

Introduction

John Witte, Jr. and Gary S. Hauk

Christianity has had a decisive influence on Western family law for two millennia, though it drew heavily on classical and Jewish prototypes and has gradually given way to modern liberalism and post-Christian teachings. In the centuries before Christ, ancient Jewish and Greco-Roman cultures viewed the marital family as a spiritual and temporal institution that was subject to both religious and political authorities and norms. Early Christians adapted this dialectic of religion and law in the church's efforts to govern family life, and eventually integrated ancient norms and practices into natural, covenantal, and sacramental frameworks. Particularly after the Christianization of Rome in the fourth and fifth centuries, church and state authorities came to enforce parallel norms of sexual etiquette, courtship, and betrothal; marital formation, maintenance, and dissolution; conjugal duties, debts, and desires; and parental roles, rights, and responsibilities. Church and state authorities issued parallel prohibitions on fornication, adultery, sodomy, incest, polygamy, prostitution, contraception, abortion, and other matters of sexuality and reproduction. And they operated interlocking tribunals to enforce these norms: the church governed the spiritual aspects of family life through its canons and courts, its consecration and registration of weddings, its baptism and catechesis of children, and its blessing and burial of the dead. The state governed the temporal aspects of family life by policing and punishing sexual crimes, controlling marital property and inheritance, and regulating household relations. Church and state officials separately and together also prosecuted sexual and marital crimes of fornication, adultery, incest, bestiality, clandestine marriage, bigamy, marital violence, and abuse.

While church and state officials often cooperated in creating and enforcing Western family laws, they also clashed over the scope of their respective jurisdiction and authority over family life – especially in the fifth, twelfth, sixteenth, and nineteenth centuries, when momentous shifts redefined

church–state relations in Western societies. In particular, the nineteenth-century reforms, born of Enlightenment liberalism, permanently broke Christianity’s dominant influence over the theory, law, and culture of the family, though many early Enlightenment figures retained traditional teachings about sexual ethics and family law, albeit with new arguments from nature, reason, utility, and common sense. The liberalization of traditional family norms has accelerated in the past half century. While today the secular state dominates Western family law, key aspects of this state law still reflect the teachings and practices of earlier Christian, classical, and Jewish cultures. Moreover, Christian clergy, scholars, and advocates still remain deeply involved in family-law policy and reform movements in the West and well beyond. And numerous churches today – Catholic, Protestant, and Orthodox alike – still operate internal legal and disciplinary systems to help govern the family lives of their voluntary members.

To tell this complex story in a single volume, we focus on twenty-eight titans who helped to shape the theory and law of sex, marriage, and family life in the West from biblical times until today. We have selected illustrative figures whose contributions to this tradition were both distinct and enduring. We have sought to balance Catholics, Protestants, and a few Orthodox figures who had influence in the West, and we have placed leading popes, emperors, and kings alongside influential jurists, theologians, and philosophers. What emerges is a running set of twenty-eight portraits chronologically arranged over some twenty-eight hundred years.

In Chapter 1, Elliot N. Dorff surveys the intricate Mosaic laws on sex, marriage, and family life set out in the Hebrew Bible and their elaboration by the rabbis of the Mishnah and Talmud. The Jewish tradition established many of the basic Western rules of betrothal and marriage, marital gifts and property, weddings and celebrations, endogamy and exogamy, marital sex and spousal duties, procreation and education of children, adultery and incest, divorce and remarriage, death and inheritance. Early Christianity inherited this complex Jewish legal system and absorbed many of its teachings, even while rejecting Jewish rules of polygamy, levirate marriage, concubinage, and unilateral male divorce. Christian theologians and jurists returned often to these Mosaic rules and the biblical narratives and prophetic elaborations surrounding them. Some Christian jurists also engaged the rabbinic expositions of particular rules, none more fully than English jurist John Selden in the seventeenth century (Chapter 16).

In Chapter 2, on Jesus and St. Paul, Gary S. Hauk shows that Jesus called Christians to live by the letter and spirit of many of the Jewish laws of marital fidelity, sexual purity, and love of children. Yet Jesus also redefined the family

to include all who serve the reign of God, and he transformed weddings and marriages into metaphors for the relationship between God and the faithful. Jesus's most famous statement on marriage was set out in Matthew 19, where he refers to the verses in Genesis in which God "made them male and female" and said, "For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh." Thus, Jesus proclaims, "they are no longer two, but one flesh. Therefore, what God has joined together, let no one separate." St. Paul, a Jew who converted to Christianity, elaborated Jesus's teaching by calling Christian marriage a *mysterion*, or *sacramentum*, modeled on Christ's sacrificial love for the church. Paul further urged Christian spouses to love, nurture, and care for each other and their children, to respect the conjugal rights and needs of the other spouse, and to avoid fornication and sexual vice, even sexual activities permitted by the Jewish and Roman law of his day. Like Jesus, Paul also severely limited divorce and remarriage among Christians and called believers to lifelong devotion to their parents, spouses, and children. These New Testament teachings have remained a perennial touchstone for Western family law to our own day.

