INTRODUCTION

It is a scene we are all familiar with: another country church; another bride in incongruously virginal white walks up the aisle, to be given away by a father under whose roof she has not resided for over a decade. The minister asks whether there are any impediments to their union, and members of the congregation look round furtively, perhaps half hoping that an unknown previous spouse will stand up and object. The parties exchange their vows and are declared to be husband and wife.

Many of the components of the supposedly ‘traditional’ wedding – the diamond engagement ring, the white dress, the morning suits, the late-afternoon ceremony followed by dinner and dancing – are innovations of the nineteenth and twentieth centuries. But celebration in church can trace a longer pedigree, and the scene above would have been recognisable to our forbears. While the words of the marriage service have been periodically updated, all the fundamentals currently required by law for a marriage according to the rites of the Church of England – banns or licence, celebration in church, and registration – were in place by the mid-sixteenth century. Today, a Church of England wedding is merely one of a number of permissible routes to legal marriage and only a minority of couples choose to marry in this way. In the sixteenth century, however, a ceremony conducted according to the rites of the Church of England was prescribed as the only method for tying the knot, and the majority of couples observed its rules. Long before the Clandestine Marriages Act of 1753 made certain formalities essential to the creation of a valid marriage in England and Wales, the

practice of celebrating a marriage in a church, or at least before an Anglican clergyman, had become virtually universal.

Yet this is not the impression of eighteenth-century marriage practices conveyed by modern commentators. Instead, stories of high-profile clandestine marriages, non-marital cohabitation and various esoteric ceremonies such as jumping over a broomstick abound. Some scholars have gone so far as to suggest that marriage in church was in fact the practice of a minority, and that those without property had no need to observe legal rites and rules. Others depict a system in chaos: according to one commentator, ‘before 1753, marriage was to a considerable extent out of the control of either church or state’. From this perspective the 1753 Act has been seen as a watershed in the history of the legal regulation of marriage, marking the change from a pluralistic system, in which multiple forms of marriage were accepted, to a more restrictive, prescriptive approach. According to this interpretation the Act

2 Most notably in the work of J. Gillis, whose work *For Better, For Worse: British Marriages 1600 to the Present Day* (Oxford University Press, 1985) is the mainstay of many subsequent accounts. For an analysis of the extent to which subsequent commentators have relied on his account, see R. Probert, ‘Chinese Whispers and Welsh Weddings’ (2005) 20 *Continuity and Change* 211.


Introduction

‘was designed to regularise state control over marriage and ... echoes ... the triumph of law over custom’. 6

Academic opinions tend to be divided over the pros and cons of most aspects of modernisation, but the 1753 Act seems to have attracted nothing but adverse criticism. It has been perceived as a patrician measure, designed to serve the interests of the ruling classes whose aim was to increase their control over the marriages of their children rather than to benefit the majority of the population.7 Others have seen it as a means of imposing ‘middle-class’ notions upon the rest of society, identifying it as ‘part of a more general movement to discipline the lower orders’. 8 It is taken as a given that the freedom of choice of those intending to marry was circumscribed by the Act.9 It has even been claimed that the Act fundamentally altered the very meaning of marriage for the participants,10 transforming marriage from a private and meaningful rite to a bureaucratic transaction. 11 The fact that a Church of England ceremony was required – with exceptions only for Jews and Quakers – has led to accusations of intolerance and discrimination on the part of the legislature.12 And it has been criticised as being prejudicial to women in particular: when the Bill was debated,

12 Howard, History of Matrimonial Institutions, p. 460.
it was claimed by one of its opponents that it would be ‘of the most dangerous consequence to the female sex’, as a woman would no longer be able to enforce a promise of marriage. A number of later commentators have adopted the view that the Act did indeed cause hardship to women and led to a rise in the number of those who were debauched under a promise of marriage and then abandoned, thereby contributing to the rise in illegitimacy.

