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The Redefinition of Clandestine Marriage by Sixteenth-Century Lutheran Theologians and Jurists

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Abstract

Within the medieval Catholic Church, the term 'clandestine betrothal' was associated with the absence of witnesses, solemnities, and other formalities. Parental consent was not a legal requirement for betrothal or marriage, which was based on the free decision of the spouses. However, Martin Luther held that the will of the parties was not sufficient, because the couple was joined by God, and God's will was reflected in parental consent. Luther intended the parents to be a public authority, and he therefore proposed a different definition of clandestine marriage that combined the absence of witnesses with the lack of parental approval. Medieval canonists had enumerated numerous types of clandestine betrothal. However, in their treatises, the jurists Johannes Schneidewin, Conrad Mauser, and Joachim von Beust translated Luther's definition into legal terms, reducing the types of clandestine betrothal to only two. The first type, absence of witnesses, continued to be regulated by canon law, with some exceptions. The second, lack of parental approval, was governed by Roman law reinterpreted according to Scripture. Cardinal Bellarmine criticized this definition as confused, prompting the Lutheran theologians Paul Tarnov and Johann Gerhard to reply that 'clandestine' had acquired a new meaning: violation of the law imposing parental approval.

In his *Quaestiones iuris tam civilis quam saxonici*, Peter Heige (1559–1599), a professor of law at the University of Wittenberg and a judge at the supreme court (*Hofgericht*) of the Albertine Electorate of Saxony, declared that clandestine marriages were void. He added:

> The pontifical [doctors] call marriages clandestine when either the marriage is contracted without the presence of any spectators and witnesses or they are present but there are no banns in the church. However, in our

> church and the Reformed churches, we call clandestine betrothals properly and strictly those contracted secretly and without the participation of witnesses, or, if witnesses were present, without the consent of the parents.[1]

Heige was pointing out a significant novelty. For centuries, the Roman Church had maintained that clandestine marriages were those contracted without witnesses and public banns in church. Such marriages were discouraged, but once contracted they were binding.[2] Instead, Heige informed his readers that in the churches instituted in the Reformation, the meaning of clandestine betrothals was expanded: they included not only marriages without witnesses, but also marriages without the consent of the parents. The word *parentes*, which in Roman law specifically identified fathers, now referred to both father and mother.

To support his statements, Heige quoted the Lutheran jurists Joachim von Beust (1522–1597) and Basilius Monner (1524–1566), who attributed this definition to Martin Luther (1483–1546). He also referred to Roman law, and to the Church ordinance by Electoral Prince August of Saxony (1526–1586), issued in 1580. Finally, he explained that the reason for this change was that marriage as a holy thing concerned the whole of life, and as such it was not suitable to be arranged in secret. Many things could be perpetrated fraudulently and secretly, and clandestineness was associated with perverse opinion.[3] Thus, Heige concluded:

> Therefore, even those who have the legal ability to act must not begin a very holy thing without spectators, but must practice publicly the order of public law. The Romans judged that sacred things that occurred in private were impious: why should we then do of this sacred thing something private?[4]

Private marriages were void. The "private" was here associated with fraud and perversion, while what was sacred belonged to the "public." Marriage was a holy thing, to be contracted not in private but in compliance with the

[1] Peter Heige, *Quaestiones iuris tam civilis quam saxonici…* (Wittebergae: 1601), 300: "*…pontificii clandestinas nuptias vocant, quoties vel absque ullis testibus matrimonium contrahitur, vel his quidem praesentibus, absque tamen denunciationibus ecclesiae ….In nostris autem et Reformatis Ecclesiis clandestina sponsalia vocamus proprie et stricte, quae clam arbitris, et nullis testibus intervenientibus, aut his quidem praesentibus, verumtamen sine parentum consensu contracta sunt…*"

[2] Although they represented different stages of the process of marital formation, the terms "marriage" and "betrothal" were often used interchangeably. See John Witte, Jr., *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2011), 142–3. This probably due to the fact that Luther rejected the canon law distinction between present and future promises to marry.

[3] Heige, *Quaestiones*, 300.

[4] Heige, *Quaestiones*, 301: "*Itaque non debent, etiam qui sui iuris sunt, clam arbitris, rem sanctissimam inchoare: sed ordinem iuris publici, publice celebrare. Sacra olim privata habere, nefas Romani judicabant: cur igitur hoc sacrum privatum faciemus?*"

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prescriptions of public law. "Public" was intertwined with connotations of the divine, "private" with the sinful. This points to a greater aversion to clandestine marriages compared with the Catholic Church, an aversion that can be traced to Luther and was further developed by Lutheran jurists.

The Lutheran Reformation of marriage law has been the subject of a great deal of scholarship. Certain studies—albeit without neglecting the conjunction between clandestineness and parental approval—have treated the two problems separately. Thus, for instance, Dieterich has explored the positions of Lutheran theologians and jurists on the requirement for witnesses and parental authority.[5] Ozment has shown that Reformers criticized the Catholic recognition of clandestine marriages as a cover for marriage based on sexual desire.[6] For Roper parental consent was an instrument *to subject the institution of marriage to the needs of civic society.* The analogy between parental and political authority could be used to regulate marriages on the basis of economic or social conditions.[7] Harrington has claimed that the requirement of parental authority was intended to reestablish patriarchal authority and impede relationships between people of unequal wealth and prestige.[8] Other studies have stressed that the Reformers changed the process of marriage formation. Schwarz has shown that Lutheran marriage ordinances invalidated marriages contracted without parental approval as "clandestine" and established different age limits beyond which such approval was no longer necessary.[9] Similarly, Kirstein has observed that betrothals required the presence of witnesses and parental consent. In the absence of these conditions, betrothals were clandestine and void.[10] Witte has noted that the requirements of witnesses, parental consent, and the church registration of vows were functional for making marriage a public institution.[11]

These outstanding publications have painted an accurate portrait of Lutheran ideas about marriage, but the notion of clandestine marriage requires further exploration. As Kirstein has rightly asserted, the fact that Reformers identified clandestine marriage not only with a lack of witnesses, but also

[5] Hartwig Dieterich, *Das protestantische Eherecht in Deutschland* (München: Claudius Verlag, 1970), 56–59, 123–27, 193–204.

[6] Steven Ozment, *When Fathers Ruled: Family Life in Reformation Europe* (Cambridge, Mass. and London: Harvard University Press, 1983), 28.

[7] Lyndal Roper, *The Holy Household: Women and Morals in Reformation Augsburg* (Oxford: Clarendon Press, 1989), 162–63.

[8] Joel F. Harrington, *Reordering Marriage and Society in Reformation Germany* (Cambridge: Cambridge University Press, 1995), 169–214. On political and economic issues related to marriage before the Reformation, see Michael Schröter, *"Wo Zwei zusammenkommen in rechter Ehe..." Sozio-und psychogenetische Studien über Eheschliessungsvorgänge vom 12. bis 15. Jahrhundert* (Frankfurt a. M.: Suhrkamp, 1985).

[9] Ingeborg Schwarz, *Die Bedeutung der Sippe für die Öffentlichkeit der Eheschliessung im 15. und 16. Jahrhundert* (Tübingen: Fabian, 1959), 60–66.

[10] Roland Kirstein, *Die Entwicklung der Sponsalienlehre und der Lehre vom Eheschluss in der deutschen protestantischen Eherechtslehre bis zu J.H. Böhmer* (Bonn: L. Röhrscheid, 1966), 154–5.

[11] John Witte, Jr., "The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now," *Journal of Law and Religion* 4, no. 2 (1986): 293–351 (325–30); John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 199–256; Witte, *From Sacrament*, 140–2.

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with the absence of parental approval, should not be underestimated.[12] This article is the first attempt to closely investigate this aspect for both its theological underpinnings and its legal repercussions. It will show that the adjective "clandestine" (*clandestinum*) obtained a different meaning: it became a violation of God's order and will. This mutation lays in the Lutheran assumption that marriage was not simply a choice of the spouses but was dependent upon God's will. Parents (father and mother) became vested with divine authority, and spouses were obligated to ask for their consent. Any rebellion against the parents was an act of Satan and disobedience to God. On the legal side, while canon law was partially abrogated, Roman law was reinterpreted in light of the fourth commandment of the Decalogue ("*honor thy father and thy mother*") and gained the force of divine law.

This article reconstructs the main coordinates of the theological and legal debate by focusing on some influential works written by theologians and jurists.[13] It is divided into nine sections, which follow a chronological rationale. The next section presents a brief sketch of the notion of clandestine marriage before the Reformation. The section "Without the Presence of Orderly Public Authority" grapples with Luther's definition of clandestine marriage, its justification, and its legal implications. Section "Is the Roman Law Imposing Parental Consent a Divine Ordinance?" analyzes the opinions of Johannes Brenz (1499–1570) and Melchior Kling (1504–1571) regarding whether the Roman law instituting parental approval complied with divine law. The section "Interpreting Roman Law in the Light of Scripture" turns to the jurist Basilius Monner, who offered aninterpretation of Roman law centered on the fourth commandment of the Decalogue. Sections "The Legal Definition of Clandestine Betrothal" and "Von Beust and the Marriage Law of Saxony" illustrate how Luther's notion of clandestine betrothal was translated into legal terms by the jurists Conrad Mauser (1506–1548), Johannes Schneidewin (1519–1568), and Joachim von Beust. The penultimate section engages with the discussion between the Roman Catholic Cardinal Robert Bellarmine (1542–1621) and the Lutheran theologians Martin Chemnitz (1522–1586), Paul Tarnov (1562–1633), and Johann Gerhard (1582–1637). This is followed by the conclusion.

Parental Consent and Clandestine Marriage before the Reformation

With the Gregorian Reform of the eleventh century, the Church secured its jurisdiction over marriage. Marriage was a sacrament governed by canon

[12] Kirstein, *Die Entwicklung*, 112.

[13] Marriage was the subject of great discussion among the reformers, and numerous essays were dedicated to it. However, considering the limited space available in this article, we had to make a strict selection. We focused on sources that addressed the problem of clandestine marriage in a detailed way and were relevant to the discourse because they were often cited. For example, some authors focused more on other issues (such as divorce, marital impediments, or priest marriage), and less on clandestine marriage (see for instance, Philip Melanchthon, *De arbore consanguinitatis et affinitatis sive de gradibus dissertatio* published in 1540, id. *De coniugio sacerdotum*, 1540, or Niels Hemmingsen in *Libellus de coniugio, repudio, et divortio* published in 1572).

