

The Canon Law of the Henry VIII Divorce Case

by Phillip Campbell

A Senior Thesis Presented to the Faculty of the Social Studies Department of Madonna University, Livonia, MI.

Presented June 14th, 2009

Many of the tumultuous events of sixteenth century England can be traced back to the divorce case of Henry VIII and Catharine of Aragon. From this pivotal event, undoubtedly one of history's nastiest divorce cases, came the English break with Rome with the subsequent English Reformation and the establishment of the Church of England. We could also cite the ascension of Queen Elizabeth, who was the progeny of Henry and Anne Boleyn, and the ensuing wars with Spain as all causally connected through a chain that originates with the divorce case of Henry and Catharine. The attempt of Henry VIII to put away Catharine and wed himself to Anne Boleyn therefore stands at the beginning of an entirely new phase of English history.

Yet for this very reason the specifics of the divorce have often been overlooked in favor of approaches which tend to treat the case as but a fragment of a larger issue while ignoring the legal intricacies of the divorce itself. Early writings on the subject tended to be unapologetically biased towards one side or another, as the issue was taken up into bigger debate about the legitimacy of the Church of England.¹ As earlier works tended to be too embroiled in the religious controversies of the Reformation, so later works tended towards the other extreme of simply treating the events of 1527 to 1533 as historical narrative without any attempt to resolve the problem or examine the strength of the arguments on either side. In this more modern approach, the facts and intricacies of the divorce are simply listed more or less chronologically with the implicit assumption that there is no objective solution to the problem.²

¹ For an example in support of Catherine, one could cite the work of St. Robert Bellarmine, *De Controversiis, etc. De Matrimonia*. One of the more famous pro-Henrician apologetics of the time was the anonymous tract *The Glasse of Truthe* (1531) believed to be written by the king himself. See J.J. Scarisbrick, *Henry VIII*, (Los Angeles: University of California Press, 1968), 166-167.

² An example of this apathetic approach to the divorce can be found in Will Durant's *The Reformation*, "Story of Civilization," vol. 6, (New York: Simon & Schuster, 1957), 535-550.

Further compounding the difficulties in examining the divorce of Henry VIII and Catharine is the fact that the popular image of Henry VIII is continually shifting to suit the literary and cultural fetishes of each succeeding age. It is difficult to come to any clear consensus on Henry VIII's divorce when the facts about Henry VIII the man are obfuscated by sensationalized and unhistorical depictions that have gone through as many incarnations as Henry had wives.³ These ever changing depictions of Henry demonstrate the degree to which the public has tended to be more fascinated by the macabre details of the beheading of his wives or his ever expanding waist line than the canonical and legal details of his divorce proceedings.⁴

The goal of this essay is to examine the details of Henry's divorce objectively, without any bias towards justifying or condemning the king, and attempt to reach some conclusion either for or against the divorce based on the canonical and biblical principles in force during Henry's lifetime. Unfortunately for canonists, Anne Boleyn's pregnancy in 1532 and her subsequent hasty marriage to Henry without the permission of the pope brought an abrupt end to the legal wrangling about the divorce. The break with Rome and all the tumults that came immediately afterward pushed the divorce into the shadow of history, causing it to become but a footnote in the story of the English Reformation. It has been left to later generations to make use of the evidence and the canonical norms then in place to speculate on the objective strength or weakness of Henry's case. This is the aim of this paper.

Before looking at the divorce case itself it is necessary to put it into proper historical context. Henry VIII was the youngest son of King Henry VII, the first ruler of the Anglo-Welsh Tudor dynasty. The Tudors rose from obscurity to prominence during the chaotic Wars of the Roses (1455-1485), eventually securing the throne by force after the victory of Henry Tudor, Earl of Richmond, over the last Plantagenet king, Richard III, at the Battle of Bosworth Field in 1485. Henry Tudor was crowned King Henry VII and set about immediately establishing his dynasty. His reign was both stern and

³ Suzannah Lipscomb counts five different versions of Henry in popular culture since 1933. See: Suzannah Lipscomb, "Who Was Henry VIII?" *History Today*, April, 2009, 14-20.

