “rebellious, obstinate, petulant, scolds [or exhibits] evil behavior,” as long as the husband “does not exceed the limits of moderation and fairness.”²²³

Penalties were provided for false accusations and for any man who incited his wife to adultery.²²⁴ If both parties were guilty of a marital fault, no divorce would be granted.²²⁵ The *Reformatio*, like the Geneva Ordinance, thus adopted the doctrine of recrimination;²²⁶ it also forbid guilty spouses to remarry.²²⁷

216. *Id.* at 255.

217. Marriages were to be performed by ministers, *id.* at 247, and divorces granted by ecclesiastical judges, *id.* at 265, 269.

218. *Id.* at 277.

219. *Id.* at 269-71 (if it was not possible to ascertain whether the departed spouse was alive, “even when the most thorough inquiry has been made,” then “it is fair for the wife to be allowed to contract a new marriage . . .”).

220. THE REFORMATIO, *supra* note 19, at 265-73.

221. *Id.* at 271.

222. *Id.*

223. *Id.*

224. *Id.* at 275.

225. THE REFORMATIO, *supra* note 19, at 277. In Zurich, by contrast, divorces were granted even if both husband and wife had committed adultery. See *supra* text accompanying note 129.

226. See *supra* text accompanying note 6.

227. THE REFORMATIO, *supra* note 19, at 267.

C. The Rise of Godly Puritans and Support for Marriage and Divorce Reform

The death of Edward VI in 1553 marked the end of parliamentary efforts to reform English marriage and divorce law for a century, although the text of the *Reformatio* was published in 1571 in an unsuccessful attempt to resurrect it.²²⁸ Mary Tudor, Henry's daughter with Catherine, came to the throne with broad popular support and a determination to return England to the Catholic Church.²²⁹ Under Mary, Cranmer and nearly 300 others were burned at the stake for heresy and married clergy were told to give up their wives or lose their positions.²³⁰ Almost 800 reformers fled to the Continent, where they established communities in exile in Frankfurt, Strasbourg, Zurich, and Geneva.²³¹

After Mary died unexpectedly in 1558, the newly crowned Elizabeth faced the challenge of coping with the aftermath of the conflicting religious positions of her father, half-brother, and half-sister. She was required to steer implementing legislation through a House of Lords from which most Protestant bishops had been purged under Mary and replaced by orthodox Catholics.²³² The resulting 1559 *Act of Settlement*²³³ restored royal control of the Church of England, directed clergy to again follow the Book of Common Prayer, and required the laity to attend services every Sunday or be fined, but it did not require professions of faith.²³⁴ This attempt to avoid inflaming matters of conscience by focusing on actions rather than belief did not satisfy many Catholics or Protestants, however.²³⁵ Protestants might have leadership of the Church of England, but they did not control parishes where Catholic priests and laity were in large majorities.²³⁶ The more determined Protestants, who called themselves the godly²³⁷ but were derided by others as "Puritans," continued

228. MACCULLOCH, *supra* note 185, at 500-01.

229. MACCULLOCH, *supra* note 26, at 280.

230. *Id.* at 282, 285; MACCULLOCH, *supra* note 185, at 603-05. By one estimate, 12,000 of 16,000 clergy were deprived of their offices for refusing to give up their wives, although other scholars estimate the number was 3,000 or less. OZMENT, *supra* note 31, at 395.

231. HAIGH, *supra* note 180, at 228.

232. WALLACE MACCAFFREY, *ELIZABETH I* 53 (1993).

233. It consisted of two acts: the ACT OF SUPREMACY, 1 Eliz. 1 c. 1, which restored the queen as the "Supreme Governor" of a separate Church of England, and the ACT OF UNIFORMITY, 1 Eliz. 1 c. 2.

234. The arrest of two Catholic bishops on trumped-up charges produced a slim majority for the legislation. MACCULLOCH, *supra* note 26, at 289. The Act of Uniformity passed by only three votes in the upper house, and was opposed by all bishops present. HAIGH, *supra* note 180, at 241.

235. MACCAFFREY, *supra* note 232, at 299.

236. HAIGH, *supra* note 180, at 252.

237. Christopher Durston & Jacqueline Eales, *Introduction: The Puritan Ethos, 1560-1700*, in *THE CULTURE OF ENGLISH PURITANISM, 1560-1700*, at 3 (Christopher Durston & Jacqueline Eales eds., 1996). They also called themselves "true gospellers" and "the elect." *Id.* The term "Puritan" was used in a publication as early as 1565 by a Catholic exile who was attacking his English Protestant enemies. *Id.* at 2.

their efforts to purify the Anglican Church of “popish” practices as well as anything not explicitly sanctioned by Scripture.²³⁸

The Puritans were strongly influenced by Calvin, who has been described as their founding father.²³⁹ They remained within the Church of England, albeit in an “uneasy coexistence” with traditional Anglicans.²⁴⁰ Few made their views on marriage and divorce public. Their reticence is understandable given the harsh treatment meted out to some who did speak out. For example, John Greenwood publicly proclaimed support for civil marriage in 1587 before the Court of High Commission, the ecclesiastical counterpart of the infamous Star Chamber.²⁴¹ Greenwood was executed in 1593 for writing seditious pamphlets on this and other topics.²⁴²

Restrictions on Puritan criticism of Anglican family law continued under James I, who became king in 1603. Ben Jonson described Puritans in his 1612 play *The Alchemist*, as “sober, scurvy, precise . . . that scarce have smiled twice since the King came in.”²⁴³

In 1619, William Whately supported divorce for adultery or desertion,²⁴⁴ but recanted when he was called before the Court of High Commission.²⁴⁵ The revised edition of his treatise contained a confession of error, in which he stated that he no longer believed adultery justified divorce.²⁴⁶ He explained: “[W]ho can doubt, but that a man or woman having secretly sinned in this kind, repenting of the sinne, and keeping his or her owne counsell, may lawfully continue to give due benevolence unto the yoke-fellow?”²⁴⁷ He added that the

238. FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 41 (2003); WILLIAM HALLER, *THE RISE OF PURITANISM* 5-8 (1938) (“Elizabeth to their dismay did not reform the church, but only swept the rubbish behind the door.”).

239. HALLER, *supra* note 238, at 9; M.M. KNAPPEN, *TUDOR PURITANISM* 135 (1939).

240. COLLINSON, *supra* note 24, at 144.

241. CHILTON LATHAM POWELL, *ENGLISH DOMESTIC RELATIONS, 1487-1653: A STUDY OF MATRIMONY AND FAMILY LIFE IN THEORY AND PRACTICE AS REVEALED BY THE LITERATURE, LAW, AND HISTORY OF THE PERIOD* 45-46 (photo. reprint 2010) (1917). The High Commission was charged with censoring “heretical, schismatical and seditious” books. CHRISTOPHER HILL, *SOCIETY & PURITANISM IN PRE-REVOLUTIONARY ENGLAND* 345 (2d ed. 1967).

242. POWELL, *supra* note 241, at 46-47; Jacqueline Eales, *A Road to Revolution: The Continuity of Puritanism, 1559-1642*, in *THE CULTURE OF ENGLISH PURITANISM*, *supra* note 237, at 184, 188 (“[T]he execution of . . . John Greenwood [and two others] contributed to driving the more radical reformers underground or into exile.”).

243. BEN JONSON, *THE ALCHEMIST* leafe B3R (1612), *quoted in* Jacqueline Eales, *A Road to Revolution: The Continuity of Puritanism, 1559-1642*, in *THE CULTURE OF ENGLISH PURITANISM*, *supra* note 237, at 184, 193.

244. WILLIAM WHATELY, *A BRIDE-BUSH: OR, A DIRECTION FOR MARRIED PERSONS PLAINELY DESCRIBING THE DUTIES COMMON TO BOTH, AND PECULIAR TO EACH OF THEM* (photo. reprint 2010) (1619).

245. William Haller & Malleville Haller, *The Puritan Art of Love*, 5 HUNTINGTON LIB. Q. 235, 267-68 (1942); HILL, *supra* note 241, at 346.

246. WILLIAM WHATELY, *An Advertisement of the Author to the Reader*, in *A BRIDE-BUSH: OR, A DIRECTION FOR MARRIED PERSONS PLAINELY DESCRIBING THE DUTIES COMMON TO BOTH, AND PECULIAR TO EACH OF THEM* (photo. reprint 2010) (rev. ed. 1623).

247. *Id.*

printer had reprinted his original text by mistake, which was why his confession of error was added to the front of the revised text.²⁴⁸

English marriage law would remain firmly under the control of religious authorities until well into the nineteenth century, and divorce forbidden.

III. MARRIAGE AND DIVORCE LAW IN COLONIAL AMERICA

During the early seventeenth century, thousands of Puritans and other religious dissenters left England for the Netherlands, Ireland, or North America.²⁴⁹ This Part looks first at the marriage practices the Pilgrims brought with them to Plymouth in 1620. It then turns to the Puritans who settled in New England a decade later and who also brought with them marriage and divorce practices that were strikingly similar to those of Reformation Zurich and Geneva. As their leader John Winthrop recorded, the Puritans in Massachusetts Bay knew that their marriage and divorce practices violated English ecclesiastical law, so they tried to hide what they were doing from the authorities in England by leaving marriage out of their first codification of the law.²⁵⁰ Less than a decade later, however, when English Puritans were for a while in control of Parliament, Massachusetts Bay colonists became more open about their family law practices, which by then included divorce. The Part also explores various paths by which knowledge of Reformation marriage and divorce theology and law may have reached the colonists, then ends with a look at the colony of Virginia which, like most colonies outside of New England, treated marriage as a civil matter not because of religious beliefs, but because there were no ecclesiastical courts established that could oversee family matters as they did in England. Divorce would not be available in any colonies outside New England until the late eighteenth century.²⁵¹

A. Civil Marriage in Plymouth Plantation

As most American schoolchildren know, the first permanent settlement in New England began a decade before the Puritans arrived in Massachusetts Bay. In 1620, forty-four Pilgrims, who had left England for Holland a dozen years earlier, sailed from Plymouth, England, on the *Mayflower* with another fifty-five colonists and thirty crewmembers to settle in New England.²⁵² They had

248. *Id.*

249. MARILYN C. BASELER, "ASYLUM FOR MANKIND": AMERICA, 1607-1800, at 27 (1998) (as many as 500,000 English subjects were transplanted during the seventeenth century out of a population that seldom exceeded five million; between 1630 and 1642 some 200,00 emigrated to Ireland and British North America).

250. *See supra* notes 3-4 and accompanying text.

251. *See infra* note 363 and accompanying text.