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law, and it could be contracted in two ways: first, through an exchange of promises to marry in the future (contract of betrothal or *sponsalia de futuro*), followed by sexual intercourse; second, through an exchange of promises to marry in the present (*sponsalia de praesenti*).[14] The spouses' free consent was the crucial element. Consent expressed in the present constituted a marriage, while consent expressed for the future constituted a betrothal. In the absence of sexual intercourse, an exchange of consent expressed for the future did not constitute a marriage. Since it was crucially important to express one's consent in the present or for the future (and to prove the existence of such an agreement), there were specific formulae in which to do so. Their interpretation was often a difficult matter.[15]

Canon law required neither formal writings nor witnesses, nor parental, secular, or ecclesiastical approval, for the validity of a marriage.[16] Roman law required the consent of the *paterfamilias* for the validity of the marriage of his children.[17] Medieval Germanic laws further set out that a person holding legal authority over a woman could determine a suitable husband, and that parents could disinherit a child who had married against their will.[18] However, the Church insisted on freedom of choice.[19] Before God, all men were free to choose their state, whether this be marriage, priesthood, or monastic profession.[20] Marriage was a sacrament based on the free consent of the spouses. As long as the parties gave their free consent, the marriage was valid; parental consent was not an essential element.[21]

[14] The bibliography on medieval marriage, and especially on the doctrine of consent as it was reshaped by Pope Alexander III (1159–1181), is abundant. A short selection: James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago and London: Chicago University Press, 1987), 331–37; Charles Donahue, Jr., *Law, Marriage, and Society in the Later Middle Ages, Arguments About Marriage in Five Courts* (Cambridge: Cambridge University Press, 2007), 16–17; Philip L. Reynolds, *How Marriage Became One of the Sacraments: The Sacramental Theology of Marriage from Its Medieval Origins to the Council of Trent* (Cambridge: Cambridge University Press, 2016), 155–288.

[15] Brundage, *Law, Sex, and Christian Society in Medieval Europe*, 235–9.

[16] Witte, *From Sacrament*, 112.

[17] George Hayward Joyce, *Christian Marriage: An Historical and Doctrinal Study* (London and New York: Sheed and Ward, 1933), 71–72; Susan Treggiari, *Roman Marriage, Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991), 323–31. See also, Charles Donahue, Jr., "The Case of the Man Who Fell into the Tiber: The Roman Law of Marriage at the Time of the Glossators," *American Journal of Legal History* 22, no. 1 (1978): 1–53 (esp. 45–52). According to Donahue, medieval glossators supported the Roman legal rule that required parental consent; however, their possible impact is unclear, as jurisdiction over marital cases lay within the purview of the Church, which applied canon law rules.

[18] Ozment, *When Fathers Ruled*, 27.

[19] Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens and London: The University of Georgia Press, 2010), 240.

[20] The choice was not always free, however. For economic or political reasons, people were often forced into particular states of life. This was especially so in the case of women, who were often forced to become nuns, prostitutes, or concubines. See, for example, Ulrike Strasser, *State of Virginity: Gender, Religion and Politics in an Early Modern Catholic State* (Ann Arbor: The University of Michigan Press, 2004); Michelle Armstrong-Partida, *Defiant Priests: Domestic Unions, Violence, and Clerical Masculinity in Fourteenth-Century Catalunya* (Ithaca, NY: Cornell University Press, 2017).

[21] Joyce, *Christian Marriage*, 73.

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Even though specific solemnities were not strictly required for the validity of the marriage, they were often demanded nonetheless. Canonists such as Ivo of Chartres (1040–1115) and some local synods stated that a marriage had to be contracted through the public exchange of vows, marriage gifts, a wedding ring, and a blessing by a priest. Those who performed a clandestine marriage might be forced to undertake penitential sanctions.[22] The *Decretum Gratiani* also included the provision that a marriage was unlawful and clandestine in the absence of the permission of those who had power over the woman, a dowry, and a sacerdotal blessing.[23] Canon fifty-one of the Fourth Lateran Council (1215) established that a marriage had to be announced publicly in church by a priest. This requirement was necessary to ascertain the presence of any impediments. Canon law forbade certain relationships. For example, consanguinity or affinity up to the fourth degree, and legal or spiritual relationships (e.g. godparent and godchild), were named "impediments" and invalidated the marriage.[24] Without some sort of publicity, it was difficult to find out whether these impediments existed. Thus, the Lateran Council set out that the priest had to check for the presence of impediments. If he assisted a marriage where the public banns had not been proclaimed, he would be suspended from office.[25]

A marriage contracted in the absence of publicity (without witnesses or other evidence), solemnities, or public banns was called "clandestine."[26] Canonists and theologians, as well as episcopal courts and synods, offered various and not always uniform classifications of clandestine marriage.[27] Cardinal Enrico da Susa (Hostiensis, 1200–1271) wrote that clandestine betrothals were defined in four or six ways: (1) the solemnities (sacerdotal blessing, a request to the father of the spouse, dowry, and handing over) were omitted; (2) the betrothal was contracted secretly, without witnesses; (3) the betrothal was contracted breaking a previous betrothal to marry someone else or a previous marriage without the *licentia* of the bishop; (4) the public banns in the church were lacking.[28]

[22] Brundage, *Law, Sex, and Christian Society*, 189.

[23] *Aliter*, c. 30 q.5 c.1.

[24] For the complete list, see Donahue, *Law, Marriage, and Society*, 18–31.

[25] This requirement was encapsulated in the *Liber extra*, under the title dedicated to clandestine betrothal (*de clandestina desponsatione*, X 4.3.3).

[26] As Schmugge points out, "clandestine" did not necessarily mean "secret," but it could also simply denote the lack of procedural requirements such as the public banns. See Ludwig Schmugge, *Marriage on Trial: Late Medieval German Couples at the Papal Court*, trans. A. Larson (Washington D.C.: Catholic University of America Press, 2012), 92.

[27] See Beatrice Gottlieb, "The Meaning of Clandestine Marriage," in *Family and Sexuality in French History*, eds. Robert Wheaton and Tamara K. Hareven (Philadelphia: Pennsylvania University Press, 1980), 49–73; Donahue, *Law, Marriage, and Society*, 4, calls it a "troublesome term because it can mean a number of things." See also, A.J. Finch, "Parental Authority and the Problem of Clandestine Marriage in the Later Middle Ages," *Law and History Review* 8, no. 2 (1990): 189–204; José Sánchez-Arcilla-Bernal, "La formación del vinculo y los matrimonios clandestinos en la Baja Edad Media," in *Cuadernos de Historia del Derecho* 17 (2010): 7–47.

[28] Enrico da Susa (Card. Hostiensis), *Summa aurea* (Coloniae: Lazari Zetneri, 1612), 1139–40. The fifth case is related to the betrothal of minors without the *licentia* of the bishop, and the sixth case is a betrothal against an *interdictum* of the church.

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Angelo Carletti di Chivasso (1411–1495), in his *Summa angelica* stated that a clandestine marriage occurred in three cases: (1) the absence of witnesses;[29] (2) the absence of the solemnities (which thereby entailed that no promise of marriage had been made to the woman's parents) and sacerdotal blessing;[30] (3) the absence of the public banns.[31] Late medieval German synods identified clandestineness with the absence of the public banns, and not with secrecy.[32] In particular, Bavarian synods and church courts used the adjective "clandestine" to refer to incorrect marital behavior, while secrecy was referred to with the words *secrete* or *clam*, and if an element of the contract could not be proved, the word used was *occulte*.[33] In Regensburg's marriage court cases, the word clandestine was used to signify the existence of a matrimonial impediment. Clandestine was used in opposition to a public and subsequent marriage with another partner.[34]

A clandestine marriage was illegal and sinful, but it was still valid, because it was based on the free consent of the spouses.[35] As Thomas Aquinas (1225–1274) opined, in a hidden marriage (*in occulto matrimonio*) the required matters of the sacrament, the people, and the lawful form—the consent of the spouses—were still present. Therefore, it was a true marriage.[36] A provision included in the *Liber extra* stated that no dispensation for the required solemnities was necessary. The Church does not judge about things that are hidden (*Ecclesia de occultis non iudicat*), and therefore if the spouses did not publish the marriage, there was nothing the church could do about it. The tricky issue, however, was to provide evidence of such a marriage. A clandestine marriage could not be presumed but had to be proved by the plaintiff.[37] The confession of both spouses was sufficient to prove a clandestine marriage, but not to prevent the validity of a public marriage. The public marriage prevailed over the clandestine.[38] The consequence was extremely problematic: one or both of the parties to the first, clandestine marriage had to live in a second (public) marriage as a perpetual adulterer.[39]

[29] *Quod nobis*, X 4.3.2.

[30] *Aliter*, c. 30 q.5 c.1.

[31] Angelo de Chivasso, *Summa angelica de casibus conscientialibus* (Venetiis: Sansovinus, 1569), 74b. X 4.3.3.

[32] Schröter, "*Wo Zwei zusammenkommen*", 322. He distinguishes between episcopal synods, where the word "clandestine" was used to mean absence of the banns, church courts, where it meant the absence of witnesses, and secular courts, where it also meant the absence of parental approval. For sixteenth century court practices, see Thomas Max Safley, *Let No Man Put Asunder. The Control of Marriage in the German Southwest: A Comparative Study, 1550–1660* (Kirksville, MI: The Sixteenth Century Journal Publisher, 1984), 152–53; 186–87.

[33] Klaus Lindner, "Courtship and the Courts: Marriage and Law in Southern Germany, 1350–1550" PhD diss., (Harvard: Harvard University Press, 1988), 94.

[34] Christina Deutsch, *Ehegerichtsbarkeit im Bistum Regensburg 1480–1538* (Köln: Vandenhoeck & Ruprecht, 2005), 271–72.

[35] Adhémar Esmein, *Le mariage en droit canonique* (Paris: Sirey, 1929), 1, 205; Donahue, Jr., *Law, Marriage, and Society*, 16–18.

[36] Thomas Aquinas, *In quatuor sententiarum*, d. xxviii, q. 1, art. 3 cit. in Joyce, *Christian Marriage*, 73.

[37] X 4.3.1.

[38] Esmein, *Le mariage*, 214.