⁴ *Ibid.*, 15.

frugal: he put to death many possible claimants to the throne on any available pretext⁵, but was also scrupulous about his expenditures, the first English king to operate within his income since 1216.⁶ Wearing of decades of war and royal fratricide, the English people quietly settled in under the new dynasty and peace returned to the realm.

Though England under Henry VII's reign (1485-1509) was well managed and tranquil, The horrors of the Wars of the Roses were within living memory of many of the people alive in the first years of the sixteenth century. The dynasty was relatively young and there still existed potential rival claimants to the throne who could assert themselves⁷, meaning there was real danger that dynastic warfare could engulf the nation again if a stable succession to the throne was lacking. It was for this reason that Henry VII sought to strengthen the position of his family by establishing a dynastic marital alliance with the powerful Kingdom of Spain. A Spanish alliance provided the twofold benefit of legitimizing his fledgling dynasty as well as providing heirs with legitimate royal blood, which the Tudors conspicuously lacked.⁸

Thus it was that Henry VII sought the hand of the Spanish princess Catharine for his eldest son, Arthur. Catharine had all the influential political connections Henry desired, for she was both the daughter of the powerful Ferdinand and Isabella of Spain and the aunt of Charles Hapsburg, future Holy Roman Emperor. At first Ferdinand and Isabella were uncertain about giving Catharine to the Tudors, who had so recently won the throne by force and whose legitimacy was questionable. But the Spanish ambassador in England, Dr. Rodrigo Gonzalez De Puebla, was charmed with the court life of Henry VII and convinced the Spanish sovereigns that Prince Arthur was a fitting match for Princess Catharine.⁹ Admiring the frugality of King Henry VII and trusting the word of Dr. De Puebla, the

⁵ John Guy, *Tudor England* (Oxford University Press: Oxford, 1988), 57-58.

⁶ Durant, *The Reformation*, 108.

⁷ Especially the descendants of King Edward IV (1461-1483).

⁸ Garrett Mattingly, *Catherine of Aragon* (Little & Brown: Boston, 1941), 24-25. Henry VII was only distantly related to any English nobility, being descended from a clerk of Queen Catherine, widow of Henry V. His only claim to nobility was that his mother was the granddaughter of the bastard son of John of Gaunt, Duke of Lancaster and third son of King Edward III. Henry thus had a very tenuous claim to royal blood. See: Guy, *Tudor England*, xiv.

⁹ *Ibid.*, 23.

Spanish monarchs pledged Catharine, while still a toddler, to Arthur Tudor in 1489 as part of the Anglo-Spanish Treaty of Medina del Campo. The two were formally married in 1501.¹⁰

Catharine's 1501 wedding to Arthur Tudor was idyllic, full of dancing, tournaments and English gaiety; especially pleasing to the English was the 200,000 crown dowry that Catharine brought with her.¹¹ After days of feasting, the young couple set off west to Arthur's castle in Ludlow, Wales, but their honeymoon was to last only briefly, for within five months Arthur was dead, killed by the sweating sickness that was endemic in England during the early sixteenth century.¹² Ferdinand and Isabella were eager to preserve the alliance and immediately insisted that Catharine be remarried to the second son of Henry VII, young Henry Tudor.¹³ After dallying with the idea of taking Catharine for his own bride, the king relented and agreed to the wishes of the Spanish monarchs. But due to the fact that Catharine had been wed to Henry's brother, the Church's canon law stipulated that a canonical impediment of *affinity* now existed between Henry and Catharine, meaning that they were seen as in some degree related, and a dispensation from the pope was needed before the marriage could proceed. Both parties petitioned the pope; Julius II granted the necessary dispensation on January 7, 1503.¹⁴ The proper ecclesiastical permission being obtained, Henry Tudor and Catharine of Aragon were betrothed on June 23, 1503, to be solemnized when Henry reached his majority.¹⁵ The young Henry initially protested the marital arrangement, but soon acquiesced to it willingly. The reasons for his change of heart are unknown.¹⁶