In Chapter 3, on Emperor Constantine (r. 306–37 CE), Judith Evans Grubbs makes clear that Christian teachings on the marital family were shaped not only by Jewish law, but also by prevailing Greco-Roman family law and culture. For nearly half a millennium before the time of Jesus, Rome had worked out a complex system of law regarding marriage and family, marital property, and inheritance. In the fourth century, the first Christian emperor, Constantine, began to blend Roman and Christian traditions in his new legislation on the family. Constantine's laws strengthened engagement contracts that protected young women from exploitation; restricted marriages and inheritances across class lines; put new limits on the exposure or enslavement of unwanted children; directed that public aid be given to poor parents with young children; eased testamentary restrictions on the celibate and childless; and prohibited married men from having both a wife and a concubine. Some of these family reforms were not (necessarily) Christian in inspiration, Evans Grubbs insists, but they became an important part of later Christian family laws. Moreover, Constantine's legislative efforts set the stage for the more overtly Christian family legislation of later Christian emperors, most notably Justinian (Chapter 6).

In Chapter 4, on St. Augustine of Hippo (354–430), David G. Hunter shows how this leading Western church father offered the most comprehensive theology of sex, marriage, and family life in the first millennium of the Western church. Augustine steered a course between the sexual renunciation of some church fathers and the sexual liberties still allowed by Roman law and

culture in his day. Calling marriage and family life good, even if celibacy and chastity might be better, Augustine identified three main goods or goals of marriage: the procreation and nurture of children (*proles*); the fidelity and troth of husband and wife (*fides*); and its permanence or indissolubility, which enables the marital union to function as a sacred symbol (*sacramentum*). Augustine also emphasized the need for sexual purity and restraint, even in the marital bed, and reduced divorce to mere separation of a couple in cases of serious fault, with a right to remarry only after the death of one's spouse. He also confirmed traditional Aristotelian teachings that the marital family was the foundation of the republic. Catholics and Protestants alike would return often to Augustine's insights, and his account of the three marital goods of children, fidelity, and sacrament remains part of the backbone of modern Catholic canon laws and theologies of marriage to this day.

In Chapter 5, Vigen Guroian outlines the thought of the leading Eastern church father St. John Chrysostom (347–407), who offered the most comprehensive teachings on sex, marriage, and family life for the Orthodox Christian tradition. Describing the marital family as a “little church,” Chrysostom encouraged marital couples to practice mutually sacrificial love and respect for each other and their children. Unlike Augustine and other church fathers, Chrysostom emphasized the importance of marital sex, insisted on equal conjugal rights for husbands and wives, and encouraged clergy to marry. He also encouraged both fathers and mothers to invest deeply and sacrificially in the care, nurture, education, and spiritual formation of their children. Although he prescribed marital fidelity and stability in accordance with the Bible, he allowed for divorce and remarriage in serious cases of family breakdown, especially when a wife or children were seriously imperiled. Following St. Paul's teachings, however, he discouraged widows and widowers from remarriage, instead calling on the church to embrace and support them as members of the broader Christian family. Chrysostom's teachings about the family had a monumental influence on Eastern Orthodox and Western Christianity alike, and they have been key parts of the neopatristic renaissance in Orthodox circles today (see Chapter 23).

In Chapter 6, on Emperor Justinian (r. 527–65), Peter Sarris presents Justinian's massive *Corpus Iuris Civilis* and Novel Constitutions as the most important synthesis of Roman and Christian laws on sex, marriage, and family life to survive from the first millennium. While privileging chastity and celibacy, Justinian's laws established clearly that marriage is a consensual, heterosexual, monogamous union, presumptively for life, designed for the mutual protection and support of husband and wife, their shared procreation and nurture of children, and the legitimate transmission of family property to

the next generation of relatives. Justinian's laws strengthened marital formation requirements, sharply restricted divorce and remarriage (albeit temporarily), streamlined inheritance rules among family members, and provided new protections for children and slaves within the marital household. These laws also called for severe punishment of adultery, incest, polygamy, and prostitution, and took strong steps to stamp out sodomy and homosexual practices. Justinian's collation and synthesis of Christianized Roman laws, though largely lost to the West after the sixth century, were rediscovered in the eleventh century. They provided a strong legal foundation for the laws of Western churches and states throughout much of the second millennium and inspired hundreds of legal commentaries by leading Western jurists.