[39] Esmein, *Le mariage*, 213, 219. On this problem, see Monique Vleeschouwers-Van Melkebeek, "Bina matrimonia: matrimonium praesumptum vs. matrimonium manifestum. Hoe passen de

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In practice, despite the absence of the requirement of publicity for the validity of a marriage, families and ecclesiastical and secular authorities controlled and directed the consent of the spouses. Marriage had important economic and political implications,[40] and secular law demanded that rights and duties be determined with reasonable certainty.[41] This custom varied from place to place. As Donahue has argued concerning France and England, it is possible that parental control was increasingly consistent and effective.[42] Similarly, Ribordy has claimed that Aristocratic families in France enforced parental control, and as Gottlieb has shown, this also happened in Champagne.[43] However, clandestine marriage, especially between minors, remained widely practiced.[44] In the majority of the cases, the plaintiff was a woman who had lost her virginity. After a man had promised to marry her, the couple had had sexual intercourse, but the man had subsequently disappeared or refused to fulfill his obligations.[45] In most of the cases, in the absence of witnesses or because of interpretative problems linked to the complicated scheme of *verba de praesenti* and *verba de futuro*, it was impossible to prove the promise, and the marriage could not be enforced.[46] In other cases, instead, courts ordered the parties to regularize their marriage publicly in

officialiteiten van Kamerijk en Brussel in de vijftiende eeuw canoniek recht en doctrine terzake toe?," in *Auctoritates. Xenia R.C. Van Caenegem oblata. De auteurs van de rechtsontwikkeling*, eds. Serge Dauchy, Jan Monballyu and Alain Wijffels (Leuven: Peeters, 1997), 245–55; Id. "Oui, je le veux": paroles de mariage prononcees en secret ou en public. Le Justice face au Succès de Mariages Clandestins. Le cas des Pays-Bas Méridionaux du 15e Siècle," in *Secret et justice: Le secret entre èthique et technique?*, eds. Jean-Pierre Royer and Bernard Durand (Lille: Espace Juridique, 1998), 164–76.

[40] Ozment, *When Fathers Ruled*, 27–28; Harrington, *Reordering Marriage*, 173–74.

[41] Charles Donahue, Jr., "The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages," *Journal of Family History* (Summer 1983): 144–58 (146).

[42] Donahue, Jr., "The Canon Law," 156.

[43] Geneviève Ribordy, "Mariage aristocratique et doctrine ecclèsiastique: Le tèmoignage du rapt au Parlement de Paris pendant la guerre de Cent ans," *Crime, History & Societies* 1, no. 2 (1998): 29–48; Beatrice Gottlieb, "Getting Married in Pre-Reformation Europe: The Doctrine of Clandestine Marriage and Court Cases in Fifteenth-Century Champagne," PhD diss. (Columbia University, 1974), 233–307.

[44] Harrington, *Reordering Marriage*, 29.

[45] Men who wanted to have sex with a woman outside marriage often deliberately used this tactic. See, for instance, Silvana Seidel Menchi, "Percorsi variegati, percorsi obbligati. Elogio del matrimonio pre-tridentino," in *Matrimoni in dubbio: Unioni controverse e nozze clandestine in Italia dal XIV al XVIII secolo*, eds. Silvana Seidel Menchi and Diego Quaglioni (Bologna: Il Mulino, 2002), 43–45.

[46] However, the female plaintiff could demand compensation for her loss of virginity or a sum of money for the expenses associated with the child. Richard Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1975), 25–73; Monique Vleeschouwers—Van Melkebeek, "Self-Divorce in Fifteenth-Century Flanders: The Consistory Court Accounts of the Diocese of Tournai," in *Tijdschrift voor rechtsgeschiedenis* 68 (2000), 83–98; Christina Deutsch, *Ehegerichtsbarkeit im Bistum Regensburg 1480–1538*, 268–80; Silvana Seidel Menchi and Diego Quaglioni, eds., *I Tribunali del matrimonio (secoli XV-XVIII)* (Bologna: Il Mulino, 2007); Kirsi Salonen, "Marriage Disputes in the Consistorial Court of Freising in the Late Middle Ages," in *Regional*

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church.[47] In some German ecclesiastical synods, marriages between minors against the will of their parents were punished with excommunication and disinheritance.[48]

"Without the Presence of Orderly Public Authority"

The canon law regulation of marriage suffered a critical setback in sixteenth-century Germany. Beyond proposing a set of reforms that affected marriage's nature, formation, and impediments, as well as divorce,[49] Luther put forward a different definition of clandestine marriage. He rejected the distinction between the present and future exchange of marital vows as misleading, and he proposed that all promises should be considered promises in the present (*sponsalia de praesentia*). Such a promise would have to be made at the presence of two witnesses, have parental consent, and be repeated publicly in church before consummation. Thus, the definition of clandestine marriage comprised not only marriages in the absence of witnesses, but also those without parental approval. In his sermon *On Marital Matters* (1530), Luther wrote:

> I define a clandestine betrothal [heimlich verlǒbnis] as one which takes place without the knowledge and consent of those who are in authority and have the right and power to establish a marriage, such as, father, mother and whoever may act in their stead. Even if a thousand witnesses were present at a clandestine betrothal and it nonetheless took place without the knowledge and consent of the parents, the whole thousand should be reckoned as acting in the darkness and not in the light, as only one voice, and as assisting treacherously in this beginning without the presence of orderly public authority [ordenlicher, offentlicher macht].[50]

This definition was quoted innumerable times, and it codified a fundamental shift in the history of marriage law.[51] For Luther, the presence of

[47] Brundage, *Law, Sex, and Christian Society*, 499–500.

[48] Harrington, *Reordering Marriage*, 179.

[49] Dietrich, *Das protestantische*, 24–74; Witte, *From Sacrament*, 113–58. Bibliography on Luther and Marriage is abundant, see, for example, Hans Hattenhauer, "Luthers Bedeutung für Ehe und Familie," in *Luther und die Folgen*, eds. Hartmut Löwe and Claus-Jürgen Roepke (München: Kaiser, 1983), 86–109 Georg Kretschmar, "Luthers Konzeption von der Ehe," in *Martin Luther: Reformator und Vater in Glauben*, ed. Peter Manns (Stuttgart, 1985), 178–207; Jane Strohl, "Luther on Marriage, Sexuality, and the Family," in *The Oxford Handbook of Martin Luther's Theology*, eds. Robert Kolb et al. (Oxford: Oxford University Press, 2014), 370–82; Thomas Kaufmann, "Reformation der Lebenswelt: Luthers Ehetheologie," in *Der Anfang der Reformation: Studien zur Kontextualität der Theologie, Publizistik und Inszenierung Luthers und der reformatorischen Bewegung* ed. id. (Tübingen: Mohr Siebeck, 2012), 550–64; Christian Volkmar Witt, *Martin Luthers Reformation der Ehe: Sein theologisches Eheverständnis vor dessen augustinisch-mittelalterlichem Hintergrund* (Tübigen: Mohr Siebeck, 2017). For a summary, see Trevor O'Reggio, "Martin Luther on Marriage and Family," (2012). Faculty Publications. 20. https://digitalcommons.andrews.edu/church-history-pubs/20.

[50] Martin Luther, *On Marriage Matters* in LW 46, 1967, 259–320 (268). See WA 30/3, 205ff. (207).

[51] The Lutheran definition was used until at least the eighteenth century. See Kirstein, *Die Entwicklung*, 154.

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witnesses was not enough to constitute the publicity of a marriage, as the witnesses did not have the public authority to establish a marriage. The parents were the public authority who also had to be present: they signaled God's will. In their absence, a marriage was made "in the darkness" (*im finstern*). The "public" was here associated with the authority of the parents, which reflected God's will, while the "clandestine" consisted of a treacherous (*meuchling*) act.

Luther justified this definition with arguments from divine law, Roman law, early canon law, and natural law, as well as practical considerations.[52] He explained the necessity of parental consent by referring to Matthew 19:6: "*What therefore God hath joined together, let no man put asunder*." This passage showed that there could be two joinings: one by God, the other without God. Joining by God meant that a marriage was made by God's word and commandment. Joining without God was marriage by the spouses alone, without corresponding to God's word and commandment. For Luther, a clandestine betrothal could not be proven to be God's will.[53] A marriage should be contracted in the presence of the parents, because without their authorization there would be no way to prove that the marriage was God's will. Obedience to one's parents was obedience to God. This was a crucial point. For Luther, a Christian was called to obey the word of God, and this obedience passed through the will of the parents.

A few years before, in *The Estate of Marriage* (1522), Luther had argued that God had instituted marriage, brought husband and wife together, and ordained that they should beget children and care for them.[54] The passage of Genesis 1:28 ("*be fruitful and multiply*") was a divine ordinance: "*It is not a matter of free choice or decision but a natural and necessary thing, that whatever is a man must have a woman and whatever is a woman must have a man.*"[55] Yet men and women were not entirely free to select their partners. It was God that brought a man and a woman together: he operated through the will of the spouses' parents. In the 1524 tract, *That Parents Should Neither Compel nor Hinder the Marriage of Their Children, and That Children Should Not Become Engaged without Their Parents' Consent*, Luther insisted that parental approval was justified by the fourth commandment of the Decalogue.[56] Jeremiah 29:6 ("*give husbands to*

[52] Luther, *On Marriage*, 268–70.

[53] Luther, *On Marriage*, 276–77.

[54] Martin Luther, *On the Estate of Marriage* in LW 45, 38. See also, Marjorie Elisabeth Plummer, "On the Estate of Marriage," in *The Annotated Luther. Christian Life in the World*, eds. Hans J. Hillerbrand et al. (Minneapolis: Fortress, 2017), 33–77.

[55] Luther, *On the Estate*, 18. As Roper observes, for Luther sexuality is a force impossible to be governed and only to be directed according to God's order. See Lyndal Roper, "Luther: Sex, Marriage and Motherhood," *History Today* 33 (1983): 33–38.