Six years later Henry VII passed away, in April, 1509. As heir apparent, young Henry was hastily married to Catharine on June 11, 1509 only thirteen days before the prince and his new bride were crowned King Henry VIII and Queen Catharine at Westminster.¹⁷ Henry VIII's marriage to

10 Ibid., 14.

11 For the festivities at the wedding of Arthur and Catharine, see Mattingly, *Catharine of Aragon*, 39-44. Also, the *Receyt of Lady Katharine*, Ed. Gordon Kipling, (Oxford University Press: Oxford, 1990), a detailed first-person account of the tournaments at the wedding of Arthur and Catharine. For the dowry of Catharine, see Mattingly, 44.

12 Neville Williams, *Henry VIII and his Court*, (New York: Macmillan, 1971), 15-17.

13 Mattingly, *Catharine of Aragon*, 52.

14 Gilbert Burnet D.D., *The History of the Reformation of the Church in England*, vol. 1, part II, (Edinburgh: H.S. Baynes & Co, 1825), 11-12.

15 Mattingly, *Catharine of Aragon*, 60-61.

16 J.J. Scarisbrick, *Henry VIII*, 9.

17 Ibid., 12.

Catharine proved a happy one, though over the years it became evident that Catharine would be unable to provide Henry with the long desired male heir. Between 1510 and 1518 Catharine was pregnant six times, the only surviving child being a girl, Mary Tudor.¹⁸ Henry's marriage had failed to produce a successor, and when Henry became enamored of Anne Boleyn, Marquess of Pembroke, in 1525, his mind began to turn. By spring of 1527 he was actively seeking ways to get out of his marriage to Catharine.¹⁹ In the canonical terminology of the day, Henry needed to be granted an *annulment* to separate from Catharine in order to be free to wed Anne.²⁰

Before proceeding further, an aside into the Catholic canonical concepts of impediments, dispensations and annulments is needed. When Henry was first engaged to Catharine, it was necessary for him to obtain a *dispensation* from the pope. In canon law, a dispensation is defined as the "relaxation of a law in a particular case."²¹ All aspects of matrimony in Henry's day were governed by ecclesiastical law, including exactly who could and could not contract legal marriage. It often happened that persons wanting to contract marriage were unable to do so due to some obstacle or circumstance which prohibited a valid marriage from being contracted. In canon law such an obstacle is called an *impediment*, or more specifically, a *diriment impediment*. Examples of diriment impediments to marriage are consanguinity beyond the accepted degrees, force or violence (the proverbial "shotgun wedding"), or insufficient age to offer consent. Unless the impediment is removed before the marriage, no actual marriage is able to take place; the marriage is "impeded" by the existence of the diriment impediment.²²

¹⁸ Mattingly, *Catharine of Aragon*, 143-145.

¹⁹ The chronology from the divorce is taken from *Letters of Henry VIII, 1526--29: Extracts from the Calendar of State Papers of Henry VIII (Uncovered Editions)*, Ed. Tim Coates, (London: Stationery Office Books, 2001).

²⁰ Though commonly called a divorce case, what Henry really sought was an annulment, and due to the subject matter it is important to draw a distinction between divorce and annulment. According to Catholic theology a divorce, popularly understood as the dissolution of a marriage, is impossible, as "the marriage bond has been established by God Himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond...is a reality, henceforth irrevocable, and gives rise to a covenant guaranteed by God's fidelity." It is a bond "perpetual and exclusive." An annulment, on the other hand, does not claim to dissolve an existing marriage, but is a legal declaration that the apparent marriage was always invalid. In the words of the Catechism, "that the marriage never existed." The former seeks to break up something acknowledged as existing, the latter denies the thing ever existed in the first place. See (*Catechism of the Catholic Church*, § 1629, 1638-1639).