252. BERNARD BAILYN, THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600-1675, at 329-34 (2012). This was not the first effort to settle in

obtained permission to settle from the Virginia Company, which was desperate for more colonists, and approval to leave England from the Secretary of State, who thought there was no better place for a small group of Protestant extremists than three thousand miles from England where they could form a bulwark against the expansionist efforts of Catholic Spain.²⁵³ Whether because of navigational difficulties, or treachery, the Pilgrims landed on November 11, 1620, far north of the area granted to the Virginia Company.²⁵⁴

In his history of Plymouth Colony, Governor William Bradford described the pressures that led many religious dissenters to emigrate, particularly those, including the Pilgrims, who had given up on reforming the Church of England, thereby earning the name “Separatists.”²⁵⁵ He recounted that Queen Elizabeth and the State “began to persecute all the zealous professors in the land . . . both by word and deed, if they would not submit to their ceremonies . . . which have no ground in the Word of God.”²⁵⁶ Bradford was the third child and only son of a farmer from Austerfield, England. His path to New England began when he was twelve and become a devoted reader of the Bible. He was inspired to join a group of religious dissidents led by Richard Clyfton in the nearby village of Scrooby, despite the “wrath of his uncles” and the “scoff of his neighbors.”²⁵⁷ Bradford reported serious persecution: “[S]ome were taken and clapped up in prison, others had their houses beset and watched night and day, and hardly escaped their hands; and the most were fain to flee. . . .”²⁵⁸ And flee they did, first to the Netherlands and, more than a dozen years later, to New England. After the death of the colony’s original governor in April, the colonists unanimously chose thirty-one-year-old Bradford to be their governor, a position he would hold for the next thirty-three years.²⁵⁹

The Pilgrims faced daunting challenges; their fresh food supplies had been consumed early in the voyage. They were able to locate some food supplies buried by Native Americans, but had to dig into ground frozen a foot deep to reach them.²⁶⁰ “The weather was very cold and it froze so hard as the spray of the sea lighting on their coats, they were as if they had been glazed.”²⁶¹ During that first winter, “half their company died . . . being infected with scurvy and

New England; it was not even the first settlement called “Plymouth.” In 1607 the Plymouth Company of Virginia had attempted, without success, to establish a colony at Sagadahoc, Maine. DANIEL K. RICHTER, *BEFORE THE REVOLUTION: AMERICA’S ANCIENT PASTS* 152 (2011).

253. MICHAEL WINSHIP, *GODLY REPUBLICANISM: PURITANS, PILGRIMS, AND A CITY ON A HILL* 113-114, 116 (2012).

254. *Id.* at 119 (their ship captain may have been paid by the Dutch to keep the Pilgrims far from a planned Dutch colony in New York).

255. WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION, 1620-1647*, at 3-10 (Samuel Eliot Morison ed., 1987).

256. *Id.* at 7.

257. Samuel Eliot Morison, *Introduction* to BRADFORD, *supra* note 255, at xxiii.

258. BRADFORD, *supra* note 255, at 10.

259. *Id.* at xxiii-xxiv, 86.

260. BAILYN, *supra* note 252, at 335.

261. BRADFORD, *supra* note 255, at 68.

other diseases which this long voyage and their inaccomodate condition had brought upon them.”²⁶² A successful harvest the next year, and the arrival of two more ships in 1623 enabled the Plymouth colony to survive and to become the first permanent settlement of dissenters in North America.²⁶³

The Pilgrims played a much smaller role in colonial development than the Puritans who settled in Massachusetts Bay a decade later, but their practices are important to this history because they show that the Pilgrims brought their non-Anglican marriage practices with them. On May 12, 1621, the first colonial marriage in New England united Edward Winslow, who had lost his wife during that difficult first winter, and widow Susannah White, who had similarly lost her husband.²⁶⁴ Bradford’s account underscores the importance of marriage and family to the colony,²⁶⁵ and confirms that the Pilgrims believed that marriage should be a civil matter:

According to the laudable custom of the Low Countries, in which they had lived, [it] was thought most requisite [for the marriage] to be performed by the magistrate, as being a civil thing [and] most consonant to the Scriptures (Ruth iv) and nowhere found in the Gospel to be laid on the ministers as a part of their office. “This decree or law about marriage was published by the States of the Low Countries Anno 1590. That those of any religion (after lawful and open publication) coming before the magistrates in the Town, or State house, were to be orderly (by them) married one to another.” –Petit’s History, fol. 1029.²⁶⁶

Bradford’s account was not finished until 1646, when he added that civil marriage “hath continued amongst not only them, but hath been followed by all the famous churches of Christ in these parts to this time.”²⁶⁷ Holland, the source of the Pilgrim’s knowledge of civil marriage, had been heavily influenced by Luther as early as 1519, although in the 1550s, a form of Calvinism overtook Lutheranism as the dominant sect in the region.²⁶⁸ Consistories, like the one in Geneva, had also been established in most Dutch towns to supervise the lives of residents.²⁶⁹

262. *Id.* at 77.

263. HART, *supra* note 200, at 107.

264. BRADFORD, *supra* note 255, at 85-86.

265. Family in the colony was the “central agency of economic production and exchange [with] its various members . . . inextricably united in the work for providing for their fundamental material wants.” JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* 183 (1970).

266. BRADFORD, *supra* note 255, at 86-87.

267. *Id.*

268. JONATHAN I. ISRAEL, *THE DUTCH REPUBLIC: ITS RISE, GREATNESS, AND FALL, 1477-1806*, at 79 (1995).

269. *Id.* at 368.

The colonists' embrace of civil marriage did not sit well with leaders of the Anglican Church. In 1635, Edward Winslow, the groom in that first colonial marriage in New England, returned to England to pay off debts the colony owed to its financial backers and to petition the Lord Commissioners for the Plantations to assist the colonists in resisting French and Dutch claims.²⁷⁰ Charles I, who became king in 1625, had established the commission in 1634 to oversee the colonies, and installed as its head William Laud, Archbishop of Canterbury, who was the scourge of most Puritans because of his efforts to purge Puritan ministers from the Church of England.²⁷¹ Laud questioned Winslow, an act Bradford characterized as designed to "disturb the peace of the [colony's] churches."²⁷² When asked about marriage, Winslow acknowledged that because he was a magistrate in Plymouth Colony, he had "married some." He defended his actions by arguing that "marriage was a civil thing and he found nowhere in the Word of God that it was tied to ministry."²⁷³ Winslow also offered a second, more practical, reason for their recognition of civil marriage: the colonists "were necessitated so to do, having for a long time together at first no minister."²⁷⁴ Neither justification satisfied Laud, however, who arranged for Winslow to spend seventeen weeks in Fleet prison.²⁷⁵ Control of marriage was a serious point of difference between colonial Puritans and English Anglicans.

B. Civil Marriage and Divorce in Massachusetts Bay Colony

The Puritans who arrived in Massachusetts Bay in 1630, ten years after the Pilgrims settled in Plymouth, were part of a "Great Migration" of people from Britain to the western hemisphere.²⁷⁶ Nearly 21,000 came to Massachusetts Bay alone between 1629 and 1640.²⁷⁷ Their leaders were convinced that if they stayed in England, their religious principles would not survive the demands for Anglican conformity being imposed by Archbishop Laud, although not all who

270. BRADFORD, *supra* note 255, at 272-73.

271. BAILYN, *supra* note 252, at 382 ("What stirred the Puritan community most deeply was Laud's sweeping 'visitation' of suspect dioceses to flush out even the mildest signs of nonconformity.").

272. BRADFORD, *supra* note 255, at 273-74.

273. *Id.* at 274.

274. *Id.*

275. *Id.*

276. DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 13-17 (1989).

277. *Id.* at 17. Seventeen ships sailed to Massachusetts in 1630, the vanguard of some 200 ships that arrived over the decade, carrying on average about one hundred colonists each. *Id.* at 16. By contrast, there were still only 2,000 Pilgrims in Plymouth when Bradford died in 1657. BAILYN, *supra* note 252, at 364. Not everyone stayed. Some two hundred members of the original 1630 fleet returned almost as soon as they arrived "partly out of dislike of our government, which restrained and punished their excesses," reported one colonist, and partly because of fear of famine. DAVID CRESSY, *COMING OVER: MIGRATION AND COMMUNICATION BETWEEN ENGLAND AND NEW ENGLAND IN THE SEVENTEENTH CENTURY* 195 (1989).

came, including servants, farmworkers, and laborers, were motivated by religious beliefs; they simply needed work.²⁷⁸ The Bay colonists included an unusually high proportion of families in comparison to the colonists who had settled in Plymouth, or any of the other North American colonies.²⁷⁹ They also had a more balanced mix of age²⁸⁰ and gender,²⁸¹ and were mostly of the “middling sort” with relatively few servants, and virtually no aristocrats.²⁸² They were also remarkably well educated for a frontier settlement; at least 130 of those who arrived before 1646 were graduates of Oxford or Cambridge. It is estimated that by 1640 there was one university-educated man in New England for every thirty-two families, a ratio similar to England itself.²⁸³

The Bay colonists had learned from the high death rates in Jamestown²⁸⁴ and Plymouth;²⁸⁵ they brought animals and sufficient food stuffs to feed themselves on the voyage and to sustain them in the new world until they could grow enough of their own.²⁸⁶ They also arranged their arrival for summer rather than late fall. Although the very cold New England winters posed many challenges, the weather produced a healthier environment than in Virginia by limiting insect-borne diseases such as malaria and yellow fever, and water-borne infections including typhoid fever, making the colony one of the healthiest places in the Western world.²⁸⁷

Following the outbreak of civil war in England, with the political power of Puritans on the ascendancy in England, Puritan migration to Massachusetts Bay ended almost as quickly as it had begun.²⁸⁸ Fortunately for the colony, there were enough colonists of the right age to reproduce themselves without additional colonists from England. The population of New England, which was

278. BAILYN, *supra* note 252, at 166-67.

279. *Id.* at 412 (“No other displacement of the English people . . . involved so many stable, complete, traditional nuclear families. . . . A meticulous study of the seven emigrant vessels of the 1630s whose passenger lists are complete reveals that almost nine-tenths (87.8 percent) of the 680 passengers aboard were traveling in family groups, most of them nuclear units of married couples, generally in their thirties, who had been married for approximately a decade and who brought with them three or more children.”).

280. FISCHER, *supra* note 276, at 26, 231 (More than forty percent were adults over twenty-five, and nearly half were children under sixteen—proportions that were similar to England’s population at the time. In Virginia, by contrast, three quarters of those who came were between fifteen and twenty-four.)

281. *Id.* at 26-27 (In Virginia, the ratio was four men for every woman; in Brazil it was one hundred men for every woman; but in Massachusetts the ratio was only three men for every two women).

282. *Id.* at 27-28 (fewer than twenty-five percent were servants as compared with seventy-five percent of those in Virginia).