[56] On the crucial importance of this commandment in the Reformation, see Robert James Bast, *Honor Your Fathers: Catechisms and the Emergence of a Patriarchal Ideology in Germany 1400–1600* (Leiden: Brill, 1997). For more in general on the role of the Decalogue for the Reformers, see Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard: Harvard University Press, 2003), 71–100; Antti Raunio, "Divine Law and Natural Law in Luther and Melanchthon," in *Lutheran Reformation and the Law*, ed. Virpi Mäkinen (Leiden: Brill, 2006), 21–62; Mathias Schmoeckel, *Das Recht des Reformation* (Tübingen: Mohr

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your daughters and wives to your sons") and other similar passages ordered children to obtain parental approval. Finally, Adam and Eve had not chosen for themselves, but rather God had brought Eve to Adam.[57]

In Luther's view, the foundation of marriage was not the will of the parties, as it was for Catholics, but the will of God. The will of God was reflected in the will of the parents. Spouses could not marry without their parents' consent, as to do so would be an arbitrary decision and a violation of God's will. However, Luther did not seek to overturn the Catholic definition of clandestine marriage. He required the presence and consent of the parents, but he also required the presence of witnesses. Since marriage was a public estate (*offentlicher stand*), he wrote, it should also begin publicly, in the presence of witnesses. In Matthew 18:16, Christ affirms: "*Every matter may be established by the testimony of two or three witnesses*." If two people had become engaged in secret, one could not be sure that consent had really been given.[58]

Thus, Luther blended the requirement for parental approval with a requirement for the presence of witnesses. Both elements were essential for the validity of a marriage. When they were lacking, the marriage was clandestine, and the spouses were committing a theft from God:

> Marriage is a public estate ordained by God and not a shady business to be carried on in dark corners, he who seeks it in corners and dark places or enters into it secretly is a marriage-thief, for he has stolen it and not obtained it honestly from God and through obedience to his word, as is fitting so honorable an estate.[59]

Once again, clandestine marriage was associated with darkness, while public marriage was connected to the light of God. Clandestine spouses were like thieves, because they disobeyed God's word. Indeed, a clandestine marriage amounted to the theft of children from their parents, who had raised their offspring with great care and attention only to see them married away without their consent.[60] On the other hand, parents had the responsibility to help their children to find an appropriate woman/man and get married.[61] They must not behave like tyrants and oppress their children with unjustified refusals or forced betrothals.[62] In

Siebeck, 2014), 24–38; Martin Heckel, *Martin Luthers Reformation und das Recht* (Tübingen: Mohr Siebeck, 2016), 406–88.

[57] M. 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 LW 45, 390. On the necessity of parental control, see Dietrich, *Das protestantische*, 56–60.

[58] Luther, *On Marriage*, 268.

[59] Luther, *On Marriage*, 283–84.

[60] Luther, *On Marriage*, 269–70. Harrington, *Reordering Marriage*, 187–8 suggests that the characterization of children as property could be associated with the attempt of secular authorities to control marriages.

[61] Witt, *Martin Luthers*, 259.

[62] A problem which occurred often in the practice. See, for example, Daniela Hacke, "Non lo volevo per marito in modo alcuno: Forced Marriages, Generational Conflicts, and the Limits of Patriarchal Power in Early Modern Venice, c. 1580–1680," in *Time, Space, and Women's Lives in*

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this case, Luther stated, the children should ask ministers and friends, and then the public authority, to compel the fathers.[63] Later on, the children could seek remedy from the *Consistorium*, an institution composed of theologians and jurists with the competence to resolve marital cases.[64]

Luther's approach to clandestine betrothals clashed with canon law. As we saw earlier, canon law deemed that clandestine marriages were binding. Where a public and a clandestine betrothal coexisted, canon law recognized the clandestine marriage as valid if both spouses confessed it and made it public. However, this opened up greater problems: if the first (clandestine) marriage could not be proved, a spouse had to keep it on his/her conscience. S/he was obligated to remain with the second spouse, who could prove their marriage because it had been publicly attested.[65] Paying attention to these issues arising from everyday practice,[66] Luther sharply repudiated this solution, and contended that a clandestine marriage must not prevail over a public one:

> A marriage obtained by treachery and stealth, secretly and dishonestly, should yield to one obtained openly and honestly with God and honor. Private arrangements must yield to public ones.... Likewise living together in secret shall yield to that which is public.[67]

For Luther, clandestine marriages were void; in case of a conflict between a clandestine and a public marriage, the latter must always be preferred. He believed that in this way it could never happen again that a party to a clandestine marriage would be obligated to live in a public marriage while remaining bound in conscience to the clandestine party. Luther admitted one exception: when the marriage had been consummated. In this case, Luther argued that the clandestine marriage could be valid, in order to avoid dishonoring the woman and her family. Thus, the woman received special protection. To avoid the prejudice she would suffer from the new regulation, the clandestine marriage was exceptionally considered to be valid.

Is the Roman Law Imposing Parental Consent a Divine Ordinance?

Luther's reshaping of clandestine marriage was shared by other leading theologians of the Reformation. Philip Melanchthon (1497–1560), Johannes

Early Modern Europe, eds. Anne Jacobson Schutte, Thomas Kuhen and Silvana Seidel Menchi (Kirksville: Truman State University Press, 2005), 203–21.

[63] Luther, *On Marriage*, 304–09.

[64] Uwe Sibeth, *Eherecht und Staatsbildung: Ehegesetzgebung und Eherechtsprechung in der Landgrafschaft Hessen (-Kassel) in der frühen Neuzeit* (Darmstadt and Marburg: Selbstverlag der Hessischen Historischen Kommission Darmstadt, 1994); Ralf Frassek, *Ehegericht und Ehegerichtsbarkeit in der Reformationszeit* (Tübingen: Mohr Siebeck, 2005).

[65] Luther, *On Marriage*, 270–71.

[66] Luther's attention to customary practices has been noticed by Thomas Robisheaux, "Peasants and Pastors: Rural Youth Control and the Reformation in Hohehlohe, 1540–1680," *Social History* 6, no. 3 (1981): 281–300 (283fn 11).

[67] Luther, *On Marriage*, 283–84.

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Bugenhagen (1485–1558), Niels Hemmingsen (1513–1600), and many others published sermons and treatises where they supported Luther's ideas.[68] These theologians continued to associate clandestineness with the absence of parental approval. They justified the need for parental approval by referring to Roman law, as "imperial" law.[69] The key argument was that as Roman law required the consent of the fathers before a marriage could be contracted, this law was consistent with divine law and had to be considered a divine ordinance. Thus, parental consent was not only expressed in divine law, but was directly applied in human law—Roman law. Since there is insufficient space to examine all of these theologians here, I will take Johannes Brenz as my example. As Anneliese Sprengler-Ruppenthal has observed, Brenz was one of the principal defenders of the use of Roman law, and he even convinced Luther to adopt it.[70]

Brenz graduated in theology at Heidelberg (MA 1518). He joined the Reformation in 1522 and became a preacher at St. Michael's Church in the imperial city of Schwäbisch Hall.[71] As a counselor to political authorities, he formulated numerous Church ordinances and participated in the most important theological and political debates of the day. In 1531, he authored a sermon on marital cases. This sermon featured a preface by Luther himself, was translated into Latin, and was later also included in Georg Dedekenn's (1564–1628) influential collection of cases of conscience.[72] For Brenz, Scripture alone could establish what was divine and what was not.[73] In Matthew 19:6, Christ said: "*What therefore God hath joined together, let not man put asunder*." Brenz commented:

[68] Dieterich, *Das protestantische*, 94–97; Witte, *From Sacrament*, 113–58.

[69] The use of Roman law became an essential feature of the Reformation after 1530. See James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 1990), 3–40; An emblematic case is marriage law, as Anneliese Sprengler-Ruppenthal, "Zur Rezeption des Römischen Rechts im Eherecht der Reformatoren," *ZRG Ka* 112 (1978): 363–418, has shown. For the "reception" of Roman law by the reformers, see also, Gerhard Günther, "'Altes Recht', 'Göttliche Recht' und 'Römisches Recht' in der Zeit der Reformation und des Bauernkrieges," *Wiss. Zeitschrift der Karl-Marx-Universität Leipzig*, 14. Jahrgang (1965): 427–34; Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986); Georg Dahm, "On the Reception of Roman Law and Italian Law in Germany," in *Pre-Reformation Germany*, ed. Gerald Strauss (London: Macmillan, 1972), 282–315; Isabelle Deflers, "Melanchthon und die Rezeption des römisches Rechts in Eherecht der Reformation," in *Sachsen im Spiegel des Rechts*, eds. Adrian Schmidt-Recla et alia (Wien: Böhlau Verlag, 2001), 185–203. More in general, see Lorena Atzeri, "Römisches Recht und Rezeption," in *Europäische Geschichte Online*, ed. Leibniz-Institut für Europäische Geschichte (Mainz, 2017). URL: http://www.ieg-ego.eu/atzeril-2017-de (March 9, 2021).

[70] See Sprengler-Ruppenthal, "Zur Rezeption des Römischen Rechts," 369–75.

[71] On Brenz see James Martin Estes, *Christian Magistrate and Territorial Church: Johannes Brenz and the German Reformation* (Toronto: CRRS, 2007).

[72] I quote from the Latin edition: Johannes Brenz, *Libellus casuum quorundam matrimonialium utilissimus* (Basileae: Westheimer, 1536). Georg Dedekenn, *Thesauri consiliorum et decisionum volumen tertium mixta et inprimis matrimonialia continens* (Jenae: Nisius, 1671), 110–13. The German version: *Wie yn Ehesachen, vnd jnn den fellen, so sich derhalben zu tragen, nach Göttlichen billichen Rechten, Christenlich zu handeln sey* (Wittenberg: Rhaw, 1531).

[73] Brenz, *Libellus*, 9b.

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> From these words, we very openly teach that between the spouses it is not the manner of that connubial pact that has to be contemplated, but whether they were divinely joined together. Indeed, Christ did not simply say: they who have joined together, but what God has joined together.[74]

Therefore, marriage was not a work of man but an act of God. The essential point was that God united the spouses. Brenz stressed that Roman law applied the tenets of Scripture. Exodus 20:12 sets out "*honor thy father and thy mother*." This honor was obedience not only to Scripture, but also to Roman law (*jus Caesareum*), which applied parental obedience to the marital contract. As this law complied with Scripture, Brenz wrote, it had to be observed as a divine ordinance, as Paul says in the Letter to the Romans (Romans 13).[75] The Romans required parental approval, and as this was consistent with divine law, it had to be observed like a divine ordinance. Accordingly, the requirement in civil law for parental consent was an application of the precept of divine law that demanded that children honor their father and mother.

In a similar way, for Brenz, Deuteronomy 7:3—"neither shalt thou make marriages with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son"—meant that children could only marry by parental consent.[76] When Roman citizens contracted marriage, the children asked the permission of the *pater familias*, because they were subjected to his *potestas*. As Roman law met the precepts of divine law in requiring children's obedience to their parents, Brenz concluded that this law had to be considered divine law and respected as such.[77] As Roman law abided by divine law, it had the same effect as divine law. On the other hand, Brenz argued that canon law was not binding, because it did not comply with Scripture.[78] He averred that a clandestine marriage arose from Satan. What God had joined together could not be separated; but what had been put together by Satan, man could certainly separate.[79] Therefore, a clandestine marriage, carried out against the will and consent of the parents, was void.[80]

Brenz's and the other theologians' assumption that Roman law's imposition of parental approval was like divine law did not find immediate acceptance among all jurists.[81] For instance, Melchior Kling, a professor of law at the

[74] Brenz, *Libellus*, 9a: "*E quibus apertissime docemur, inter coniuges non modo pactum illud connubiale contemplandum esse, sed an divinitus etiam coniuncti sint. Christus enim non simpliciter ait, qui coniuncti fuerint, sed quod Deus coniunxerit.*"

[75] Brenz, *Libellus*, 10a. This biblical passage was used many times to give moral support to legal norms. See Richard J. Ross, "Binding in Conscience: Early Modern English Protestants and Spanish Thomists on Law and the Fate of the Soul," *Law and History Review* 33 (2015): 803–37.