In Chapter 7, on Theodore Balsamon (ca. 1130–99), John Anthony McGuckin shows that Justinian's family laws continued to govern the Eastern Byzantine Empire and were periodically supplemented by fresh imperial and canonical laws and commentaries. In the twelfth century, Theodore Balsamon, a great monastic jurist and later Orthodox patriarch, brought all these first-millennium laws together in a massive legal synthesis that remained at the heart of Orthodox canon law until modern times and spilled over into Western canon law. Balsamon largely retained Justinian's family laws, but he placed new emphasis on elaborate church liturgies for valid marital formation, elevated marriage into a sublime expression of a hypostatic divine union, and emphasized the need for sexual purity within and beyond the marital bed, especially around the many holy days of the church. Balsamon also, however, severely limited the status and rights of women in society, churches, and homes, and issued several misogynist and patriarchal directives. Although these ran contrary to the more egalitarian teachings of earlier Greek fathers, they became commonplaces in some later Orthodox and Western Christian communities.

In Chapter 8, Anders Winroth shows how the rediscovery of many Roman law and patristic texts in the later eleventh century helped create the medieval church's law and theology of marriage and family life. The anchor legal text of medieval canon law was Gratian's twelfth-century *Decretum*, which, in two iterations, assembled many of the legal, theological, and canonical sources of the first millennium and synthesized them authoritatively. Gratian drew a clear distinction between betrothals, which could be broken for a number of causes, and valid marriages, which were indissoluble once properly contracted. A valid marriage, Gratian insisted, required both consent and sexual consummation between a man and a woman, each of whom could thereafter claim conjugal rights against the other. The parties had to have the fitness and capacity to marry each other, however, and various blood, family, and spiritual

ties between the couple were absolute impediments of incest that would lead to annulment. Gratian regarded divorce as separation only, permitting no right to remarry until one's spouse died. He insisted that clergy and monastics be celibate and chaste, echoing conciliar decrees of mandatory celibacy, which became an absolute requirement for ordained Catholic clergy after 1123. Gratian's *Decretum* inspired hundreds of glosses and commentaries over the next centuries and comprised the first part of the *Corpus Iuris Canonici* (1582).

In Chapter 9, Giulio Silano demonstrates that while Gratian collected many first-millennium canons, Peter Lombard (d. 1160) added many first-millennium theological sources on the family and drew them together in an impressive synthesis in his four-volume *Book of Sentences*. Lombard repeated the three Augustinian goods of marriage, but he emphasized that marriage was itself the first sacrament, reserved only to baptized members of the church in good standing. He repeated Gratian's rules of marital formation and impediments, but he stressed that mutual consent alone could make a marriage, even without wedding ceremonies and other formalities or, for that matter, sexual intercourse. Lombard had a positive view of marital sex as an expression of love, fidelity, and conjugal rights, but he stressed that children were an essential part and product of the institution of marriage. He also stressed that the nuclear family of husband, wife, and child was the Christian family ideal, modeled on the holy family of Mary, Joseph, and Jesus. Peter Lombard's collection and syntheses of texts shaped Christian theologies of marriage and the family for the next half millennium and, like Gratian's *Decretum*, were subject to hundreds of commentaries.

In Chapter 10, Charles Donahue, Jr. shows how two powerful popes, Alexander III (r. 1159–81) and Innocent III (r. 1198–1216), put into legal form many of the family-law teachings of Gratian and Lombard and their commentators. These popes' many encyclicals and canons, collected in the *Liber Extra* of 1234 (the second core text of the *Corpus Iuris Canonici*), confirmed that marriage was both a heterosexual, monogamous union and an indissoluble sacrament of the church. A valid marriage was formed either by a betrothal promise followed by intercourse, or by mutual consent of marriage stated in the present tense with or without consummation. Couples were urged to marry with parental consent, witnesses, liturgies, and priestly blessings, but none of this was required. Parties could separate for serious causes like adultery, but they could not remarry until their spouse had died. Marriages could be annulled if the parties discovered various defects of consent (like, fear, error, insanity, or frigidity), religious impediments (like differences in religion or one party's prior solemn vow of chastity),

or incest born of blood, family, or spiritual ties between the man and woman. These intricate canon-law rules were assiduously enforced by the church courts and comprised the principal family law of the West until the sixteenth-century Reformation. Thereafter, many of these laws penetrated deeply into the state laws of Catholic and Protestant lands, and they remain at the core of the Catholic Church's canon law to this day.