283. BAILYN, *supra* note 252, at 414.

284. *See infra* text accompanying notes 371-373.

285. As early as 1623, a visitor from the Virginia Company noticed how much healthier the colonists were in Plymouth than in Virginia. CRESSY, *supra* note 277, at 8.

286. *Id.* at 127-28; FISCHER, *supra* note 276, at 14.

287. FISCHER, *supra* note 276, at 52. The colonies experienced terrible epidemics, but the average mortality rates in Massachusetts remained well below those in most of the Western world. *Id.*

288. *Id.* at 17.

made up mostly of descendants of the first 21,000 colonists, increased to some 100,000 by 1700, and to more than a million by 1800.²⁸⁹

1. Civil Marriage

Although the *Body of Liberties* adopted in 1641 in Massachusetts Bay did not address marriage or divorce,²⁹⁰ the *Laws and Liberties of Massachusetts*,²⁹¹ adopted in 1648, did. The Bay colonists may have been emboldened to codify their marriage practices by the growing power of Puritans in England during the intervening seven years.²⁹² Archbishop Laud was impeached for treason in 1640 and beheaded in 1644.²⁹³ Between 1640 and 1642, the leaders of the Church of England were widely reviled and discredited.²⁹⁴ Few bishops retained any authority, and church courts ceased to function.²⁹⁵ By 1647, Parliamentary forces, led by the New Model Army under Oliver Cromwell, defeated Royalist forces almost everywhere, and Charles I was placed in protective custody.²⁹⁶

The 1648 codification of law demonstrated the continuing importance to the Bay colonists of maintaining their nonconforming marriage and divorce practices. Indeed, family life was considered so fundamental to the good order of the colony that as early as 1629, a law was passed that ordered servants who were not already part of a family to be divided into family-size units with a chief “grounded in religion” to keep a watchful eye over all members “so disorders may be prevented, and ill weeds nipt before they take too great a head.”²⁹⁷ Confirming an ongoing concern about unmarried colonists, in 1672, one court ordered a single man to “settle himself in some orderly family” to avoid being “subject to much sin and iniquity, which ordinarily are the companions and consequences of a solitary life.”²⁹⁸ In 1669, Plymouth Colony

289. *Id.* It is estimated that in 1700, one-third of the British colonists in North America lived in New England. Their large numbers are another reason the Puritans had a disproportionate influence on colonial America.

290. *Body of Liberties*, see *supra* text accompanying note 4.

291. THE LAWS AND LIBERTIES OF MASSACHUSETTS, reprinted from the copy of the 1648 edition in the Henry E. Huntington Library 15, 37-38, (Harvard Press ed. 1929).

292. See DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692, at 35 (1979) (“The turmoil that characterized English politics after 1640 freed Massachusetts Bay of its fear of imminent charter revocation.”).

293. BLAIR WORDEN, THE ENGLISH CIVIL WARS, 1640-1660, at 33 (2009).

294. See JOHN MORRILL, THE NATURE OF THE ENGLISH REVOLUTION 89 (1993).

295. See *id.* at 86.

296. See CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603-1714, at 95 (2d ed. 1980); D. E. KENNEDY, THE ENGLISH REVOLUTION, 1642-1649, at 48 (2000) (Charles I was first in the custody of Parliament and then was kidnapped by radicals from the New Model Army).

297. 1 RECORDS OF THE GOV. AND CO. 397 (Nathaniel B. Shurleff ed., 1853-54) (April 21, 1629), <http://archive.org/stream/recordsofgoverno01mass#page/396/mode/2up>.

298. *Colony v. Littleale*, Quarterly Ct. Hampton 1672, in RECORDS OF ESSEX, V: 104, cited in I WILLIAM E. NELSON, THE COMMON LAW OF COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660, at 51 n. 14 (2008). Because the Church of England was established before the Council of Trent revised Catholic marriage law, the English ecclesiastical courts, like the medieval

adopted a law requiring every single person in the colony to live with a “well governed family.”²⁹⁹ The importance of marriage was underscored by a New England proverb: “women dying maids lead apes in hell.”³⁰⁰ Ninety-four percent of the women and ninety-eight percent of the men in the colony married.³⁰¹ By contrast, as many as twenty-seven percent of the adult population in England never married.³⁰²

The marriage and divorce provisions of the 1648 *Laws and Liberties* may have been contrary to Anglican ecclesiastical law, but they were consistent with the theological writings of both Luther and Calvin. Clandestine marriages were prohibited, parental consent was required for underage parties, and repeat adulterers were subjected to fines.³⁰³ Magistrates and others authorized by “the General Court, or Court of Assistants” were given exclusive authority to perform marriages.³⁰⁴ No grounds for divorce were specified, but the *Laws and Liberties* acknowledged judicial divorce by providing that “causes of divorce shall be tried only in the . . . court of Assistants.”³⁰⁵

The result was a form of marriage unique to Puritan New England. Weddings were performed at home by a magistrate in a simple ceremony. There were no wedding rings. The parties “agreed to” or “executed” the marriage before the magistrate; the marriage was not “performed” or “solemnized.”³⁰⁶ At the celebration that followed, there was no dancing, although there was enough cake and rum for everyone present.³⁰⁷

Because the Bay Puritans had not spent a dozen years in Holland, their knowledge of civil marriage cannot be attributed to a stay in the Netherlands. It is also highly unlikely that they copied the marriage practices of the Plymouth colonists, with whom they had a strained relationship because the Puritans did not consider themselves to be Separatists.³⁰⁸ There are, by contrast, many ways

Church, recognized as valid all marriages that had been consummated, with or without witnesses. The result was “an abundance of bigamous and clandestine marriages.” EDMUND S. MORGAN, *THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* 31 (rev. ed. 1966) (1944).

299. *THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH* 156 (William Brigham ed., 1836), reprinted in *MAJOR PROBLEMS IN THE HISTORY OF AMERICAN FAMILIES AND CHILDREN* 38 (Anya Jabour ed., 2005).

300. *Id.* at 77.

301. FISCHER, *supra* note 276, at 77.

302. *Id.*

303. *THE LAWS AND LIBERTIES OF MASSACHUSETTS*, *supra* note 291, at 37.

304. *Id.* at 38.

305. *Id.* at 15.

306. FISCHER, *supra* note 276, at 77-78.

307. MORGAN, *supra* note 298, at 33-34.

308. *The Humble Request*, a statement signed in 1630 by Winthrop and others who departed with him, insisted they were not separatists (we are not “of those that dreame of perfection in this world”) but committed members of the Church of England (“We desire you would be pleased to take notice of the principals, and body of our company, as those who esteeme it our honour, to call the Church of England . . . our dear Mother.”). EDMUND MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP* 53 (1958). Their differences with the separatist Pilgrims continued for years. Winthrop reported that, when a group of Bay Puritans sailed to Plymouth in 1631 to trade for corn, they were not only forbidden to

that knowledge of the marriage and divorce principles of Luther, Zwingli, or Calvin and of the marriage and divorce practices of Reformation Europe may have been transmitted to the Bay colonists. It is likely, for example, that the Bay colonists knew about Dutch marriage and divorce laws because many of them came from East Anglia, a region in England that had long been influenced by Dutch trade, Dutch religion, and Dutch culture.³⁰⁹

The Bay colonists never thought of themselves as mere colonials, moreover, but as part of international Protestantism. As described above, Puritans in England had long been directly influenced by continental reformers such as Bucer and Peter Martyr, as well as a stream of writings including Calvin's *Institutes of the Christian Religion*.³¹⁰ Before and after their emigration to New England, the Bay colonists were also in contact with Protestants from Geneva to Leiden.³¹¹ John Cotton, one of the leading ministers in the colony, was part of an active, international network of religious correspondents.³¹² He had studied the works of Calvin and Bucer and, during the 1630s, exchanged letters with Puritans in Amsterdam, Leiden, the Hague, and Rotterdam.³¹³ The Bay Puritans thus had access to multiple sources of information about Protestant principles and practices that governed civil marriage and divorce in Reformation Europe.

Civil marriage and divorce in Massachusetts Bay, then, is best understood as an aspect of the colonists' deep commitment to Puritanism. Indeed, their aversion to contemporary Anglican leadership of the Church was a major factor in their decision to leave England.³¹⁴ To have permitted ministers to perform marriages in the new world risked giving control to Laudian Anglicans. It was better to leave marriage to magistrates, particularly Winthrop and the other "godly" magistrates, who would ensure that Puritan values and Scripture shaped New England families.

The decision to give magistrates rather than ministers control of marriage was also consistent with the colonists' aversion to theocracy. Of all the governments of the Western world at the time, the government of Massachusetts Bay gave clergy the least authority.³¹⁵ Power to run the state "rested firmly in the hands of laymen."³¹⁶ Although they could and did give advice to the secular government, clergy were forbidden to hold civil offices in

trade, but were told that they would be opposed by force, even "to the spending of their lives." WINTHROP, *supra* note 1, at 67.

309. FISCHER, *supra* note 276, at 43.

310. SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 91 (1972).

311. PERRY MILLER, *THE NEW ENGLAND MIND* 6 (1953).

312. *THE CORRESPONDENCE OF JOHN COTTON* 22 (Sargent Bush, Jr. ed., 2001).

313. *Id.* at 15, 27, 140, 151, 160, 177.

314. MORGAN, *supra* note 308, at 27-33; FRANCIS J. BREMER, *JOHN WINTHROP: AMERICA'S FORGOTTEN FOUNDING FATHER* 147-70 (2003).

315. MORGAN, *supra* note 308, at 95-96.

316. *Id.*

New England in sharp contrast to England, where bishops sat in the House of Lords.³¹⁷

The Court of Assistants, which was authorized by the *Laws and Liberties* to grant divorces, was more than a court. Its members were the most important officials in the colony, and included the governor, the deputy governor, and eighteen “assistants” elected by the stockholders or “freemen” of the Massachusetts Bay Company, which had founded the colony.³¹⁸ The assistants met at least monthly as the main executive and legislative body of the colony.³¹⁹ Not only were all the powers of the colony’s government concentrated in this one body,³²⁰ its members also sat individually as magistrates with the same powers as English justices of the peace.³²¹

Winthrop’s account of a 1647 Boston wedding confirms that the Bay Puritans were as resistant as the Plymouth Pilgrims to having ministers perform marriages. The minister of the groom’s church had been invited to preach but the magistrates asked him “to forbear” because they were not willing to bring in the “English custom of ministers performing the solemnity of marriage.”³²² The Bay Puritans were a bit more relaxed about the strict separation of church and state than were the Plymouth Pilgrims, however. If any ministers happened to be at a wedding, they were permitted to “bestow a word of exhortation.”³²³

2. Fault Divorce

An equally significant deviation from English ecclesiastical law in Massachusetts Bay was the granting of divorces. It may be difficult to reconcile the image of the austere Puritans who darken the pages of Nathaniel Hawthorne and Arthur Miller with colonial acceptance of divorce two centuries before it was available in England. The Puritans not only believed in living a “smooth, honest, civil life”;³²⁴ they tried to impose it on everyone else, too. They denounced and punished as fornication any sex outside of marriage, forbade dancing and “riotous merrymaking,”³²⁵ and made both adultery and witchcraft

317. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 5 (1986).

318. GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 9-10 (1960).

319. *Id.*

320. *Id.* at 26-27. Power was further concentrated in 1631, when the Colony decided that only male members of one of the colony churches could be “freemen” who were entitled to vote. Haskins estimated that in the first ten years of the colony, only about 1,300 men qualified to be freemen out of a population of more than fifteen thousand. *Id.* at 29. More recent scholarship has shown that a very high percentage of men joined the churches in Dedham, Sudbury, and Rowley, and at least half the men in Salem. FISCHER, *supra* note 276, at 21-22.

321. HASKINS, *supra* note 318, at 32.

322. WINTHROP, *supra* note 1, at 330.

323. *Id.*

324. MORGAN, *supra* note 298, at 3.

325. *Id.* at 33.

capital offenses.³²⁶ What is sometimes overlooked, however, is how much Puritans celebrated the joy of sex *in* marriage.³²⁷ In New Haven, for example, the law allowed a wife to annul her marriage to an impotent or “unperforming” husband, whether or not she was able to bear children.³²⁸ Colonial Puritans may not have favored divorce, but they accepted it in their city on a hill, just as Luther did a century earlier, as the best way to prevent an innocent spouse in a failed marriage from being forced to remain celibate for life.

The first divorce in Massachusetts Bay colony was granted in 1643,³²⁹ but several earlier decisions are also of interest because they show the efforts made by the Court of Assistants to keep marriages together if possible, as was done in Bern and Geneva nearly a century earlier.³³⁰ When Henry Seawall and his wife, Ellen, jointly petitioned for a legal separation rather than a divorce, the Court of Assistants granted their petition in 1635 and ordered Henry to provide Ellen with her clothing, a bed and other furniture, and twenty pounds annually.³³¹ The marriage of James Luxford was annulled in 1629 when it was learned that he already had a wife. All of his possessions were awarded to the deceived woman, and he was sent back to England.³³² In two other early cases, the court intervened to end apparent desertions: Katherine Finch promised to “carry herself dutifully to her husband,”³³³ and William Wake promised to repent and to go home to his wife.³³⁴

George Eliot Howard, a German-trained Stanford sociologist who favored laws to prevent “unsound unions” over harsh divorce laws, published a three volume *History of Matrimonial Institutions* in 1904, which became the standard source on colonial marriage and divorce.³³⁵ He did not have access to information about several of the divorces, however, because the third volume of the records of the Court of Assistants was not completed until 1928.³³⁶ He

326. *Body of Liberties*, *supra* note 4, at 55.

327. EDMUND S. MORGAN, THE GENUINE ARTICLE: A HISTORIAN LOOKS AT EARLY AMERICA 22 (2004); M. MICHELLE JARRETT MORRIS, UNDER HOUSEHOLD GOVERNMENT: SEX AND FAMILY IN PURITAN MASSACHUSETTS 9 (2013). According to Morgan, the Puritans were neither prude nor ascetics. They knew how to laugh and how to love. MORGAN, *supra* note 298, at 64.

328. MORGAN, *supra* note 298, at 34. *Accord* White v. White, Quarterly Ct. Ipswich 1651, in RECORDS OF ESSEX, III 110 (wife complained of her husband’s “insufficiency concerning the marital state;” initially the Court of Assistants advised the couple “to a more loving & suitable cohabitation” but later the Quarterly Court ruled that “it would not be offensive . . . for her . . . to marry another man”), cited in NELSON, *supra* note 298, at 51 n. 10.

329. *See supra* note 5 and accompanying text.

330. *See supra* text accompanying notes 141-143, 164-170.

331. Seawall v. Seawall, in ASSISTANTS, *supra* note 5, at 2:60 (1635).

332. *In re* Luxford, *in id.* at 2:89 (1639).

333. *In re* Finch, *in id.* at 2:82 (1639).

334. *In re* Wake, *in id.* at 2:100 (1640).

335. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 84-85 (1985); GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1904-1928).

336. HOWARD, *supra* note 335, at 2:333.

did remark that the Bay colonists were two hundred years ahead of England in adopting civil marriage and divorce.³³⁷

There were twenty petitions for divorce and three for annulment granted by the Court of Assistants between 1639 and 1692.³³⁸ Although no grounds for granting the divorce were listed for some actions, adultery and desertion are the most frequently mentioned grounds. Adultery was also a capital offense.³³⁹ Many adulterers were prosecuted, but few were put to death.³⁴⁰ Wives brought most of the petitions for divorce: fifteen petitions were from wives, four were from husbands, and one involved petitions from both. Most of the petitions alleging desertion also were brought by wives, although two were brought by husbands.³⁴¹ A few reports mentioned other grounds, but they were in addition to, not in lieu of, adultery or desertion. In 1672, for example, Nanny Naylor was granted a divorce from her husband, Edward, for cruelty against her as well as for adultery.³⁴² A criminal case was first brought against Edward for being involved with Mary Read, a pregnant household servant.³⁴³ He was alleged to have thrown “earthen platers,” food, and chairs at family members and servants, and one evening to have thrown his daughter, Lydia, to the floor and “kikt her down the garet stayres.”³⁴⁴ After hearing from some twenty-five witnesses, a jury found Edward Naylor “guilty of Inhumane carriage & several

337. *Id.* at 2:126. Although Howard knew there was a legal difference between annulment and divorce, he mistakenly categorized cases involving bigamy as divorce cases. (Bigamy is a ground for annulment, not divorce, because a bigamist is not able to contract a valid second marriage.). Thus Howard incorrectly identified the annulment of James Luxford, a bigamist, as the first divorce. *Id.* at 2:333.

338. Of the twenty divorces granted, one was overturned on appeal to the General Court. An analysis of the divorce decisions of the Court of Assistants between 1643 and 1692 is contained in Chart A in the appendix. It compares the available data with the two most comprehensive studies of the earliest decisions. Howard reported that the Court of Assistants heard “not less than eighteen” petitions during this time period. HOWARD, *supra* note 335, at 2:332. Howard apparently did not have access to the cases of Elizabeth and Robert Lisby or of Sarah and Hubartus Mattoon.

Lyle Koehler included the same twenty divorces in his table of petitions for divorce in New England, but did not differentiate between divorces and annulments. He listed all cases under the title “Petitions for Divorce” and noted only whether the petition was granted or denied. LYLE KOEHLER, *A SEARCH FOR POWER: THE “WEAKER SEX” IN SEVENTEENTH-CENTURY NEW ENGLAND* app. 1 (1980).

Not all petitions for divorce were granted. *See, e.g.*, *Drury v. Drury*, in ASSISTANTS, *supra* note 5, at 1:91 (court enjoins them to live together according to the ordinance of God as man and wife; no reason is given for not granting a divorce); *In re Perry*, in *id.* at 1:229 (having considered the petition of Ann Perry for divorce the court reported it could “see no Cause to grant hir request”).

339. *Body of Liberties*, *supra* note 4, at 55.

340. MORGAN, *supra* note 298, at 41 (Massachusetts, Connecticut, and New Haven carried out capital punishment for adultery only three times. “For the most part they sentenced offenders to fines, whippings, brandings, the wearing of the letter “A,” and symbolical executions in the form of standing on the gallows with a rope about the neck.”).

341. *Goss v. Goss*, in ASSISTANTS, *supra* note 5, at 1:326; *Holton v. Holton*, in *id.* at 1:197 (1681).

342. *Naylor v. Naylor*, in *id.* at 3:252-53 (1672).

343. The details of the litigation are analyzed in Lauren J. Cook, “*Katherine Nanny, Alias Naylor*”: *A Life in Puritan Boston*, 32 HIST. ARCHEOLOGY 15 (1998).

344. *Id.* at 17.

cruelties in abusing his wife and children,” and of fornication with Mary Read.³⁴⁵

Cases could be appealed from the Court of Assistants to the General Court, which included the members of the Court of Assistants plus all the freemen of the colony. In 1656, for example, the Court of Assistants granted Joan Halsall a divorce after she charged her husband, George Halsall, with “abusing himself with Hester Lug.”³⁴⁶ On appeal, the General Court voided the divorce and declared that he could “have and enjoy the said Joan Halsall, his wife, againe.”³⁴⁷ The General Court granted another eleven divorces between 1650 and 1685 that were not tried first in the Court of Assistants, and that brought the total for the period to thirty-one.³⁴⁸ Eight of the divorces granted by the General Court were sought by wives, three by husbands.³⁴⁹

The Massachusetts Bay courts, like the marriage courts in Zurich and Geneva, worked hard to keep marriages together, not just to end them. In the case of Mary and Elias White, in which the wife sought an annulment on the grounds of impotence, the court advised the spouses to “a more living and suitable Cohabitation” and instructed them to use all physical means to do so.³⁵⁰ John Smith of Medfield, who left his wife to live with Patience Rawlins, was fined ten pounds and given thirty “stripes.”³⁵¹ When Ruth Lock left her husband and complained of ill treatment, the court admonished them both and ordered her to return.³⁵²

The colonial courts were aided in their goal of maintaining order in families by a culture that encouraged keeping an eye on one’s neighbors.³⁵³ There are few surviving records from the seventeenth century,³⁵⁴ but a 1773 divorce deposition recounts that, when Mary Angel went out walking in Boston with Abigail Galloway, they saw their neighbor, Adam Air, “in the Act of

345. *Id.*

346. HOWARD, *supra* note 335, at 2:334.

347. See 3 RECORDS OF THE GOV. AND CO. 413 (Nathaniel B. Shurtleff ed., 1853-54); 4 RECORDS OF THE GOV. AND CO. 272, 380, 401 (Nathaniel B. Shurtleff ed., 1853-54).

348. See *infra*, app. Chart C. The colony of Connecticut had an even more liberal divorce policy. During the period 1670-1799, magistrates in Connecticut granted more than 900 divorces. DAYTON, *supra* note 15, at 112.

349. See *infra*, app. Chart C.

350. *White v. White*, in ASSISTANTS, *supra* note 5, at 3:131-32 (1662).

351. *In re Smith* (1679/80), in 2 RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680, at 1158 (1933).

352. *Lock v. Lock* (1674), in *id.* at 524.