²¹ Amelto Cardinal Cicognani, *Canon Law*, (Dolphin Press: Philadelphia, 1934), 829.

²² See Scarisbrick, Henry VIII, 183-84 for more on impediments. Also see the article "Canonical Impediments"

It sometimes happens that the persons contracting marriage may not have known that there were existing impediments to their union, for example, a man who unwittingly marries his own cousin. In such cases the impediment may not be discovered until much later, if ever. In the meantime, they live as if a valid marriage has been contracted while in reality there has been no marriage. They have been living a "putative marriage"; i.e., a marriage in appearance only. Canonically speaking, the marriage is said to be null and void. Thus, the parties have recourse to two options: to either acknowledge the nullity of the union, separate and cease living as man and wife, or to go through the proper canonical procedures to get the impediment removed and then be properly married. In the former case, the Church would issue a decree of nullity (known as an "annulment"), which is a legal document attesting that a given putative marriage is null and void and that the persons in question are free to contract marriage with another party.²³

It was desire for an annulment that was at the center of the Henry VIII divorce case. When Henry resolved to leave Catharine and marry Anne, he stood in need of obtaining an annulment from Pope Clement VII (1523-1534) stating that his marriage to Catharine was null and that he was legally free to marry Anne Boleyn. Annulments, however, were not granted for just any reason, and this placed the burden on Henry and his ministers of coming up with legal grounds for why an annulment should be given. If Henry could persuade the pope that there was good canonical reason to assume that his marriage with Catharine of Aragon was invalid, and that declaring it to be so would be in the best interests of the kingdom, then the resulting annulment would free him to wed Anne Boleyn and presumably raise up a legitimate male heir to the throne of England.

Henry's request was not all that atypical in late medieval Europe, but was made more difficult by several political factors that complicated his situation. For one thing, his nemesis Charles V, the Hapsburg Holy Roman Emperor and King of Spain, happened to be Catharine's nephew. For most of

in the Catholic Encyclopedia [online encyclopedia] (New Advent.org, 2009); available from <<http://newadvent.org/cathen/07695a.htm>> (accessed 22 May 2009).

23 Edward Peters, *Annulments and the Catholic Church* (Ascension Press: West Chester, PA, 2004), 1-14.

the divorce dispute, Italy and Pope Clement VII in particular were under intense pressure militarily from Charles, who insisted that his aunt not be shamed by the Church allowing Henry to put her away. This accounts for much of the pope's inactivity and apparent dissembling from 1527 to 1533.²⁴ Furthermore, with the Lutheran movement in Germany at its height and anti-papalism spreading throughout Christendom, the pope was particularly sensitive to any issue that might exacerbate existing tensions with Rome, such as declaring the marriage of the Holy Roman Emperor's aunt to be null. Conversely, the English were not above using potential English support of Lutheranism as a sword to dangle over Clement's head should he fail to rule in favor of the king.²⁵ These factors ensured that the theological and canonical arguments for or against the divorce were never too far removed from their political implications.

While these political complications are interesting in their own right, this essay will lay them aside in order to focus exclusively on the theological and canonical aspects of the divorce. After some deliberation, Henry and his counselors were able to bring two main arguments to bear against the validity of Henry's marriage to Catharine: first, that the marriage was invalid due to a Scriptural prohibition against marrying a brother's widow as found in Leviticus; second, that the pope lacked the authority to dispense from certain impediments.²⁶

The favored argument of Henry, one he developed himself, was lifted from the text of Leviticus 20:21, where Scripture says, "If a man takes his brother's wife, it is impurity; he has uncovered his brother's nakedness, they shall be childless." This argument had the benefit of pitting the Word of God against the power of the pope, a dichotomy that was gaining popularity in early sixteenth century exegesis as both the Protestant movement and humanist methodology, with its emphasis on a return to