[76] Brenz, *Libellus*, 10a–10b.

[77] Brenz, *Libellus*, 10b–11b.

[78] Brenz, *Libellus*, 11b–12.

[79] Brenz, *Libellus*, 12. Pivoting on moral dishonesty, Erasmus also argued that clandestine marriages were not a sacrament because they were contracted by sexual attraction, or else the parties were drunk when they exchanged consent, and they could be manipulated by persons who stood to profit from them. Brundage, *Law, Sex, and Christian Society*, 497.

[80] Brenz, *Libellus*, 16b.

[81] Witte, *From Sacrament*, 157. See also, Witte, "The Reformation," 327–8.

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University of Wittenberg and an expert on marital cases, received the new teachings with skepticism. Kling was educated in Wittenberg by the Lutheran professors Hieronymus Schurff (1481–1554) and Johann Apel (1486–1536). He obtained the title of *doctor utriusque iuris* (doctor in civil and canon law), and in 1536 he became a professor of canon law at the same university. He was an assessor at the *Schöffenstuhl* (bench of jurymen) and the *Hofgericht*, but not at the *Consistorium*.[82] In his 1553 treatise on marriage cases, Kling refused to adopt Luther's definition of clandestine marriage. Instead, he followed his master Schurff, who did not second Luther's thesis on the necessity of parental consent,[83] and he repeated the traditional canon law definition: a clandestine marriage was when the contract was concluded by the spouses alone, without witnesses.[84] Thus, no parental consent was necessary, and the only rationale for witnesses was the necessity to prove the marriage.

Following the medieval canonist Hostiensis,[85] Kling held that clandestine marriages were forbidden because of the danger to the souls (*periculum animarum*). If one of the spouses in a clandestine marriage changed his/her mind, the judge could not trust him/her, and the court would consider the spouses to be able to marry. However, the first marriage existed in conscience. The party who contracted a new marriage would be obliged to pay his/her conjugal debt and have sex with the new spouse, under pain of excommunication; but on the other hand, s/he would be bound to the first spouse. For Kling, in this case the spouse should rather be excommunicated than offend his/her conscience.[86] Luther indicted the disobedience to God, but for Kling and the canonists the moral concern was different. The problem was not the absence of parental consent, but rather the validity of a clandestine marriage even if it could not be proved: this entailed that a party was obliged to live as a perpetual adulterer in a public marriage. For Kling, parental consent was not a strict requirement, because it was not sufficiently supported by law. Civil law, Kling observed, established that the consent of the father was necessary, but not that of the mother. Canon law did not require this consent for the validity of the bond, but only for its honesty. The theologians affirmed that if the marriage had also been consummated with sexual intercourse, then it

[82] Heiner Lück, "Zur Grundlegung des evangelischen Eherechts in Wittenberg," in *Katharina von Bora. Die Lutherin: Aufsätze anlässlich ihres 500. Geburtstages*, ed. Martin Treu (Stiftung Luthergedenkstätten in Sachsen-Anhalt: Wittenberg, 1999), 161–77, (167); on the Wittenberg jurists see also, Heiner Lück, "Beiträge ausgewählter Wittenberger Juristen zur europäischen Rechtsentwicklung und zur Herausbildung eines evangelischen Eherechts während des 16. Jahrhunderts," in *Reformation und Recht: Ein Beitrag zur Kontroverse um die Kulturwirkungen der Reformation*, ed. Christoph Strohm (Mohr Siebeck: Tübingen, 2017), 73–109; on the Schöffenstuhl, the Hofgericht, and the Consistorium, see Heiner Lück, "Wittenberg als Zentrum kursächsischer Rechtspflege: Hofgericht-Juristenfakultät-Schöffenstuhl-Konsistorium," in *700 Jahre Wittenberg*, ed. Stefan Oehmig (Weimar, 1995), 213–48; Id., *Die kursächsische Gerichtsverfassung 1423–1550* (Köln, Weimanr, Wien: Böhlau, 1997).

[83] Hieronymus Schurff, *Consiliorum seu responsorum iuris*, centuria prima (Francofurti: Egelnoff, 1594), 150–1.

[84] On Kling's approach to canon law, see Witte, *From Sacrament*, 72–3.

[85] Enrico da Susa (Card. Hostiensis), *Summa aurea*, 1140; Esmein, *Le mariage*, II, 149.

[86] Kling, *Tractatus*, 68b–69. See also, Dieterich, *Das protestantische*, 122–4.

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was valid. However, civil law did not accept this solution, because it invalidated all marriages contracted without parental approval, regardless of consummation.[87]

Interpreting Roman Law in the Light of Scripture

Unlike Kling, Basilius Monner endorsed Luther's definition of clandestine marriage. Monner studied law in Wittenberg with Apel, Schurff, and Goede. He was also a student of Luther. He became a member of the Wittenberg *Consistorium* in 1539, and in the same year he was also appointed councilor to Johann Friedrich of Saxony (1503–1554). In 1554, he became a professor of law at the Gymnasium in Jena. With the foundation of the University of Jena, Monner was appointed professor of law in 1558; he later became prochancellor and dean.[88] In his 1561 treatise on marriage, Monner did not define clandestine marriage, but he nonetheless associated clandestineness with the lack of parental consent. He responded to Kling's objections by proposing an original interpretation of Roman legal sources, influenced by his reading of the fourth commandment of the Decalogue. The fourth commandment was presented as a cornerstone of society that demanded that children should obey their father as a representative of God. Disobedience to fathers would lead to the dissolution of society, and therefore clandestine marriages had to be forbidden.

Kling had contended that Roman law only demanded the consent of the father and not of the mother. Monner replied that some passages in Roman law also required the consent of the mother.[89] For instance, in *Cum de nuptiis* (C. 5.4.1), the transfer of a daughter required the consent not only of the guardian, but also of the mother.[90] In addition, Roman law used the term *parentes* several times where it also included the mother, grandparents, and all ancestors.[91] Finally, in *De raptu virginum seu viduarum*, consent was required from parents or from others who were suitable in this regard (*parentes vel alios quos decet*).[92] Monner concluded that Roman law did not restrict *potestas* over the children to fathers, but had a much broader conception. When Roman law required *consensus parentum*,[93] it referred to the consent of the father and the mother.[94] In Roman law, the term *parens* was mostly associated with

[87] Kling, *Tractatus*, 78a and 78b.

[88] Eyk Ueberschär, "Basilius Monner (um 1500 bis 6. Januar 1566)—Ein treuer Diener seiner Herren," *Rechtsgelehrte der Universität Jena aus vier Jahrhunderten* ed. Gerhard Lingelbach (Jena: Bussert und Stadeler, 2011), 5 ff.

[89] C. 9.13.1.

[90] Basilius Monner, *Tractatus duo: I de matrimonio; II de clandestinis coniugiis*, secunda editione (Jenae: Steinmann, 1604), 247–8.

[91] Monner, *Tractatus*, 244–45. D. 2.4.4.2 and D. 50.16.51.

[92] C. 9.13.2.

[93] I. 1. 10, *de nuptiis*.

[94] Monner, *Tractatus*, 240. See also, Dieterich, *Das protestantische*, 124–5. The necessity of parental consent became an opinion shared by the great majority of Lutheran jurists. See Witte, *From Sacrament*, 59.

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the father and not with the mother. However, Monner contended that the word *parentes* could refer to both parents and not only to the father.

Monner's innovative interpretation of Roman law was determined by the crucial importance he attributed to the fourth commandment of the Decalogue. For Monner, this commandment

> is not to be disdained or neglected as if it were said by a greengrocer somewhere or a drunken farmer, but it is the voice of the divine majesty, resounding in the skies and commanding all sons, of whatever condition and dignity, to obey their parents. This obedience is not performed towards men but to God.[95]

The fourth commandment spoke about obedience in general, and following the theologians, Monner held that this encompassed marriage. If a son or daughter were taken from the parents in secret, such a transfer would have no effect, and a theft would have been committed.[96] The point, Monner explained, was that obedience was not simply to parents; most of all, it was obedience to God. Thus, he concluded that civil law was like a divine ordinance.[97]

For Monner, the first virtue in civil affairs was obedience to parents, and to those who occupied similar positions, such as masters and magistrates. Following a standard assumption in Lutheran two kingdoms doctrine,[98] Monner argued that God had put these people in his place, as his vicars, with regard to that which pertained to the economy, the state, and the observance of external discipline, and had commanded obedience to them.[99] This obedience was necessary because it preserved public utility.[100] God required this virtue of obedience in the first table of the virtues (of the Decalogue) in order for us to know that

> we are not dealing with childish and light things, but with the most important of all things by which human society and the entire city are maintained when we obey the ones who command, or it is turned about when we refuse to obey, as immediately the authority of the parents and the magistrates would be overthrown.[101]

[95] Monner, *Tractatus*, 232: "*Atque hoc praeceptum nullo modo contemnendum aut negligendum est: quasi dictum sit ab holitore quopiam, aut ebrio rustico: sed est vox* Maiestatis divinae, *de coelo sonantis ac praecipientis omnibus liberis, cuiuscunque conditionis et dignitatis*, obedientiam erga parentes. *Haec enim obedientia non homini praestatur: sed Deo.*"

[96] Monner, *Tractatus*, 232.

[97] Monner, *Tractatus*, 242.

[98] See Witte, *Law and Protestantism*, 87–118.

[99] Monner, *Tractatus*, 233.

[100] Monner, *Tractatus*, 234.

[101] Monner, *Tractatus*, 234: "*... ut sciamus, agi non de re puerili ac levi: sed de re omnium maxima: qua societas humana et universa politia, vel conservatur, si praecipienti obtemperavimus: vel vertitur, si parere noluerimus. Statim enim atque parentum et magistratuum autoritas fuerit labefacta.*"

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If adultery, lust, and theft were not forbidden, the bond would be dissolved or abolished. Monner concluded that this would also happen if we would permit clandestine marriages without the consent of the parents.[102] Obedience to fathers, masters, and magistrates was functional for the preservation of human coexistence. God empowered these figures with authority to maintain order within society. They must avoid immoral behaviors such as adultery. Clandestine marriages were along the same lines, and therefore they should be outlawed. In substance, Monner's work highlighted that the requirement of parental authority was anchored in the two kingdoms doctrine.