In Chapter 11, Philip L. Reynolds probes the sophisticated and influential natural-law theories of the marital family developed by Dominican friar Thomas Aquinas (1225–74). Aquinas advocated enduring and exclusive pair-bonding unions as the best means for humans to achieve the principal goals of procreation of healthy children and protection from sexual sin. He also wrote with great insight into the ways fornication, adultery, prostitution, concubinage, polygamy, and unilateral divorce all unjustly and disproportionately harm wives and children. Humans thus have natural inclinations toward enduring and exclusive monogamous marital families, said Aquinas, which both natural reason and sacramental theology serve to affirm and strengthen – especially against men, who are by nature more prone to wander sexually. Aquinas's refined natural-law arguments about the marital family remained axiomatic for the Western legal tradition. They were given special new impetus first by the Spanish neoscholastics of the sixteenth century (Chapter 15), and later by the architects of modern Catholic social teachings on the family, notably Popes Leo XIII (Chapter 20) and John Paul II (Chapter 22).

In Chapter 12, Steven Ozment and John Witte, Jr. explore the Protestant reform of marriage and family law engineered by former Augustinian monk Martin Luther (1483–1546). Luther rejected the canon-law rules of clerical and monastic celibacy as a dangerous denial of God's soothing gift of marriage to remedy lust. He rejected the church's sacramental theology of marriage as a self-serving biblical fiction, and instead called marriage a social estate of earthly life, open to Christians and non-Christians alike. Moreover, he rejected the church's legal control over the family and called instead for the state to govern family law, leaving the church to offer marital counseling to couples, pastoral care to families, and catechesis to children. The resulting new state family laws that emerged in Lutheran lands incorporated many traditional canon-law and Roman-law rules. But they also now called for mandatory parental consent, two witnesses, civil registration, and church consecration for valid marriages; strongly encouraged clerical marriage; greatly reduced the impediments to betrothal and marriage; permitted inter-religious marriages; created new structures for the catechesis and education of children; and allowed for divorce in cases of serious fault, and remarriage for the innocent party. Luther's views remained foundational for later Protestants

and were given progressive new expression in the early twentieth century by Emil Brunner (Chapter 19).

In Chapter 13, Barbara Pitkin shows how French jurist and theologian John Calvin (1509–64) engineered a top-to-bottom reformation of sex, marriage, and family life and law for sixteenth-century Protestant Geneva. Calvin's reforms radiated widely in European and North American Protestant lands for the next three centuries. Like Luther, Calvin preserved many traditional ideas about the nature and purpose of marriage, the place of children in church and society, and the regulation of sexual morality and behaviour, and he also adopted many of the same theological and family-law reforms that Luther had introduced. However, he integrated them into a covenantal framework that provided a Protestant interpretation of the spiritual dimensions of faithful marital and family life. In addition, he created a new model for the cooperation between church and state in family affairs that underscored the essential role that the clergy and consistories must play in family governance. Even more than Luther, Calvin insisted that engagements were serious contracts that could not be easily broken, and he emphasized the essential publicity requirements for valid marital formation, especially mandatory public church weddings. He stressed the role of parents, godparents, and the church community in baptizing, nurturing, educating, and catechizing children. At the same time, he underscored children's spiritual equality within the community and advanced a new rationale for infant baptism that emphasized the infant's right to the sacrament as members of God's covenant. Both as preacher and consistory leader, Calvin sought to root out sexual immorality – not only traditional offenses of fornication, adultery, prostitution, polygamy, and incest, but also more attenuated offenses like lewd art and literature, bawdy songs, sexy dancing and dress, and inappropriate courtship.

In Chapter 14, Henry Ansgar Kelly focuses on the Reformation in England, which was catalyzed by the famous dispute between King Henry VIII (r. 1509–47) and the papacy over his desire to end his marriage with Catherine of Aragon in order to marry Anne Boleyn. This high-stakes conflict, which reverberated throughout Western Christendom, involved intricate disputes over the canon-law rules and procedures surrounding marital impediments and annulment. Henry resolved the dispute locally when Thomas Cranmer, Archbishop of Canterbury, annulled the marriage in 1533. In the following year, Henry withdrew from all papal jurisdiction by having Parliament recognize him as supreme head of the Church in England, with final authority over marriage and family law. Henry followed Protestant criticisms of monasticism and ordered a massive dissolution of English monasteries, but he did not release the clergy from their obligation of celibacy. He also reduced a number

of the traditional canon-law impediments to marriage, yielding a distinct common law of incest that allowed cousin marriages, among others, in emulation of Mosaic law (Chapter 1). But Henry and his Tudor successors ultimately rejected most of the other Protestant reforms of marriage and family law, as well as the later Catholic family-law reforms of the Council of Trent. England thus lived largely under medieval canon-law rules of the family, but now subject to parliamentary legislation that introduced incremental reforms, which are traced into the twenty-first century.