353. Michelle Morris found from a study of more than 500 courts cases decided between 1660 and 1700 that family members, rather than the community at large, were the backbone of the sexual policing system. MORRIS, *supra* note 327, at 2, 6.

354. DAYTON, *supra* note 15, at 5-6 (1995) (noting that there were no written records of oral testimony in courts, and the practice of issuing judicial opinions began only in the 1780s).

Copulation.”³⁵⁵ They proceeded to enter the house and ask Adam whether he was not “Ashamed to act so when he had a Wife at home.”³⁵⁶

The obvious similarities between the marriage and divorce practices of Massachusetts Bay Colony and those of Reformation Europe make it unlikely that the colonists devised them based only on their reading of Scripture. Both considered marriage vital to community stability and intervened to punish spouses who were not fulfilling their marital duties, and both granted divorces. Protestants in the sixteenth century were hardly the only people to achieve loving marriages, but their recognition of a mutual right to divorce and remarriage, and of not permitting arranged marriages if one or both of the spouses-to-be did not consent, supported the ideal of sharing, companionate marriage.³⁵⁷ In the same way, the Puritan marriage and divorce practices followed in colonial New England encouraged a more democratic sharing of power between husbands and wives within families than was typical in England at the time.³⁵⁸ The colonists went further than most Reformation courts or England, moreover, in punishing spousal abuse. As early as 1641, the *Body of Liberties* prohibited a husband from “bodilie correction or stripes [upon his wife] unlesse it be in his owne defence.”³⁵⁹ County court records show that the restriction was taken seriously and enforced by the authorities.³⁶⁰ Such legal protection for women against their husbands was unknown in England at the time, although it had been included in the text of the *Reformatio* as a ground for divorce.³⁶¹

355. Nancy Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. SOC. HIST. 20, 22 (1976).

356. *Id.*

357. OZMENT, *supra* note 74, at 99.

358. DAYTON, *supra* note 15, at 10 (“In sum, policies that were intended to create the most God-fearing society possible operated to reduce the near-absolute power that English men by law wielded over their wives. . . .”); ALAN TAYLOR, *AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA* 173 (2001) (“[T]he Puritan faith provided a bit more authority, protection, and respect for women in New England than they enjoyed in the Chesapeake or old England. . . . Above all, Puritanism preached the importance of love and mutual respect as the foundations for Christian marriage.”).

359. *Body of Liberties*, *supra* note 4, at 51.

360. MORGAN, *supra* note 298, at 40.

361. THE *REFORMATIO*, *supra* note 19, at 270-71; RICHARD B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW WITH SPECIAL REFERENCE TO THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 126 (1930) (“The new legal rights which married women acquired . . . evolved out of the revised concept of the institution of marriage which resulted from the Protestant Revolution and out of the different economic and social conditions of colonial America.”). *But see* Marylynn Salmon, *The Legal Status of Women in Early America: A Reappraisal*, in *WOMEN AND THE AMERICAN LEGAL ORDER* 89, 93 (Karen J. Maschke ed., 1997) (challenging claim that early colonial American was a “golden age” of history for women).

C. Civil Marriage, but No Divorce, in the Colonies Outside New England

Civil marriage and divorce were available not only in Plymouth and Massachusetts Bay, but in the other New England colonies as well.³⁶² By contrast, although all thirteen colonies treated marriage as a civil matter, most colonies outside New England followed the ecclesiastical law of the Church of England and did not permit divorce.³⁶³ Their approach to family law is exemplified by Virginia, which was also the first permanent colony.³⁶⁴ When James I approved the charter for the Virginia Company, which was a joint stock company set up to make a profit from East Coast land north of Spanish Florida, he directed the company to carry the “Christian religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God.”³⁶⁵ Despite the idealistic language, however, commercial goals were the company’s primary motivation. The charter directed them to take possession of all the “Lands, Woods, . . . Mines, . . . [and] Fishings,” and to “dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper. . . .”³⁶⁶ In contrast to the many Puritan families who later settled Massachusetts Bay, the first ships to Jamestown brought adventurous gentlemen, mostly younger sons of aristocratic families, a few artisans and laborers, as well as a contingent of soldiers of fortune (including Captain John Smith), who were veterans of wars on the continent or in Ireland.³⁶⁷ Most were drawn to the adventure of it all as well as to the possibility of making a fortune.³⁶⁸ The company investors envisioned sending shiploads of England’s unemployed to the new world, thereby solving two problems at once. They would be servants of the company, required to work for seven years in return for their transportation, and then free to create new lives for themselves.³⁶⁹

Things did not work out as planned. The colonists found no gold or silver, or even enough iron to mine.³⁷⁰ Conditions were so difficult that only thirty-eight of the original 104 colonists survived the first nine months.³⁷¹ Several

362. HOWARD, *supra* note 335, at 2:348-66.

363. Some exceptions to this pattern arose just before the American Revolution. In 1772, the General Assembly of Pennsylvania passed a private bill that granted a divorce to Philadelphia barber George Keehmle. 8 Pa. Archives, Ser. 8, 6742, 6774, 6796, 6800, 6814, 6818, 6848, 7030-34. In 1773, the English Privy Council, which had authority to overturn legislation passed by the colonies, disallowed the divorce. 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 366 (James Muno ed., 1912). Divorce bills from New Hampshire and New Jersey were similarly disallowed. *Id.* at 379-81, 395, 580-81. Divorce thus joined the growing list of colonial grievances against England.

364. Earlier efforts to establish a colony on Roanoke Island were not successful. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 25-43 (2d ed. 2003).

365. THE AVALON PROJECT, THE FIRST CHARTER OF VIRGINIA, APR. 10, 1606, available at http://www.avalon.law.yale.edu/17th_century/va01.asp.

366. *Id.*

367. BAILYN, *supra* note 252, at 43-48.

368. *Id.*

369. MORGAN, *supra* note 364, at 45-46, 235.

370. *Id.* at 87.

371. TAYLOR, *supra* note 358, at 130.

hundred reinforcements were sent by the Virginia Company, but only sixty of 220 survived the winter of 1609. It has been estimated that the Virginia Company shipped as many as 10,000 people to the colony between 1609 and 1622; only twenty percent of them were still alive by 1622.³⁷² One contemporary critic warned, “[i]nstead of a plantacion, Virginia will shortly get the name of a slaughterhouse.”³⁷³

Part of the problem was location. Jamestown had been built near a swamp in order to protect the colony from Spanish or Indian attacks, but the swamp also harbored diseases, including malaria and typhoid fever. Another problem was a shortage of food; most of the colonists were unable or unwilling to grow enough food to feed themselves.³⁷⁴ In addition there were attacks by Native Americans. Fortunately, Pocahontas protected John Smith from her father Powhatan, the local chief, and her 1614 marriage to colonist John Rolfe provided the colony with several crucial years without attacks.³⁷⁵

Tobacco also was critical to the survival of the colony. Profits from shipping it to England were high enough that colonists soon refused to grow much else.³⁷⁶ Governor Edwin Sandys continued to bring over servants to grow crops, but not enough supplies to feed them. When a king’s commission found out what was happening, the Crown revoked the company’s charter and, in 1624, turned Virginia into a royal colony under the direct control of the king.³⁷⁷

The population in Virginia was very different from the colonists who later settled Massachusetts Bay. Women constituted a much smaller proportion of the colony not only than in New England, but than anywhere in Europe.³⁷⁸ In addition, so many colonists died that the colony was sustained for decades only by continuing heavy immigration.³⁷⁹ When the death rate slowed later in the century, Virginia’s planters switched from buying servants to slaves. The

372. *Id.*

373. *Id.*

374. MORGAN, *supra* note 364, at 72-73, 89-90.

375. PETER WALLENSTEIN, CRADLE OF AMERICA: FOUR CENTURIES OF VIRGINIA HISTORY 2, 15 (2007); MORGAN, *supra* note 364, at 76. Pocahontas died in England in 1617; her father died in 1618. WALLENSTEIN, *supra*, at 19, 24. In 1622 there was a major Indian assault on the colony that killed roughly one third of the colonists. *Id.* at 24.

The Pocahontas-Rolfe marriage was noted by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967) (holding unconstitutional Virginia’s antimiscegenation statute). The statute contained an exception for persons with less than one-sixteenth “of the blood of the American Indian,” an exception that had been described as reflecting “the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas.” *Id.* (citing tract issued by the Registrar of the State Bureau of Vital Statistics).

376. MORGAN, *supra* note 364, at 108-09.

377. *Id.* at 101.

378. *Id.* at 163 (women constituted a smaller proportion of the population in Virginia than anywhere in Europe. In 1625 there were 350 men for every 100 women). See also *supra* notes 281-282 (in Massachusetts the ratio was three men for every two women).

379. MORGAN, *supra* note 364, at 163.

change increased both productivity and profits, but tied Virginia and, ultimately, the United States, to slavery for nearly two centuries.³⁸⁰

Slavery also revealed the limits of Virginia's civil marriage laws; the white legal system did not recognize the marriages of slaves.³⁸¹ In 1691, the colony passed a law barring interracial marriages providing that "whatsoever English or other white man or woman being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free shall . . . be banished and removed from this dominion forever. . . ."³⁸² The marriage of Pocahontas and John Rolfe, which had provided crucial protection for the colony in its early years, would not have been permitted only a few decades later.

Royal control meant that, at least in theory, the Church of England was the established church of the colony. In keeping with Anglican law, no divorces were permitted in Virginia until after the American Revolution.³⁸³ The goal of establishing the Church in fact rather than theory remained elusive, however, given the colony's distance from England and the wide dispersal of the colony's population.³⁸⁴ Because there were no Anglican bishops in Virginia (or in any of the colonies for that matter), colonial men seeking holy orders had to cross the Atlantic in order to be ordained.³⁸⁵ This hardship contributed to a shortage of clergy.³⁸⁶ Archbishop Laud made plans in 1638 to send a bishop to the colonies but, by 1640, he was imprisoned in the Tower of London.³⁸⁷ The shortage of clergy meant the Virginia laity assumed a much greater role in church governance than did the laity in England.³⁸⁸ As a result, churches in Virginia were governed in a more democratic fashion than churches in

380. *Id.* at x ("Indeed the freedom of the free, the growth of freedom experienced in the American Revolution depended, more than we would like to admit on the enslavement of more than 20 percent of us at that time.").

381. Glenda Riley, *Legislative Divorce in Virginia, 1803-1850*, 11 J. EARLY REPUBLIC 51, 57 (Spring 1991).

382. WALLENSTEIN, *supra* note 375, at 42. *See also* RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 19 (2001) ("Black-white marriages [during the colonial period] threatened the presumption that blacks were subhuman slaves incapable of exercising authority, demonstrating moral responsibility, and capitalizing on economic opportunity. If whites could share their emotional lives and economic fortunes with blacks, how could blacks be anything less than full persons?").