The Legal Definition of Clandestine Betrothal

Monner supported Luther's association between clandestineness and parental approval. Yet he did not elaborate on Luther's definition of clandestine marriage. Two law professors at the University of Wittenberg, Conrad Mauser and Johannes Schneidewin, made a further step by translating Luther's notion of clandestine marriage into a coherent legal formulation. This formulation integrated previous canon law teachings with those proposed by the Lutheran theologians. Conrad Mauser became a professor of *Institutiones* at the University of Wittenberg in 1536. He was also appointed assessor at the *Schöffenstuhl*, the *Hofgericht*, and the *Consistorium*.[103] In his legal treatise on marriage (1569), Mauser combined the canon law definition of clandestine marriage with Luther's.[104] Clandestine betrothals (*sponsalia clandestina*), he wrote, were divided into two types: first, properly and strictly, when they were started secretly and with nobody present; second, in a more general sense, when they were contracted in the presence of witnesses but without parental consent.[105] Mauser first reduced the number of cases of clandestineness described by canonists to only one: the absence of witnesses. Public banns in church, ecclesiastical prohibitions, and other Catholic solemnities were not mentioned. Then he added Luther's definition. Thus, by arguing that clandestine betrothals had both a strict and a general meaning, Mauser developed an innovative double definition.

The strict notion of clandestine betrothal was governed by canon law.[106] Yet Mauser claimed that there was an exception. When a public and a clandestine marriage coexisted, the public betrothal always had to be preferred. Thus, if one or both spouses confessed a prior, clandestine marriage, their confession

[102] Monner, *Tractatus*, 234.

[103] Lück, "Zur Grundlegung," 168.

[104] For the use of Canon Law in Protestant context, see Richard Helmholz, ed., *Canon Law in Protestant Lands* (Berlin: Duncker & Humblot, 1992); John Witte Jr., "Canon Law in Lutheran Germany: A Surprising Case of Legal Transplantation," in *Lex et Romanitas: Essays for Alan Watson*, ed. Michael Hoeflich (Berkeley: Robbins Collection, 2000), 181–224; Kenneth Pennington, "Protestant Ecclesiastical Law and the Ius Commune," *Rivista internazionale di diritto comune* 26 (2015): 9–36.

[105] Conrad Mauser, *Tractatus juridicus de nuptiis* (Jenae: Nisius, 1682), 10: "*Primum proprie et stricte, quando prorsus clam, et nemine praesente sunt inita. Secundo large, quando quidem in praesentia testium sunt contracta, tamen sine consensu parentum.*"

[106] X 4.3.1,2,3.

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could not prejudice the public marriage.[107] This was the same solution proposed by Luther, and it reversed the canon law teachings. Civil law and divine law governed the second type of clandestine betrothal. As with Monner previously, the fourth commandment served here as a pillar for a new interpretation of Roman legal sources. For Mauser, civil law required parental consent because of the effects of the *patria potestas*.[108] Yet under civil law, a *filius emancipatus* would be able to marry without parental approval. This conclusion, Mauser observed, should be rejected, because the fourth commandment of the Decalogue, which was perpetual and immutable, could not be removed by civil law.[109] The fourth commandment did not set any age limits, and it was always broken when children married without parental approval.[110]

Concerning the consequences of disobedience, Mauser did not claim that this would constitute theft; rather, he suggested that in such cases the child acted at his/her own risk against God and his/her conscience.[111] He reported that a pragmatic solution was often adopted in the *Consistorium*. If a son or daughter had married a dishonest person, the marriage had to be rescinded; if s/he had married a person who was honest and at the same social level, then the betrothal could be tolerated.[112] This should not be a surprise as marriages had important economic consequences.[113] Furthermore, Mauser maintained that the child could not be disinherited: Justinian's *Novellae* had specified a list of reasons for children to be disinherited, which could not simply be extended. For him, the consequence of an annulled marriage was that the transfer of the dowry was invalid, as it could not exist without marriage.[114]

The other Wittenberg professor who inserted Luther's notion of clandestine marriage into a legal framework was Johannes Schneidewin. Schneidewin, whose marriage was celebrated by Luther himself, studied in Wittenberg with Schurff, Goldstein, and Kling. In 1551, he obtained the degree of *doctor utriusque iuris*, and in 1555 he was appointed professor of *Institutiones*. He was a member of the *Spruchkollegium* of the law faculty, the *Schöffenstuhl*, the *Hofgericht*, and later the *Consistorium*.[115] In his posthumously published treatise on marriage, he defended Luther's view on clandestine marriage. He started his chapter on clandestine betrothals by observing that Hostiensis had classified clandestine marriages according to six kinds, and in the end had included everything that could be defined as a clandestine marriage according to ecclesial prohibitions. Panormitanus (1386–1445) had acted in a similar way.[116] In

[107] Mauser, *Tractatus*, 10–11.
[108] Mauser, *Tractatus*, 46.
[109] Mauser, *Tractatus*, 47.
[110] Mauser, *Tractatus*, 49.
[111] Mauser, *Tractatus*, 51.
[112] Mauser, *Tractatus*, 52.
[113] Harrington, *Reordering Marriage*, 187–97.
[114] Mauser, *Tractatus*, 53. N. 115. 3, *Causas*.
[115] Lück, "Zur Grundlegung," 169.
[116] For Hostiensis, see before section "Parental Consent and Clandestine Marriage before the Reformation". Niccoló Tedeschi (Panormitanus), *Commentaria in quartum et quintum decretalium libros*, tomus 7 (Venetiis: Iuntas, 1617), 17v.

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our churches, however, Schneidewin continued, there were only two kinds of clandestine betrothal:

> First, properly and strictly, when the promises are contracted secretly, after the removal of the spectators and without the presence of any witnesses. Second, in a general sense, when they are contracted in the presence of witnesses, but without the consent of the parents.[117]

In the first case, a marriage defined as clandestine was governed by canon law.[118] The second case followed Luther's definition. If a public betrothal and a clandestine one coexisted, Schneidewin endorsed Luther and contended that the public betrothal should prevail over the clandestine, because a male spouse could easily corrupt a female, then repent and marry another. If there were two marriages, one public and the other private, but the private marriage had been consummated, the public marriage had to yield to the private. For Schneidewin, this solution rested on the greater damage to the woman and the honor of her family.[119]

In his commentary on the four books of sentences by Peter Lombard (1100–1160), the Spanish Dominican theologian Domingo de Soto (1494–1560) adopted a similar formulation. He wrote that the canonists recognized at least six ways in which a marriage could be clandestine, and he concluded that only two meanings were relevant. First, in the strictest sense, a marriage was clandestine in the absence of witnesses. Second, in a broader sense, the marriage was clandestine if ecclesiastical procedure (especially the banns) had not been followed.[120] While the first meaning was very similar to Schneidewin's, the second differed. Most probably, Schneidewin, and Mauser before him, had borrowed the definition of clandestine betrothals from de Soto, replacing the failure to comply with ecclesiastical procedure with the absence of parental consent.

In substance, drawing upon de Soto, Mauser and Schneidewin reduced cases of clandestine betrothal, which the canonists had classified in various ways, to only two. They coined a legal definition of clandestine betrothal that gave new life to Luther's theological statements. Canon law was not completely discarded, but rather modified in its application: a public marriage always prevailed, while a private marriage could be maintained only if it had been consummated. The need for parental approval was certainly inspired by Luther. However, these jurists also referred to Roman law, which was interpreted in the light of the fourth commandment.

[117] Johannes Schneidewin, *In quatuor institutionum imperialium D. Justiniani libros, commentarii* (Coloniae Agrippinae: Metternich, 1698), 100: "*Sed secundum hodierna tempora in ecclesiis nostris duobus tantum modis dicuntur clandestina sponsalia: stricte et proprie videlicet, quae clam, remotis arbitris et nullis testibus praesentibus, contrahuntur…large quando in praesentia testium, sed sine consensu parentum…*"

[118] X 4.3.1,2,3, and c. 30 q.5 c.1.

[119] Schneidewin, *In quatuor institutionum*, 101.

[120] Domingo de Soto, *In quartum sententiarum commentarii tomus secundum* (Venetiis: Zenarium, 1584), d. 28, q. 1, a. 1, 151; Reynolds, *How Marriage*, 799.

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Von Beust and the Marriage Law of Saxony

If Roman law was useful to defend the new regulation of clandestine marriages, the actual breakthrough happened via Church and marriage ordinances, which invalidated marriages without parental consent.[121] Joachim von Beust incorporated some of these ordinances into a coherent edifice that was based on previous theological and legal works. He marshaled the most convincing arguments, thus favoring the process of consolidation. Von Beust was an assessor at the *Consistorium* and a professor of law at the University of Wittenberg. In 1586 he published his *Tractatus de sponsalibus et matrimoniis*, which became the standard guide to the nascent Lutheran marriage law.[122] As von Beust was a Wittenberg jurist, he paid special attention to Saxon law: the *Cellische Ehebedenken* (1545) and a Church ordinance of Elector August of Saxony (1580).[123] The former did not include Luther's definition but it did invalidate clandestine betrothals.[124] The Church ordinance of Electoral Prince August adopted Luther's definition that a marriage was clandestine and not binding if both parents'—or if they were dead, the grandparents'—consent was lacking. If the children had neither parents nor grandparents, their marriage was clandestine if only a single witness attended, and it had to be repeated in front of "honest people." This ordinance also issued heavy sanctions to repress clandestine marriage. If the children married against their parents' will, the ordinance permitted the fathers to disinherit their children. Moreover, if the children were discovered to have had carnal intercourse after a clandestine betrothal, they had to be punished with prison or another discretionary punishment.[125]

Von Beust inscribed the Church ordinance of August and the *Cellische Ehebedenken* into the tradition of the Church. Their antecedents, he wrote, were the Church fathers and medieval canon law.[126] He also observed that canon law did not require parental consent and was only based on the consent

[121] This practice also existed in many city laws. On the new marriage ordinances, see Roper, *The Holy Household*, 157–62; Witte, *From Sacrament*, 138; Henning P. Jürgens, "Eheordnungen - Ordnungen für die Ehe als 'weltlich Ding'," in *Gute Ordnung. Ordnungsmodelle und Ordnungsvorstellungen in der Reformationszeit*, eds. Irene Dingel and Armin Kohnle (Leipzig: Evangelische Verlagsanstalt, 2014), 221–37; Saskia Lettmaier, "Marriage Law and the Reformation," *Law and History Review* 35, no. 2 (2017): 461–510 (473–89). With regard to parental consent and clandestineness, see also, Schwarz, *Die Bedeutung der Sippe*, 60–66; Gottlieb, *Getting Married*, 124–137. Certain ordinances established criteria according to which the parents could lawfully deny their consent, see Sibeth, *Eherecht*, 120–21.