The operation of the Act has attracted just as much criticism as the motivations of the legislators. It has been described as ‘draconian’, ‘stringent’, and ‘in many instances productive of great hardship and injustice’. It has also been assumed that it was strictly interpreted: commentators have claimed that a marriage might be annulled on the basis of trivial or accidental non-compliance with the formalities. Finally, it has been seen as a failure: persuaded by purported evidence of cohabitation in the late eighteenth century, Hay and Rogers conclude that the attempt to regularise plebeian marriage did not succeed, and that in the end custom triumphed over law.

So the Act is generally depicted as harsh, biased, and ultimately ineffective. But how far are such criticisms justified? The evidence...
on which they are based is often deficient. Basic errors about the terms of the Act crop up with alarming frequency. No modern commentator has explored the case law on the interpretation of the Act in any depth. And there is very little information about the way in which ordinary people experienced the law: few parish-level studies have been devoted to the specific issue of conformity. When I began to look at the operation of the law of marriage in the eighteenth century I was constantly surprised by the disjunction between the claims made by secondary sources and the evidence of the primary sources. At regular intervals throughout the research and writing of this book I have convinced myself that I must have misunderstood something. But every time I have returned to the original sources – whether the Act itself, legal texts, contemporary cases on marriage law, the fiction of the time, or the parish registers that form the mainstay of a number of case studies used in this book – I have been reassured. In particular, I have drawn comfort from the fact that other scholars have had to explain away much evidence that does not fit with their arguments. It is of course entirely possible that some eighteenth-century individuals were confused about their legal status, but the more evidence that has to be explained away on the questionable basis of the confusions of contemporaries, the more any such theory should be regarded with suspicion. Occasional confusions could occur, but mass delusion seems unlikely. On the basis of such primary evidence, I have come to the conclusion that the 1753 Act did not constitute such a radical break with the past as has been claimed, was almost universally observed, and was not subject to harsh interpretation by the courts.


20 The two most common errors are that the marriage of a minor would be invalid in the absence of parental consent, and that a failure to comply with any requirement of the legislation rendered the marriage void: on the actual requirements of the Act see further Chapter 6.

21 Parker, Informal Marriage, p. 61 cites only a single case when discussing the impact of the Act, while the discussion of post-1754 cases in Stone’s Road to Divorce and Outhwaite’s Clandestine Marriage is relatively brief.

22 Indeed, in earlier publications I followed the standard view that a contract per verba de praesenti constituted a valid marriage: see e.g., ‘The Impact of the Marriage Act of 1753: Was it Really “A Most Cruel Law for the Fair Sex”?’ (2005) 38 Eighteenth-Century Studies 247. It took a considerable amount of primary evidence to persuade me otherwise and to give me the confidence to challenge this view.
But this is to anticipate. Two preliminary issues need to be considered before I can begin to substantiate these arguments: first, the definition of certain basic concepts that will recur throughout the book, and, secondly, the nature of the evidence on which I have relied.

**Defining Regular Marriage and Its Alternatives**

In order to demonstrate that the 1753 Act did not constitute a radical break with the past it is necessary to consider law and practice both before and after the Act. The focus will be on the decades immediately before and after 1754, when the Act came into force: too often in other accounts, as we shall see, evidence from the sixteenth, seventeenth, or nineteenth centuries is pressed into service as ‘evidence’ of trends in the eighteenth. The extent to which the 1753 Act was an innovation, and the impact that it had, can only be judged by examining law and practice as it stood in the eighteenth century.

It is appropriate to start with what was required for a regular marriage before 1754, as a basis for evaluating how far practice in the early eighteenth century departed from these prescriptions and how far the 1753 Act built on existing requirements. Christian marriages had long been celebrated with due ceremony, and the canon law that governed marriage prior to 1754 made it clear that marriages should be celebrated according to a prescribed form. The canons—as revised in 1604—stipulated that the marriage should be preceded by the calling of banns in the church of the parish or parishes where the parties resided, or by the obtaining of a licence from the appropriate authorities. Further detailed prescriptions required minors to obtain parental consent and stipulated the hours and even days when marriages could take place. The canons also stated that the marriage should be celebrated by a minister, in the church of the parties’ parish of residence, before at least two witnesses, and recorded in the church register. Before 1754,

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23 Specifically, on 25 March, which under the old calendar had marked the start of the new year. In 1752 the Julian calendar was adopted, and henceforth the new year began on 1 January. Throughout the book I have used the modern style of dating: i.e., 1 January 1733 rather than 1 January 1732/3.