In Chapter 15, Rafael Domingo explores how the most important early modern reforms of Catholic family-law teachings came out of the Council of Trent (1545–63), which was in part the Church’s final formal response to the Protestant Reformation. It was Spanish Jesuit Thomas Sanchez (1550–1610) who most thoroughly systematized Catholic teachings on the family thereafter. Echoing Trent as well as the learned Salamanca neoscholastics, Sanchez defined heterosexual monogamous marriage among baptized Catholics as a natural institution formed by a consensual contract, but elevated into a sacrament of the Church. Valid marriage required witnesses and priestly blessing and could not be dissolved except by the death of one spouse. The essence of marriage, Sanchez argued, lies in the unique and permanent conjugal bond by which spouses are formally united as a consequence of mutual self-giving. The principal end of marriage is the procreation and Christian nurture of legitimate children, which cannot be obstructed by any form of contraception or abortion. Procreative sex within marriage was thus important, making impotence and frigidity serious impediments that could lead to annulment. Sanchez dwelt at great length on the strict sexual morality that married couples needed to follow to avoid the mortal sin of lust, and he emphasized the intense pastoral care that the church owed to the Christian family, even if the state now administered secular family law. Sanchez’s family-law treatise remained a foundational text for Spain and its many Latin American colonies until well into the twentieth century.

In Chapter 16, Jason P. Rosenblatt unveils the unique synthesis of Jewish laws and traditional Western laws of the family offered by English jurist John Selden (1584–1654). Taking the Hebrew Bible, the Talmud, and Maimonides as valuable but neglected sources of natural-law teachings, Selden argued that the rabbinic Noahide laws were divinely promulgated universal laws of perpetual obligation, which he compared closely with the laws of ancient Greece, Rome, Christianity, and Islam. Regarding the degrees of incest according to natural law, he accepted as authoritative the rabbinic minimalist four modes of differentiation: between the species, which prohibits bestiality; between the sexes, which prohibits male homosexual relations; between what

is one's own and what belongs to another, which prohibits adultery; and between oneself and one's close relations, which prohibits sex with one's mother, stepmother, and birth sister. Selden went farther than any early modern Christian Hebraist to demonstrate that far from corrupting the Bible, the rabbis offer humane interpretations of its harshest laws. For example, he interpreted the conjugal debt expansively to require a husband to provide his wife with sex, food, clothing, dowry, medicine, protection, and ransom if she were abducted. He also interpreted the right to divorce and remarry expansively, arguing that Jesus's allowance for divorce on grounds of adultery (*porneia*) involved all manner of uncleanness, not just extramarital sex, thereby implying that England should no longer be under the thrall of canon-law prohibitions on divorce and remarriage. Selden's neo-Hebraist account of the natural law of sex, marriage, and family life was controversial in his day, but he anticipated many of the reforms of Anglo-American family law in succeeding centuries.

In Chapter 17, Eileen Hunt Botting writes about Mary Wollstonecraft (1759–97), an English pioneer of women's rights. Drawing on liberal Christian and classical teachings, Wollstonecraft proffered a new argument that marriage should be structured by law and culture as a “dyadic perfectionist friendship” between a man and a woman who are vested with rights and duties toward each other and their children. Rejecting traditional Christian arguments of male headship, she argued that God created men and women as equals and gave them equal rights to education, property, and opportunities to flourish in private and public life. This God-given gender equality does not and should not change with marriage, even if husbands and wives by nature need to play different parental roles, especially in their children's early years. Wollstonecraft called for the abolition of traditional common-law rules of coverture, primogeniture, and entail, all of which subsumed a woman's identity and subordinated her property and inheritance claims. She also called for the robust protection of children's rights to nurture and support from their parents, to custody and care from the most suitable parent in the event of separation or divorce, and to education for boys and girls alike. Wollstonecraft's arguments blended a number of progressive Protestant and new liberal teachings about marriage and family life, and they resonate strongly with contemporary views of what the structure and function of the family ought to be.

In Chapter 18, James D. Bratt shows how Dutch theologian, journalist, and statesman Abraham Kuyper (1837–1920) helped to revitalize European Protestantism in the aftermath of the French Revolution, much as his contemporary Pope Leo XIII revitalized Catholicism (Chapter 20). Kuyper called