[122] Lück, "Zur Grundlegung," 170–2.

[123] The latter ordinance was also discussed beyond Saxony. See, for instance, the erudite work by the Schleswig jurist Paul Cypraeus (1536–1609): *De connubiorum iure tractatus* (Francofurti: Porssius,1605), 347. On August of Saxony see Staatliche Kunstsammlungen Dresden, *Kurfürst August von Sachsen: Ein nachreformatorischen "Friedensfürst" zwischen Territorium und Reich. Beiträge zur wissenschaftlichen Tagung vom 9. bis 11. Juli 2015 in Torgau und Dresden* (Dresden: Sandstein, 2017).

[124] Emil Sehling, *Die evangelischen Kirchenordungen des XVI: Jahrhunderts* (Leipzig: Reisland, 1902), vol. 1 first part, 294. The necessity of parental consent was established in another paragraph: *von ehegelubden ane bewilligung der eltern*. See p. 292.

[125] Sehling, *Die evangelischen*, 386.

[126] Joachim von Beust, *Tractatus de sponsalibus et matrimoniis ad praxin forensem accommodatus* (Witebergae: Ruhelii, 1588), 208–09; Kirstein, *Die Entwicklung*, 66–7.

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of the spouses. However, it was no longer applied in Saxony (*hodie in his terris non observatur*):

> Canon law removed discipline and obedience to the parents and offered the children a matter of sin. Therefore, it cannot and must not have the validity of law among good and pious men, because a law must be honest.[127]

Thus von Beust concluded that today, in these lands, the civil law concerning parental approval applied. Von Beust integrated the teachings of canon law with the positions of Luther, Schneidewin, and Mauser, and the Church ordinance.[128] He stressed the difference between the new Lutheran marital law and canon law. Hostiensis and Panormitanus had maintained that clandestineness alone did not invalidate a marriage, provided that both spouses confessed the clandestine marriage. However, because of the new ordinance, von Beust remarked, clandestine betrothals were not valid, even if they had been made in the presence of a single witness. Such betrothals must be repeated publicly in the presence of honest people.[129] In cases where a clandestine and a public marriage coexisted, the public betrothal had to be preferred to the "private and clandestine" one, unless the former had not been consummated.[130]

The Debate with Bellarmine and the New Meaning of "Clandestine"

While the new regulation of clandestine marriage was spreading throughout the Reformed lands, the Council of Trent reaffirmed the Catholic traditional teachings on consent. Despite strong demands for the repression of clandestine marriages, mostly from France and Spain, the requirement of parental consent was rejected.[131] The decree *Tametsi* established the necessity of observing public formalities in order for the bond to be created. The betrothed couple had to exchange consent before a parish priest and at least two witnesses.[132] Luther's definition of clandestine marriage was debated but eventually brushed aside. The reasons for this rejection were multiple, and there is no room to examine them in detail here. It should suffice to mention one: under divine law, marriage was based on the free consent of the spouses.[133] Parental authority

[127] Joachim von Beust, *Tractatus*, 202: "*...tamen hodie in his terris quod ad consensum parentum attinet, servatur ius civile, l. si ut proponis C. de nupt.* [C.5.4.5] *et non ius canonicum, quod tollit disciplinam et obedientiam erga parentes, ac praebet liberis peccandi materiam, unde nec debet, nec potest apud bonos et pios ullam vim legum habere, cum lex debeat esse honesta*."

[128] Joachim von Beust, *Tractatus*, 21.

[129] Joachim von Beust, *Tractatus*, 22.

[130] Joachim von Beust, *Tractatus*, 23.

[131] Jutta Sperling, "Marriage at the Time of the Council of Trent (1560–70): Clandestine Marriages, Kinship Prohibitions, and Dowry Exchange in European Comparison," *Journal of Early Modern History* 8 (2004): 65–108 (76–77); Reynolds, *How Marriage*, 896–982.

[132] See "Concilium Tridentinum," Sessio XXIV (November 11, 1563), in *Conciliorum oecumenicorum decreta*, eds. Giuseppe Alberigo et al. (Bologna: Dehoniane, 1962), 753–59.

[133] Charlotte Christensen-Nugues, "Parental Authority and Freedom of Choice: The Debate on Clandestinity," *Sixteenth Century Journal* XLV/1 (2014): 51–72 (59).

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would limit the children's freedom, which must be complete in spiritual matters.[134] As we saw earlier, for Luther it was God, and not the spouses themselves, who joined spouses together—and God's will was expressed through obedience to fathers. For Catholics, the fathers' power could not affect the sacrament, because this centered on the will of the parties. Moreover, as a sacrament, marriage was the purview of priests, and parental or secular authority could not intervene.

The Reformers rebuffed the decisions of Trent. In particular, Martin Chemnitz, a leading theologian of the Church of Braunschweig and coauthor of the *Formula of Concord*, published an imposing critique of the Council of Trent's decrees, *Examen decretorum concilii Tridentini* (1565–1573).[135] Chemnitz restated Luther's and the other theologians' ideas on clandestine marriage. Once again, he understood Roman legal teachings in the light of Scripture. The *patria potestas* was not only established by civil law but was also a divine order, he said. Divine law granted paternal authority over children not only in civil contracts, but also in contracting marriage. The fourth commandment and various biblical passages (Deuteronomy 7:3; Jeremiah 29:6; 1 Corinthians 7:36) supported this conclusion.[136] In his later work, the *Loci theologici*, Chemnitz also insisted that Luther had intended marriage not as a political or human union, but as a divine union: it had to be contracted according to lawful form, which was expressed by the word of God (Genesis 2:22; Matthew 10:6).[137] Clandestine marriages were a machination and work of the Devil (*machinatio et opus diaboli*) that disturbed the divine order.[138] Thus, for Chemnitz, a marriage without parental approval was a violation of divine law and clandestine.

Cardinal Robert Bellarmine argued that Chemnitz had confused marriage without parental consent with clandestine marriage. A marriage could be clandestine, he wrote, and nonetheless be contracted with parental approval; conversely, a marriage might be not clandestine but public and before the church, but nonetheless celebrated without parental approval.[139] Bellarmine's comment stressed the novelty of the Lutheran definition of clandestine marriage, which incorporated the need for parental approval. For Bellarmine, as for traditional Catholic teachings, a marriage with or without parental consent was

[134] Christensen-Nugues, "Parental Authority," 66. For the whole discussion, see 64–70. See also, Reinhard Lettmann, *Die Diskussion über die klandestinen Ehen und die Einführung einer zur Gültigkeit verpflichtenden Eheschliessung auf dem Konzil von Trent* (Münster: Aschendorff, 1967).

[135] Theodor Mahlmann, "Chemnitz, Martin," *RPP*, vol. II, 2007, 509–10.

[136] Martin Chemnitz, *Examen concilii tridentini* (Francofurti ad Moenum: Sande, 1707), 610.

[137] Martin Chemnitz, *Loci theologici* (Witebergae: Meisner, 1615), 251.

[138] Chemnitz, *Loci*, 251.

[139] Roberto Bellarmino, *Disputationum de controversiis christianae fidei ... tomus tertius* (Lugduni: Pillehote, 1610), c. XIX, 1548–9: "*In eadem sententiam descendit Martinus Kemnitius in 2 ar. Exa Concilii Tridentini, pa. 1272, 1273 et sequentibus, ubi tamen non recte, confundit matrimonia filiorum sine consensu parentum, cum matrimoniis clandestinis: potest enim fieri ut matimonium sit clandestinum, et tamen cum parentum consensu contractum: et contra non sit clandestinum, sed publicum et coram ecclesiam et tamen insciis et invitis parentibus celebratum*."

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not clandestine but public, even if it was celebrated without the knowledge or will of the parents.

Bellarmine's words sparked a heated reaction among the Reformers. Paul Tarnov and Johann Gerhard,[140] two leading theologians of the so-called Lutheran orthodoxy, responded that Bellarmine had to consider the different meanings of clandestine betrothal.[141] As Mauser and von Beust had written earlier, in a proper and stricter sense "clandestine betrothal" referred to betrothals contracted secretly (*clam*) where nobody was present. Usually, however, and in a more general sense, clandestine betrothals were those contracted in the presence of witnesses but without parental consent. For Tarnov and Gerhard, the crucial point was that these clandestine betrothals lacked the public authority of the parents, which the law of God expressed as a requirement for marriage.[142] Therefore, Gerhard claimed that "it was not without reason" that such betrothals should also be included in the group of clandestine betrothals, being so called not because of the location but because of the manner (*non tam a loco quam a modo*), because they were contracted against the laws and public law (*contra leges et jus publicum*), which required parental consent.[143]

Tarnov and Gerhard clarified that in the Lutheran definition of clandestine marriage, the adjective "clandestine" was employed to delimit not only the absence of publicity, but also the lack of parental approval. A clandestine marriage was a marriage that breached the divine order. In this sense it was not clandestine because of the location, but because of the manner: it was contracted in violation of divine law and civil law. The spouses had disobeyed the public authority instituted by God. They had breached the laws (divine law and Roman law) and public law (the new marriage ordinances).[144] "Public" was linked to the authority of fathers and magistrates, which was divinely established by God. "Private" was instead the fruit of an evil choice by the spouses, who had disobeyed God. This was the innovation introduced by the Reformers.

Bellarmine not only attacked the Lutheran definition of clandestine marriage, but also censured the motivation for the necessity of parental consent. He maintained that God was the author of marriage, in two ways. First, God had created marriage as an institution. Second, he inspired the couple to

[140] Markus Friedrich, et alii, eds., *Konfession, Politik und Gelehrsamkeit: Der Jenaer Theologe Johann Gerhard (1582–1637) im Kontext seiner Zeit* (Stuttgart: Steiner, 2017).

[141] Paul Tarnov, *De conjugio libri tres* (Rostochi: Pedani, 1614), 5–6.

[142] Johann Gerhard, *Loci theologici* (Berolini: Schlawitz, 1869), tom. 7, 89.