383. *See infra* text accompanying note 438.

384. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 247 (1967).

385. Edward L. Bond & Joan R. Gundersen, *The Episcopal Church in Virginia, 1607-2007*, 115 VA. MAG. HIST. & BIOGRAPHY 163, 175 (2007).

386. By 1697, only twenty-two of the nearly fifty parishes in the colony had ministers. *Id.* at 174.

387. ARTHUR LYON CROSS, *THE ANGLICAN EPISCOPATE AND THE AMERICAN COLONIES* 89 (1902); WORDEN, *supra* note 293, at 33.

388. CROSS, *supra* note 387, at 5-8. Legislation passed in 1643 provided that all churches would be run by a "vestrie" made up of "the most sufficient and selected men." The vestrie was given the power "to elect and make choyce of their ministers." A. WILLIAM W. HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 240-42 (1823) *reprinted in* CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY 38 (J. F. MacLear ed. 1995).

England³⁸⁹ and, as in New England, laymen in Virginia even performed marriages.³⁹⁰

County courts in Virginia took the place of the ecclesiastical courts in overseeing marriages and legal separations and sometimes took the place of lay vestries as well. The difference between church and state was not always clear; “it can be difficult to distinguish in the early records between a meeting of the one or the other” because the same individuals often served both as commissioners on the courts and as vestrymen, and the same clerk sometimes transcribed the business of both in the same book.³⁹¹

Civil control of marriage was specifically approved in 1685 by the king’s instruction to the royal governors that the bishop of London had ecclesiastical jurisdiction in the colonies, *except* for “the collating to benefices, granting licenses for marriage, and the probate of wills,” all of which were reserved to the governors.³⁹²

IV. CONTINUED REFORM AND COUNTER-REFORM OF MARRIAGE AND DIVORCE LAW

The Civil War in England brought Puritans to power for more than a decade, and with them came Protestant marriage laws. This Part examines the brief period when civil marriage was law in England, then tracks the continued resistance in New England to Anglican marriage and divorce doctrine after the Restoration of 1660.

A. In England

In 1643, John Milton, the poet and Puritan activist, published the first of a series of five pamphlets and documents that argued for divorce.³⁹³ The following year, Milton expanded the first pamphlet, *The Doctrine and*

389. Tarter, *supra* note 20, at 26.

390. GEORGE MACLAREN BRYDON, *VIRGINIA’S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW* 463-64 (1947) (The 1661/62 code of laws for the colony provided that only ministers could marry colonists. “But . . . this act simply could not be enforced at a time when . . . not more than one-fifth of the parishes in Virginia had settled ministers. . . . [Q]uite obviously during the two decades after its enactment with no change in the law and no authoritative permission given as far as is known, some other official in each vacant parish, a layman, must have been permitted to officiate at marriages.”).

391. MORGAN, *supra* note 364, at 150.

392. William Seiler, *The Church of England as the Established Church in Seventeenth-Century Virginia*, 15 J. S. HIST. 478, 501-02 (1949).

393. CHRISTOPHER HILL, *MILTON AND THE ENGLISH REVOLUTION* 124-25 (1977). The timing suggests that the pamphlets may have been inspired by Milton’s own domestic situation. In June 1642, thirty-four-year-old Milton went to Forest Hill, near Oxford, to collect a debt owed to his father by a Richard Powell. He returned with a wife, seventeen-year-old Mary, one of Powell’s eleven children and the promise of a £1,000 dowry (which was never provided). A month into the marriage, Mary returned home, and, for unknown reasons, did not return. *Id.* at 121-22.

Discipline of Divorce, to almost twice its original length, and addressed it to Parliament, which was by then at war with Charles I.³⁹⁴ In both versions Milton praised marriage as the “solace and delight of man,” but warned that, without divorce, marriage could turn into “a drooping and disconsolate household captivity, without refuge or redemption.”³⁹⁵ Marriage should be a conjugal society of happiness and peace, not “a prescribed satisfaction for irrational heat.”³⁹⁶

Because a supportive and loving relationship between husband and wife was central to Milton’s conception of marriage, he reasoned that sexual infidelity should not be the only ground for divorce.

[I]f it were needful before the fall, when man was much more perfect in himself, how much more is it needful now against all the sorrows and casualties of life to have an intimate and speaking help, a ready and reviving associate in marriage? whereof who misses, by chancing on a mute and spiritless mate . . . forbidden to divorce is in effect forbidden to marry and compelled to greater difficulties than in a single life.³⁹⁷

Divorce for incompatibility should be permitted, Milton concluded, at least if both spouses agree and there are no children.³⁹⁸

Six months after Milton published the expanded version of *The Doctrine and Discipline*, he published *The Judgment of Martin Bucer*,³⁹⁹ which contained his translation of relevant passages from Bucer’s 1533 treatise on marriage and divorce. In the preface, Milton explained that he did not learn until three months after the publication of his first divorce pamphlet that Bucer also had favored divorce for incompatibility as well as infidelity; Milton taunted his critics by asking if they intended to criticize someone as respected as Bucer.⁴⁰⁰

Nonetheless, to write in support of divorce in mid-seventeenth century England was considered an embarrassment by most respectable clergy.⁴⁰¹ Milton’s arguments for divorce were met for the most part “either with silence or denunciation.”⁴⁰² He was even denounced in a sermon to the two houses of

394. The best collection of the five is THE DIVORCE TRACTS OF JOHN MILTON, *supra* note 196.

395. *Id.* at 40, 103.

396. *Id.* at 46, 112.

397. *Id.* at 113-14.

398. *Id.* at 44.

399. THE DIVORCE TRACTS OF JOHN MILTON, *supra* note 196, at 44.

400. *Id.* at 204.

401. *Id.*; HILL, *supra* note 393, at 130; THE DIVORCE TRACTS OF JOHN MILTON, *supra* note 196, at 1 (“Of all the controversial arguments Milton advanced in his poetry and prose, his justification of divorce was perhaps the most shocking. . . .”).

402. HILL, *supra* note 393, at 131.

Parliament, but no action was ever taken.⁴⁰³ It was not until a quarter century later, when German jurist Samuel Pufendorf summarized Milton's arguments for divorce in Book Six of his *Of the Law of Nature and Nations*,⁴⁰⁴ that Milton received a broader and more receptive audience. Thomas Jefferson, a century later and on the other side of the Atlantic, used Milton as well as Pufendorf in his preparation for representing a client in a divorce matter.⁴⁰⁵

In contrast to the failure of Milton to persuade England to accept divorce, Puritan efforts to make marriage a civil matter in England were more successful, if only briefly. The first step was taken in 1645, when Parliament developed a revised marriage service as part of a new Directory of Public Worship that was designed to replace the service in the Book of Common Prayer.⁴⁰⁶ The ordinance declared that marriage was not a sacrament, and required parental consent for marriage if the parties were underage. Parental consent could not be denied "without just cause."⁴⁰⁷

After Oliver Cromwell took power in 1653, Parliament, which had been purged of Anglicans to its "barebones" by the Army,⁴⁰⁸ declared marriage to be a civil matter.⁴⁰⁹ It considered making adultery grounds for divorce, but in the end, did not.⁴¹⁰ The 1653 Marriage Act also declared that church weddings would no longer be recognized; couples were directed to publicize their wedding three days before the ceremony, and to have a simple civil ceremony before a justice of the peace.⁴¹¹ The Act produced enough confusion about what was needed to contract a valid marriage that some couples had both a minister and a justice of the peace officiate, just to be safe.⁴¹² The new Marriage Act was not effectively enforced, however. Fewer than ten percent of the parishes had acquired the new Directory of Public Worship six months after the Act was adopted, and no penalties were ever imposed.⁴¹³

After Parliament restored Charles II to the throne in 1660, he brought back church weddings and Cranmer's wedding service in the Book of Common

403. BARBARA K. LEWALSKI, *THE LIFE OF JOHN MILTON: A CRITICAL BIOGRAPHY* 178-79 (rev. ed. 2002).

404. SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* 462-65 (photo. reprint 2010) (Oxford 1710) (1672).

405. Frank L. Dewey, *Thomas Jefferson's Notes on Divorce*, 39 WM. & MARY Q. 212, 214-16 (1982).

406. I ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 599-601 (C. H. Firth & R. S. Rait eds., 1911) [hereinafter ACTS AND ORDINANCES].

407. *Id.*

408. HILL, *supra* note 393, at 124.

409. Act Touching Marriage and the Registering Thereof, ACTS AND ORDINANCES, *supra* note 406, at 715-18.

410. CHRISTOPHER DURSTON, *THE FAMILY IN THE ENGLISH REVOLUTION* 98-99 (1989). One factor may have been the Adultery Act adopted in 1650, which permitted wives whose husbands deserted them to remarry; it thus legalized a kind of *de facto* divorce. ACTS AND ORDINANCES, *supra* note 406, at 387-88.

411. ACTS AND ORDINANCES, *supra* note 406, at 715-18.

412. DURSTON, *supra* note 410, at 75.

413. MORRILL, *supra* note 294, at 153.

Prayer.⁴¹⁴ Unhappiness with Puritan efforts to change the rules governing marriage did not provoke the Restoration, but it was one of the many reasons ordinary citizens were not sorry to see the Puritans out of power in England.⁴¹⁵ Anglicans were as attached to their traditional marriage practices as New England Puritans were to theirs.

B. In the Colonies

After the Restoration, the New England colonies faced increasingly severe challenges to their independence.⁴¹⁶ They had been shielded from Crown control during their earliest decades because England had been distracted first by European wars and, later, by civil war. After 1660, not only were efforts made to bring the colonies under tighter control, there was particular interest in reining in the Bay Colony, which was considered the most autonomous of them all.⁴¹⁷ In 1684, those efforts came to a head when the colony's original charter was cancelled.⁴¹⁸ The 1629 charter had functioned almost as a constitution for the colony, one they had interpreted as a shield against ecclesiastical intrusions; its cancellation was viewed as a major loss.⁴¹⁹ Increase Mather denounced the cancellation as "inconsistent with the main end of their fathers' coming to New England."⁴²⁰

James II, who succeeded his brother, Charles II, in 1685, considered England's colonies in North America too small and their elected assemblies too fractious in contrast to the larger and aristocratically-controlled colonies of Spain in the New World. He attempted to emulate the Spanish model by consolidating the North American colonies into larger units and by giving their

414. 13 Car. 2, c. 11.