24 On the details of the canonical requirements, see Chapter 6.
a marriage was only ‘regular’ if it complied with all of the requirements of the canon law; the same exacting definition will be used in this book.

The very existence of such rules inevitably necessitated a legal category to describe those marriages that failed to comply. There has been some debate among modern scholars as to whether non-compliant marriages should be described as ‘clandestine’, ‘irregular’, or ‘informal’: some use different terms to denote different forms of non-compliance, while others encompass all deviations from the required norm within a single term. Such modern classifications are, however, unsatisfactory in that they do not reflect eighteenth-century usage. I have not found the term ‘informal marriage’ in any eighteenth-century text, and the term ‘irregular marriage’ but rarely, by contrast the term ‘clandestine marriage’, widely used in the eighteenth century, had a specific meaning, and one that is crucial for the correct interpretation of contemporary legal texts and cases. Although to modern readers the term ‘clandestine marriage’ might suggest secrecy and romantic elopements, in the eighteenth century it would have been understood simply as a marriage celebrated before a clergyman of the Church of England otherwise than

25 T. Benton, *Irregular Marriages in London Before 1754*, 2nd edn (London: Society of Genealogists, 2000), for example, reserves the term ‘clandestine’ for marriages that were not preceded by banns and did not take place in the parties’ parish of residence, and uses the term ‘irregular’ either to denote marriages that took place in the parties’ parish of residence but without banns or licence, or marriages that were preceded by banns or licence but did not take place in the parties’ parish of residence.

26 See e.g., Outhwaite, *Clandestine Marriage*, p. xiv, who uses the term ‘clandestine’ to describe all those marriages that did not comply with the canon law; and Parker, *Informal Marriage*, who employs the term ‘informal marriage’ in a similar fashion.


28 That it was used in a less specific sense in the medieval period and again in the nineteenth century, after the decision in *Dalrymple v. Dalrymple* (1811) 2 Hag. Con. 54; 161 ER 665 (see further Chapter 2), should not be taken as evidence of its meaning in the eighteenth century, any more than the Gothic revival of the early nineteenth century should lead an outsider to assume architectural continuity from the Middle Ages.
in strict accordance with the requirements of canon law. Both the negative and the positive aspects of this should be stressed: the failure to comply with the law was not the sole defining feature of such a marriage, since exchanges that did not involve an Anglican clergyman were not described as clandestine marriages.

The term 'clandestine marriage' will therefore be used in this book in the way in which it would have been understood in the eighteenth century. This usage also has the advantage of drawing a sharp distinction between marriages that were celebrated before a clergyman – whether regularly or clandestinely – and the contract per verba de praesenti. The latter simply comprised an exchange of vows between the parties in words of the present tense; for example ‘I take thee for my wife/husband’. It was binding on the parties (assuming it could be proved to the satisfaction of the ecclesiastical courts: no easy task, as Chapter 2 will show), but it was not, by itself, a complete marriage. Maintaining the distinction between a clandestine marriage and the contract per verba de praesenti is essential to an understanding of law and practice prior to 1754, since too often the evidence of one form of non-compliance has been mistaken for evidence of another. Since it is a fundamental contention of this book that it is misleading to describe a contract per verba de praesenti as a marriage, it will be referred to as a contract, in line with eighteenth-century usage.

Of course, to say that the contract per verba de praesenti was not the same as a marriage inevitably poses the question: by what criteria is this being assessed? This leads on to a final definitional point. It is commonly claimed that there were numerous alternatives to a