[143] Gerhard, *Loci*, 89: "*...ideo haud immerito clandestinorum sponsaliorum censui eadem adscribuntur, ratione appellationis petita non tam a loco, quam a modo, quod contra leges et jus publicum, quod consensum parentum requirit, contrahuntur*." In a similar way, Tarnov, *De conjugio*, 4–5.

[144] The discipline of public law was still embryonic at the time. However, Gerhard refers here to von Beust and Mauser. The former cites the new Church ordinance, while the latter cites Roman law and divine law. Therefore, we can assume that the term *leges* refers to Roman law and divine law, while "public law" identifies the law of magistrates. On the emergence of public law in early modern Germany, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, I (München: C.H. Beck, 1988), 73–224; Bernardo Sordi, *Diritto pubblico e diritto privato: Una genealogia storica* (Bologna: Il Mulino, 2020), 29–36. On the words "public" and "private," see the classic work by Peter von Moos, «*Öffentlich*» *und «privat» im Mittelalter* (Heidelberg: Winter, 2004).

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marry. It might occur that the recipient of the sacrament was inspired by the Devil, if s/he received it not for the glory of God and the health of his/her soul but for profit or a shameful or dirty advantage.[145] Thus there was no need for parental authorization, as the couple could be inspired by God in any case, and marriage as such had been instituted by God. Gerhard responded that the necessity of parental approval had already been established by the first marriage of Adam and Eve. This marriage had been decided by God, not by the spouses. Adam had not chosen his spouse of his own free will, nor had Eve sought a spouse of her own will: it had been God's will that intervened, and this was now represented by the will of the parents.[146] Gerhard straddled the basic Lutheran assumption: it was God who joined the couple. What God had once done in a nonmediated way, visibly and manifestly (*immediate, visibiliter ac manifeste*), Gerhard said, he now did mediately, invisibly, and hiddenly (*mediate, invisibiliter et occulte*) in lawful marriages. Therefore, a lawful marriage was a marriage where God was the author.[147] Ultimately, the marriage did not rest on the will of the parties, but was also an act of God.

Conclusion

The teachings of Luther, Schneidewin, Mauser, von Beust, and Gerhard gained popularity in seventeenth-century legal discourse, as they were collected and employed by Benedict Carpzov (1595–1666) in his *Jurisprudentia ecclesiastica seu consistorialis* (1649). As the great German jurist and historian Rudolph Sohm has argued, Carpzov is the best summary and the best evidence of the results achieved by the Lutheran reformers.[148] Carpzov repeated that clandestine betrothals were not just betrothals without witnesses but also betrothals contracted without parental approval, which were clandestine not because of their location but because of their modality.[149] In this way, Carpzov shows how the work of the early Reformers had taken hold in legal thought. These jurists and theologians were also leading practitioners (members of consistories, advisers to nobles and judges, lawyers, authors of Church and marriage ordinances), and so their ideas are likely to have found their way into practice. However, an important limitation of this study is that it has not been able to examine the court records of consistories.[150]

Luther and his fellow theologians and jurists managed to overhaul the notion of clandestine marriage. Clandestineness was no longer limited to a

[145] Bellarmino, *Disputationum*, 1554–5.

[146] Gerhard, *Loci*, 45.

[147] Gerhard, *Loci*, 45.

[148] Rudolph Sohm, *Das Recht der Eheschliessung aus dem deutschen und canonischen Recht geschichtlich entwickelt* (Weimar: Böhlau, 1875), 241.

[149] Benedikt Carpzov, *Jurisprudentia Ecclesiastica seu Consistorialis* (Hanoviae: Aubry, 1652), 379–80. On Carpzov, see Mathias Schmoeckel, "Benedict Carpzov the Younger (1595–1666)," in *Great Christian Jurists in German History*, eds. Mathias Schmoeckel and John Witte, Jr. (Tübingen: Mohr Siebeck, 2020), 156–173.

[150] See however, the cited works by Robisheaux, "Peasants and Pastors"; Steven Ozment, *The Bürgermeister's Daughter: Scandal in a Sixteenth-Century German Town* (New York: HarperCollins, 1997).

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lack of witnesses or other procedural requirements that could confirm what had taken place; the definition was extended to include approval by the public authority. This perspective marked a radical difference from Roman Catholic teachings, according to which marriage was dependent upon the freedom of the parties, and clandestineness delineated the absence of witnesses or legal formalities. For Lutheran theology, God joined the spouses and placed children under the authority of their fathers, who were the relevant "public" authority that the children must obey; by extension, spouses must act publicly and seek the consent of their parents, thereby adhering to God's will. A "private" and personal choice by the spouses signified a rebellion against God, and should be dissolved.

For medieval canonists, the term "clandestine betrothal" could have various and multiple meanings. From the works of Schneidewin and Mauser to the monumental compilation by Carpzov, clandestine betrothal was reduced to two types: the absence of witnesses, and the absence of parental approval. Canon law continued to govern the first type, but this type of marriage could always be annulled. The second type was clandestine not because of the location, but because of the manner: it breached the commandment of God. In this regard, the legislation was based upon theological interpretation that informed a reassessment of legal sources. The theologians claimed that Matthew 19:6 established that marriage was not only a free decision by the couple but an act that expressed the will of God. The fourth commandment of the Decalogue imposed upon children that they obey their parents. A clandestine marriage was disobedience to God, a theft, and an act of Satan; it could never be valid.

Theologians and jurists clung to Roman law, which required the consent of the fathers before a marriage was contracted. They claimed, however, that the Romans also considered mothers, grandparents, guardians, and other individuals who had authority over the children. Taking the fourth commandment as a beacon, they interpreted the word *parentes* as referring to parents, and not to fathers alone. Because Roman law complied with divine law, it had to be observed as a divine ordinance, a law that was also binding on conscience. Conversely, canon law had to be disregarded. Against divine law, it did not require parental consent, and it accepted as binding marriages that had been contracted in secret. The new marriage ordinances translated theological teachings into legal norms, and imposed sanctions on couples who contracted clandestine marriages.

The redefinition of clandestine marriage was necessary for social, legal, and theological reasons. As Luther himself wrote, marital litigation regarding clandestine marriages was frequent and troublesome. In canon law, a clandestine marriage was valid, but proving its existence could be extremely difficult. The consequence was that if the marriage could not be proved, the parties involved would be considered still able to marry. In that case, the party in question would nonetheless remain obliged in conscience to his or her "clandestine" husband/wife, living as a perpetual adulterer and placing his/her soul's salvation in jeopardy. By declaring that clandestine marriages were invalid, and requiring parental consent, Luther aimed to solve this problem. He

wanted to eradicate the practice of clandestine marriages and instill obedience to public authority.

At the same time, Luther's solution rested on theological underpinnings, in particular the two kingdoms doctrine. Luther's anthropology started from man's sinfulness and incapacity to redeem himself, and in its most radical form it denied freedom of will (a standard postulate of Catholic theology). Man was corrupted by sin and unable to save himself. He was unable to perform virtuous acts alone, and was constantly dependent upon God's grace. Through faith he became a citizen of the heavenly kingdom, which was governed by the Gospel, but he was still a sinner and needed governance and guidance in the earthly kingdom. In the earthly kingdom, God governed the world through divine institutions, namely the *Hausvater*, the priest, and the magistrate. These natural offices had specific tasks that mirrored God in the governance of the world.[151] Fathers had the divine task to nurture and educate their children. Children had to obey their fathers.[152] In this context, the association between parental consent, marriage, and divine will becomes clearer, as does the connection with clandestineness as a violation of divine order.

Luther redefined the essential elements of clandestine marriage, which led to a transformation of the legal regulation. The legal framework was cemented by a moral structure rooted in the fourth commandment and other biblical passages. Certainly, the introduction of parental approval into the notion of clandestine marriage was also determined by social needs. The necessity to protect families against the risk that their power and riches might be diminished by the marriage of two unequally wealthy persons was a powerful engine for this change. Moreover, the practical difficulties that affected the previous canon law regulation undoubtedly prompted its revision. However, none of these alone can explain the switch in the definition of clandestine marriage. Lutheran theology provided the crucial argument for the reformulation of the notion of clandestineness. Public and private took on new meanings that were interwoven with obedience or disobedience to God. This seems ultimately to have been an effect of the two kingdoms doctrine and the requalification of the powers of state, Church and household within society. The Council of Trent reacted against clandestine marriages and imposed public celebration in church and in the presence of witnesses. These requirements made it hard to escape family ties and parental influence. However, to preserve the fundamental principle of freedom in the matter of salvation, parental consent could not be accepted.

Opposition to marriages without parental approval persisted in other countries across Europe. While Calvin eventually returned to canon law and refused to annul clandestine marriages,[153] in France an *Édit contre les mariages*

[151] Witte, *Law and Protestantism*, 201.

[152] See the classic study by Gerald Strauss, *Luther's House of Learning: Indoctrination of the Young in the German Reformation* (Baltimore: Johns Hopkins University Press, 1978).

[153] John Witte, Jr., "Clandestine Marriage and Parental Consent in John Calvin's Geneva: The Gradual Synthesis of Theology, Statutes, and Case Law," in *Law and Marriage in Medieval and Early Modern Times*, ed. Per Andersen (Copenhagen: Djøf, 2012), 273–98. A similar situation occurred in England, where the *Reformatio Legum Ecclesiasticarum* (1553) would invalidate marriages contracted

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clandestins by Henry II in 1556 defined marriages contracted against the will of the parents as clandestine marriages.[154] In 1579, an ordinance obliged sons and daughters to seek their parents' or guardians' permission to marry. Marriage without parental consent was equated with kidnapping, and a son or daughter could be disinherited and sentenced to death.[155] In the Netherlands, a church ordinance in Dordrecht (1578) invalidated marriages without parental approval.[156] This, however, is an aspect on which further studies will expand. This article has only been able to shed some light on the notion of clandestine marriage in sixteenth-century Lutheran thinking.

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without parental approval. However, even though this measure enjoyed vast support, in 1597 the parliament decided to keep the traditional rule that marriage is formed by the sole consent of the spouses. See Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge: Cambridge University Press, 1988), 134–5.

[154] Henry II, *Édit contre les mariages clandestins* in François-André Isambert, *Recueil général des anciennes lois françaises*, tome XIII (Paris, 1828), 469.

[155] *Ordonnance rendue sur les plaintes et doléances des états-généraux assemblés à Blois en novembre 1576*, art. 41 and 42, in Isambert, *Recueil*, tome XIV/1 (Paris, 1829), 392.

[156] See the classic study by Emil Friedberg, *Das Recht der Eheschliessung in seiner geschichtlichen Entwicklung* (Leipzig, 1865), 480–1.

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