415. DURSTON, *supra* note 410, at 174.

416. Philip S. Haffenden, *The Crown and the Colonial Charter, 1675-1688*, 15 WM. & MARY Q. 297, 299 (1958).

417. In Massachusetts Bay, "disregard for royal authority was a long-established tradition." DEMOS, *supra* note 265, at 16-17. See also HERBERT L. OSGOOD, 2 THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 438 (1904) (No appeals were permitted from the Puritan colonies to the Privy Council; the binding force of English statutes was ignored; and justice was not administered in the name of the king.).

418. In 1684, Attorney General Robert Sawyer, on the advice of Edward Randolph, wrote a letter suggesting that a writ of *scire facias et alias* be served on the sheriff of Middlesex County requiring an appearance at Westminster to defend the charter. Chancery issued the writ and gave Massachusetts insufficient time to respond, resulting in a judgment entered vacating the charter on October 23, 1684. MICHAEL GARIBALDI HALL, EDWARD RANDOLPH AND THE AMERICAN COLONIES, 1676-1703, at 83 (1960). See also Sherwin Lawrence Cook, *Governmental Crisis, 1664-1686*, in 1 COMMONWEALTH HISTORY OF MASSACHUSETTS 557, 565-66 (Albert Bushnell Hart ed., 1927).

419. 1 OSGOOD, *supra* note 417, at 224 ("Next to the Bible, the Massachusetts Puritans esteemed and valued their charter. It guaranteed to them the possession of their lands against all adverse claims . . . ; it was the basis of their civil order, and by skillful use of its provisions they had been able to give such form as they desired to their institutions of government. . . .").

420. DAVID S. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA 123 (1972).

governors more power.⁴²¹ He appointed Joseph Dudley, a Bay resident, as the interim royal governor of not only Massachusetts Bay and Plymouth, but also of the colonies of New Hampshire and Maine.⁴²² One of the earliest acts of the Dudley government was to announce that justices of the peace as well as ministers could continue to celebrate marriages, thereby demonstrating the continued importance to the colonists of their nonconforming marriage practices.⁴²³

Royal efforts to control the colonies ratcheted up dramatically in December, 1686, with the arrival in New England of Sir Edmund Andros; he had been commissioned by the Crown to reorganize all eight of the colonies north of the Delaware River into a new governance unit to be known as the Dominion of New England, with himself as its Governor-General.⁴²⁴ Andros and his appointed council dispensed with the elected colonial assemblies.⁴²⁵ He also promoted the Church of England⁴²⁶ and demanded unprecedented levels of taxation.⁴²⁷ He even attempted to impose a system of land grants that could be issued only by his government, and which would have produced new tax revenues for the Crown.⁴²⁸ The result was rebellion. Encouraged by news that Protestant William of Orange had landed in England to claim the throne, militiamen filled the streets of Boston on April 18, 1689.⁴²⁹ When some 2,000 militiamen marched against his garrison of fourteen redcoats, Andros wisely decided to surrender. He and his associates were kept in prison until February 1690 and then shipped back to England.⁴³⁰ The New England colonies quickly revived their separate governments under their old charters and applied for approval from the new monarchs, William and Mary.⁴³¹

Attempts to restore the old charter in Massachusetts Bay were not successful, however. The new charter, issued in 1691, was a rough compromise between the hopes of the colonists and the needs of the new monarchs.⁴³² It required that royal governors be appointed by the Crown rather than elected, although it did permit an elected colonial legislature. The charter also expanded

421. Richard Dunn, *The Glorious Revolution and America*, in *THE ORIGINS OF EMPIRE: BRITISH OVERSEAS ENTERPRISE TO THE CLOSE OF THE SEVENTEENTH CENTURY* 445, 452 (Nicholas Canny ed., 1998) (quoting Hutchinson Papers 78 (1825)).

422. LOVEJOY, *supra* note 420, at 159.

423. 3 OSGOOD, *supra* note 417, at 388.

424. Dunn, *supra* note 421, at 452.

425. *Id.*

426. *Id.*

427. TAYLOR, *supra* note 358, at 277.

428. *Id.* at 277.

429. *Id.* at 280.

430. Dunn, *supra* note 421, at 456. Andros was later sent to be Royal Governor of Virginia, but he was too arbitrary even for Virginia. With the assistance of John Locke and the Bishop of London, Andros was recalled. MORGAN, *supra* note 364, at 350-51.

431. LOVEJOY, *supra* note 420, at 245, 341-53.

432. The new charter annexed the "Old Colony" of Plymouth, leaving it to live on only in legend. DEMOS, *supra* note 265, at 17-18.

the boundaries of the Massachusetts Bay Colony to include Plymouth and Maine, gave the colonial legislature the power to tax, and authorized the colonial courts to issue judgments in civil and criminal cases.⁴³³ Religious qualifications for voting were replaced by the kind of property ownership requirements common in England; that change brought a measure of religious tolerance to New England for the first time.

Efforts were made to change the colony's marriage laws, but once again the nonconforming practices of the colonists prevailed. The 1692 Act for "the Orderly Consummating of Marriage" permitted magistrates as well as ministers to marry colonists and gave the General Court primary jurisdiction to grant divorces, even though divorces were still not available in England except by private act of Parliament.⁴³⁴

C. In the United States

After the Revolution, the Commonwealth of Massachusetts gave the state courts jurisdiction over divorce, although divorce could be granted only for adultery.⁴³⁵ Massachusetts Bay may have granted divorces for either adultery or desertion, but the Commonwealth, reflecting the Anglican influence that had grown in the colony during the eighteenth century, recognized only one ground for divorce, not two.⁴³⁶ Not until 1870 did Massachusetts recognize cruelty as another ground for divorce, and even then it had to be *extreme* cruelty.⁴³⁷

In 1803, the Commonwealth of Virginia first began to grant divorces, but only by legislative act.⁴³⁸ Slavery and racism rather than religion led to the change, confirming how central they were to the culture of the colony. The first two divorces granted each involved a white husband seeking a divorce on the ground of adultery from a white wife who gave birth to a biracial child and who acknowledged that the child's father was a slave.⁴³⁹ Whatever the strength of the opposition to divorce in Anglican Virginia, it was no match for the reaction of the legislature when confronted with a marriage that involved not only

433. THE AVALON PROJECT, THE CHARTER OF MASSACHUSETTS BAY-1691, http://www.avalon.law.yale.edu/17th_century/mass07.asp.

434. ACTS AND LAWS, PASSED BY THE GREAT AND GENERAL COURT OR ASSEMBLY OF THEIR MAJESTIES PROVINCE OF MASSACHUSETTS-BAY 33 (1692).

435. An Act for Regulating Marriage and Divorce, ACTS AND RESOLVES OF MASSACHUSETTS, 1784-85, at 564-67 (1892).

436. G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 43 (2012); NELSON MANFRED BLAKE, THE ROAD TO RENO 48, 50 (1962) (speculating that the narrowing of grounds for divorce reflected the prejudices of lawyers influenced by English law.)

437. In 1857, extreme cruelty was made a ground for legal separation. GEN. STATUTES OF THE COMMONWEALTH OF MASS. ch. 107, § 9, at 532 (1860). In 1870, legal separation was prohibited, and extreme cruelty was made a ground along with "utter desertion, gross and confirmed habits of intoxication contracted after the marriage, or cruel and abusive treatment by either of the parties." ACTS AND RESOLVES OF MASSACHUSETTS, 1870, ch. 404, at 307-308.

438. 3 STAT. AT LARGE OF VA., ch. 6 (Dec. 1803 Sess.).

439. Riley, *supra* note 381, at 57.

adultery by a wife, but adultery with a slave.⁴⁴⁰ The legislature granted another 148 divorces between 1803 and 1851, when a new constitution prohibited legislative divorce.⁴⁴¹ Apparently the growing volume of divorce petitions was taking up too much legislative time.⁴⁴² Support for judicial divorce began in 1827 with an act authorizing courts to grant legal separations.⁴⁴³ By 1853, Virginia courts were authorized to grant divorces.⁴⁴⁴

V. FINAL REFLECTIONS

The roots of American family law were planted nearly four centuries ago when New England Puritans adopted both civil marriage and divorce in clear violation of the laws of the Church of England. They continued to recognize and defend both for the next century and a half, despite repeated efforts made by England to impose Anglican ecclesiastical law on all the colonies.

This recovered history shows that the regional groupings of colonial divorce law described by Lawrence Friedman were the result of religious differences among the colonies that were rooted in the continental and English Reformations.⁴⁴⁵ The intercolonial differences in marriage and divorce exemplified by Puritan Massachusetts Bay on the one hand and Anglican Virginia on the other became interstate differences after the American Revolution. These intercolonial differences, together with the Constitution's allocation to the states rather than to the federal government of power to establish religion and to oversee family law, explain why there are fifty different laws of marriage and divorce in the United States today, rather than only one, as is the case in most other nations.

Some historians and political scientists have acknowledged the influence of the Reformation on America. Sydney Ahlstrom declared America was "molded by the Reformation with a directness and intensity unequaled in any other country";⁴⁴⁶ Samuel Huntington traced American culture to the concepts and values of dissenting Protestantism "which faded in England but which the settlers brought with them and which took on new life on the new continent";⁴⁴⁷ and Diarmaid MacCulloch argues that "American life is fired by a continuing energy of Protestant religious practice derived from the sixteenth century."⁴⁴⁸ None discussed the impact of the Reformation on colonial family

440. *Id.*

441. Joshua D. Rothman, "To be Freed from Thate Curs and Let at Liberty": *Interracial Adultery and Divorce in Antebellum Virginia*, 106 VA. MAG. HIST. & BIO. 443, 444-45 (1998).

442. Riley, *supra* note 381, at 66.

443. ACTS OF VIRGINIA, ch. 23, 21 (1827).

444. ACTS OF VIRGINIA, ch. 28, 47-48 (1852-1853).

445. See *supra* text accompanying note 11.

446. AHLSTROM, *supra* note 310, at 29.

447. SAMUEL P. HUNTINGTON, WHO ARE WE?: AMERICA'S GREAT DEBATE 59 (2004).

448. MACCULLOCH, *supra* note 26, at xxii.

law or life, however, or recognized the role of family law in transmitting Protestant ideals and values to America. Puritan beliefs, which protected wives from spousal abuse and gave them equal access to divorce, encouraged more egalitarian family relationships than existed in England at the time and, in this way, contributed to the development of a colonial culture that valued equality. That culture, in turn, would later bolster the decision of colonists to declare independence from England.

New England family law, unlike most colonial law, derived from Reformation sources rather than from English law. Sectarian disputes between the Puritans and Anglicans were a major factor in the decision of the Massachusetts Bay colonists to leave England, as well as in their adoption of secular rather than religious control of marriage and recognition of divorce. To have permitted ministers to perform marriages in the new world would have risked giving too much control to Anglicans. It was safer to leave marriage to magistrates like John Winthrop who would ensure that Puritan values and Scripture shaped families in the colony. Secular control of marriage also appealed to the new middle class that was beginning to dominate in England in the period surrounding their Civil War, although it was rejected in England after the Restoration.