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29 This is also the meaning ascribed to it by Stone: see Road to Divorce, p. 96.
30 On marriages celebrated by non-Anglican ministers, see Chapter 4.
31 The reason for this was that such exchanges were not regarded as marriages, rather than because they were not regarded as clandestine. One could, for example, have a clandestine contract: see e.g., M.N., A letter to a Friend Concerning Marriage Contracts, occasioned by a late Appeal from the Dean of Arches to a Court of Delegates (London, 1740), p. 29. The ample evidence demonstrating the necessity of an Anglican clergyman to preside over the ceremony will appear in the course of the following chapters.
33 Stone, Road to Divorce, p. 46, suggested that the terminology of ‘contract marriage’ was used in the eighteenth century but there is no support for this in the primary sources: see further Chapter 2.
regular marriage prior to 1754. One major problem with such accounts is that the status and function of the practices described is not always made clear. This leads to a number of practices (such as, for example, that attributed to the inhabitants of the Isle of Portland of not marrying until the woman was pregnant) being described as marriages or alternatives to marriage. Pre-marital sex, by itself, hardly seems to merit the description of an alternative marriage practice. It is therefore important to determine what is actually meant by an ‘alternative’ to marriage.

A practice may be an ‘alternative’ to a regular marriage in two different ways. First, it may offer a different way of achieving the same end, i.e., a different route to all the same rights that would usually attach to a regular marriage. Secondly, the term ‘alternative’ may be used in a more radical sense to denote a different type of marriage that does not carry the same rights or legal status. In considering the prevalence of, and motivation for, alternative marriage practices, it is important to be certain which of these two types of alternative is meant.

From the first perspective, if a particular practice or ceremony did not give rise to a legally valid marriage, it would not be appropriate to regard it as a genuine alternative to a regular marriage. After all, a modern client seeking legal advice would be unimpressed by a legal advisor who expounded on all of the possible options but then admitted that none of them would be valid in the eyes of the law. With this in mind, some basic criteria for assessing whether a particular practice can really be described as an alternative to a regular marriage in the first sense will be suggested. First, a marriage may be defined as a relationship that is at least intended to be permanent: it is binding on the parties in a way that mere cohabitation is not, and exit from the relationship is regulated by law. A second criterion is that the relationship is recognised by the law, which accords a defined package of legal rights to the parties. Finally, marriage may be defined as a relationship that is accepted as legitimate by both law and society. The parties are regarded as a unit and would be allowed to set up home together with neither legal punishment nor social disapproval. The term ‘full alternative’ will

34 See e.g., Parker, Informal Marriage, p. 27; Outhwaite, Clandestine Marriage, ch. 2, who identifies no fewer than seven types of what he terms ‘clandestine marriages’. 35 See e.g., Parker, Informal Marriage, p. 26, who describes it as a ‘trial marriage’.
be used to denote practices other than regular marriage that meet all these criteria.

From the second perspective, a less legalistic definition of marriage should be applied, but it is still important to make sure that like is being compared with like. A particular practice could hardly be considered as a real alternative to a regular marriage if it did not fulfil broadly the same functions. If a couple were not actually living together, could they really be regarded as engaging in an ‘alternative marriage practice’? It may be objected that not all eighteenth-century spouses lived under the same roof, but the fact that some did not does not mean that co-residence should not be a basic criterion for assessing whether a practice resembles a marriage. But at the same time co-residence might be explained by convenience rather than an emotional relationship: our concern is with couples, and therefore with those who were in a sexual relationship. A third potential element – namely the way in which a couple defined themselves – does not lend itself so easily to objective evidence, but on occasion we do have surviving statements from individuals that can throw light on their own perception of their status. Thus, the term ‘functional alternative’ will be used to denote a relationship that involved co-residence, sex, and, where this can be ascertained, some recognition by the parties themselves that the relationship was felt to be equivalent to a marriage.

These different meanings of ‘alternative’ will be used to analyse different practices for which the status of marriage (or of an alternative to marriage) has been claimed, both before and after 1754. After the 1753 Act, there was no question of any alternative form of marriage being a full alternative (at least if it took place within England and Wales and did not comply with those terms of the Act that were mandatory), but the question remains as to whether functional alternatives existed, as well as whether various evasive measures resulted in valid marriages.

Within this conceptual framework, a further question arises regarding the nature of the evidence used to determine whether any particular practice was a full or functional alternative to regular marriage.

VARIETIES OF EVIDENCE

The devil, it is said, has all the best tunes. It could also be said that those who argue that the 1753 Act was an imposition on ancient