Secular control of marriage was adopted by colonies outside of New England as well, not because of sectarian disputes, but because the Church of England was never able to establish ecclesiastical courts that could oversee marriage as they did in England. Divorce was not accepted in Virginia until after the American Revolution, however, and was prompted by slavery and racism rather than religion. This complex mix of sectarian differences and the absence of ecclesiastical courts explains the paradox that the United States, despite the religious zeal of so many of the original colonists, nonetheless was a pioneer in adopting secular marriage and divorce.

The fault divorce recognized in New England was grounded in Scripture, but it was also shaped by the theology of Luther, Zwingli, and Calvin. No-fault divorce also first became law more than four centuries ago when Zurich enacted a marriage and divorce statute that included no-fault grounds. As early as 1533, theologian Martin Bucer argued that Scripture supported divorce for incompatibility, a position that was later taken up by John Milton.

In the mid-nineteenth century, divorce for incompatibility rather than marital fault became law for the first time in some parts of the United States.⁴⁴⁹ In 1846, Iowa, for example, provided that a divorce could be granted “when it shall be made fully apparent to the satisfaction of the court that the parties

449. Connecticut’s 1849 divorce statute included an omnibus clause in its list of grounds: “Any such misconduct as permanently destroys the happiness of the petitioner and defeats the purposes of the marriage relations.” REVISION OF 1875: THE GENERAL STATUTES OF THE STATE OF CONNECTICUT WITH THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTION OF CONNECTICUT 188 (Simeon Eben Baldwin ed., 1875).

cannot live in peace and happiness together, and that their welfare requires a separation between them.”⁴⁵⁰ The divorce law that was adopted in California in 1970 thus was not the first American no-fault divorce law. California was the first state to eliminate all of its fault-based divorce grounds, however, as well as the first to permit no-fault divorce that was sought by one spouse only (unilateral rather than mutual divorce).⁴⁵¹ Significantly, the language of the California statute did not mandate unilateral divorce; it left the final decision in each case to the courts, just as Luther and Calvin left the distasteful matter of granting fault divorces to the civil authorities nearly five centuries ago.⁴⁵²

450. Iowa’s 1842 amendment to its divorce statute added abandonment by the husband as a ground for divorce. ACTS AND RESOLUTIONS PASSED AT THE SEVERAL SESSIONS OF THE TERRITORIAL LEGISLATURE OF IOWA, 1840-1846, at 192 (W.C. Hayward ed., 1911). An 1846 amendment added the incompatibility ground quoted in the text. *Id.* at 659. The Supreme Court of Iowa made clear that couples could be divorced under the new law even though neither spouse had committed a marital fault. *Inskeep v. Inskeep*, 5 Iowa 204 (1857).

451. *See supra* text accompanying note 7.

452. CAL. CIV. CODE ch. 8, § 4508 (West 1970) (if either party moves for the dissolution of the marriage, “the court *may* enter a judgment of dissolution) (emphasis added). *See supra* notes 82, 171 and accompanying text.

**A. Divorces Granted by the Court of Assistants of Massachusetts Bay Colony,
1630-1692**

Source	Date of Decree	Court	Parties	Petitioner	Grounds	Decree
Assistants 2:138	Jan. 5, 1643 / 1644	Court of Assistants	Anne Clarke v. Denis Clarke	Anne Clarke	Desertion, adultery	Divorce granted
Suff. Files, 257; C. R. IV, i, 272, 380, 401	Granted 1656; reversed Nov. 12, 1659	Court of Assistants to General Court	Joan v. Geo. Halsall	Petition from each spouse	Desertion	Divorce granted; reversed on appeal
Assistants 3:146	1664	Court of Assistants	Sarah Helwis v. Edward Helwis	Sarah Helwis	Desertion, adultery	Divorce granted
Assistants 3:253; Mass. Archives, IX, 63	1672	Court of Assistants	Nanny Naylor v. Edward Naylor	John Wheelwright on behalf of his daughter, Nanny Naylor	Adultery, cruelty	Divorce granted
Assistants 1:30-31	1674	Court of Assistants	Mary Sanders v. William Sanders	Mary Sanders	Desertion, adultery	Divorce granted
Assistants 1:127	1678	Court of Assistants	Hope Ambrose v. Samuel Ambrose	Hope Ambrose	Desertion, adultery	Divorce granted
Assistants 1:138	1678	Court of Assistants	Rebeckah Cooly v. Richard Cooly	Rebeckah Cooly	Desertion, physical abuse	Divorce granted
Mass. Arch. IX, 74-83, Assistants 1:131	1679	Court of Assistants	Elizabeth v. Robert Lisby	Elizabeth Lisby	Adultery	Divorce granted
Assistants 1:144	1679	Court of Assistants	Mary Bishop v. Job Bishop	Mary Bishop	Desertion, adultery	Divorce granted
Assistants 1:168	August 9, 1680	Court of Assistants	Susannah Goodwin v. Edward Goodwin	Susannah Goodwin	Desertion, failure to provide	Divorce granted
Assistants 1:168, 256	August 9, 1680; Sept. 2, 1684	Court of Assistants	Sarah Cooper v. Thomas Cooper	Sarah Cooper	Unknown	Divorce granted

Source	Date of Decree	Court	Parties	Petitioner	Grounds	Decree
Assistants 1:197	1681	Court of Assistants	Samuel Holton v. Mary Holton	Samuel Holton	Desertion, adultery	Divorce granted
Assistants 1:200	1681	Court of Assistants	Dorcas Smith v. Christopher Smith	Dorcas Smith	Desertion	Divorce granted
Assistants 1:208	March 18, 1681	Court of Assistants	Rachel Clenton v. Lawrence Clenton	Rachel Clenton	Adultery	Divorce granted
<i>Maine Court Records</i> , III, 87-88, Libby, Allen & Moody, eds.	1682	Court of Assistants	Sarah v. Hubartus Mattoon (petition from New Hampshire)	Sarah Mattoon	Desertion, adultery	Divorce granted
Assistants 1:227	1682	Court of Assistants	Elizabeth Street v. Robert Street	Elizabeth Street	Desertion, adultery	Divorce granted
Assistants 1:240	1683	Court of Assistants	Elisabeth Maning v. Nicholas Maning	Elisabeth Maning	Desertion, adultery, incest	Divorce granted
Suff. Files 2347	Sept. 17, 1685	Court of Assistants	Petition of Thomas Winsor	Thomas Winsor	Adultery	Divorce granted
Assistants 1:326	April 10, 1690	Court of Assistants	Phillip Goss v. Hannah Goss	Phillip Goss	Desertion, adultery	Divorce granted
Assistants 1:342	1690	Court of Assistants	Mary Stebbins v. Samuel Stebbins	Mary Stebbins	Adultery, refusal to cohabit	Divorce granted
			Totals:	Husbands: 4 Wives: 15 Joint petitions: 1	Adultery: 15 Desertion: 13 Cruelty/ Abuse /Failure to Provide: 3 Incest: 1 Refusal to Cohabitate: 1 Unknown: 1	19 divorces granted 1 divorce granted and later reversed

B. Annulments Granted by the Court of Assistants of Massachusetts Bay Colony, 1630-1692

Source	Date of Decree	Court	Parties	Petitioner	Grounds	Decree
Assistants 2:89	October 3, 1639	Court of Assistants	James Luxford	No petition – criminal charges	Bigamy	Second marriage annulled; property given to second wife
Assistants 3:67-68	March 1, 1658	Court of Assistants	Anna Laine v. Edward Laine	Anna Laine	Impotence	Marriage annulled
Assistants 1:342	1690	Court of Assistants	Samuel Newton v. Rebekah Newton	No petition – criminal charges	Affinity	Marriage annulled
			Totals:	Wives: 1 No petition: 2	Bigamy: 1 Impotence: 1 Affinity: 1	3 annulments granted

**C. Divorces Granted by the General Court of Massachusetts Bay Colony,
1630-1692**

Source	Date of Decree	Court	Parties	Petitioner	Grounds	Decree
C. R. IV, i, 32	October 15, 1650	General Court	William v. Eleanor Palmer	William Palmer	Desertion, adultery	Divorce granted
<i>Maine Records</i> , I, 169, Libby, Allen, & Moody, eds.	1651		Margery v. William Norman (petition from Maine)	Margery Norman	Adultery	Divorce granted
C. R. III, 277, IV, i, 89	May 31, 1652	General Court	Dorothy v. William Pester	Dorothy Pester	Long absence	Leave to marry
C. R. III, 350, IV, i, 190	May 15, 1654	General Court	Dorcas v. Jno Hall	Dorcas Hall	Desertion, adultery	Divorce granted
Suff. Files, 257; C. R. IV, i, 272, 380, 401	Granted 1656; reversed November 12, 1659	Court of Assistants to General Court	Joan v. Geo. Halsall	Petition from each spouse	Desertion, adultery	Divorce granted; reversed on appeal
C. R. IV, ii, 8	May 22, 1661	General Court	Rachel v. Joe Langton	Rachel Langton	Unknown	Divorce granted
Mass. Arch., IX, 41	May 7, 1662	General Court	Mary v. William Chichester	Mary Chichester	Desertion	Divorce granted
Plym. Rec., v. 33	August 3, 1670	General Court	James v. Elizabeth Skiffe	James Skiffe	Desertion, adultery	Divorce granted
C. R. IV, ii, 465	October 12, 1670	General Court	Elizabeth v. Henry Stevens	Elizabeth Stevens	Desertion, adultery	Divorce granted
<i>Savage, Genealogical Dictionary or New England</i> , III, 108	Between 1676 and 1685		Mary v. Thomas Litchfield	Mary Litchfield	Unknown	Divorce granted
Rec. Suff. Co. Ct. 506	Before 1678	General Court	Philip and Mary Wharton	Phillip Wharton	Desertion	Divorce granted
C. R. V, 188	May 9, 1678	General Court	Mary v. Henry Maddox	Mary Maddox	Long absence	Leave to marry
Suff. Files 1807; C. R. V, 248, 249	October 15, 1679	General Court	Mary v. Aug. Lyndon	Mary Lyndon	Unknown	Divorce granted
Mass. Arch., IX, 114, 117	1685	General Court	Hannah Ayres v. Benjamin Ayres	Hannah Ayres	Desertion	Divorce granted

Source	Date of Decree	Court	Parties	Petitioner	Grounds	Decree
			Totals:	Husbands: 5 Wives: 13 Joint petitions: 1	Desertion/long absence: 10 Adultery: 6 Unknown: 3	Divorces granted: 11 Divorces reversed: 1 Leave to marry: 2