24 In spring of 1529 Cardinal Wolsey complained to Stephen Gardiner, English ambassador to Rome, that "whatever solicitations have been made to the pope for the furtherance of his [Henry's] cause depend entirely upon the emperor's will, whom the pope dare not oppose. The emperor, as appears by sundry letters, has interposed his power unfavorably to the king." *Letters of Henry VIII, 1526--29: Extracts from the Calendar of State Papers of Henry VIII (Uncovered Editions)*, Ed. Tim Coates (London: Stationery Office Books, 2001), 113.

25 Wolsey frequently hinted that, if Henry did not get his way, the king might choose to remarry without the pope's permission and extend his sympathy and aid to the Lutherans. *Ibid.*, 120.

26 Scarisbrick, *Henry VIII*, 163.

the original texts, gave an argument from the Scriptures a timely and controversial tone.²⁷ It was the interpretation of this text that Henry submitted to all the universities and learned scholars of Europe, its popular appeal making it the equivalent of a Renaissance media frenzy.²⁸ It was a clear text with its seemingly straightforward command that a brother shall not marry his brother's wife and thus seemed the perfect argument with which to pursue the divorce from Catharine.

The argument suffers from several serious criticisms, however. First place must be given to an apparently contradictory text from Deuteronomy which reads, "If brothers dwell together, and one of them dies and has no son, the wife of the dead shall not be married outside the family to a stranger; her husband's brother shall go into her, and take her as his wife, and perform the duty of a husband's brother to her."²⁹This verse explicitly *commanded* a man to marry his brother's widow, a duty known as the *levirate*, seemingly in contradiction to Leviticus which prohibited the union.³⁰ Some who supported the king's divorce, like Robert Wakefield of Oxford, suggested that Deuteronomy simply trumped Leviticus; others against the divorce argued the opposite.³¹

Of course, any argument that one verse simply trumped the other appeared somewhat arbitrary, and those who suggested that Deuteronomy be interpreted strictly while Leviticus be interpreted loosely found the argument was a double-edged sword, for there was no reason why the same could not be said about the opposing position. According to standard biblical exegesis, these two texts had to be reconciled harmoniously in some way, and clearer minds usually sought a synthesis that would explain the two verses without negating either.³²

When Leviticus is interpreted in light of other scriptural passages, Henry's argument weakens

27 Jasper Ridley, *Henry VIII: The Politics of Tyranny* (New York: Fromm International, 1984), 164.

28 *Ibid.*, 163.

29 Deuteronomy. 25:5 RSV.

30 From the Latin *levir*, meaning "brother-in-law."

31 *Letters of Henry VIII*, 37-38.

32 It has been and remains Catholic doctrine that any contradictions in the Sacred Scriptures are only apparent, and that upon further study and reflection one can find a way to resolve them harmoniously. "[T]here is a difference in the point of view...the arguments meet like rays of light which set out from distinct foci and are received in the same screen; but they are not more confused than - in our comparison - the luminous sources are confused." Maurice DeWulf, *Philosophy and Civilization in the Middle Ages* (New York: Dover Publications, 1953), 153.

considerably. For example, in Genesis, Judah commands his sons to perform the levirate with the widow of his son Er not once but twice, saying specifically, "Go into your brother's wife, and perform the duty of a brother-in-law to her and raise up offspring for your brother."³³ The levirate duty is again portrayed in the Book of Ruth as obligatory upon the surviving kin of a dead brother.³⁴ Perhaps most damning to Henry was the fact that the contrary genealogies for Jesus listed in Matthew 1:1-17 and Luke 3:23-38 had traditionally been explained as being due to the levirate.³⁵ One could therefore hardly condemn the levirate when St. Joseph the earthly father of Jesus was born of such a union!

All the evidence of the Old Testament suggests that the levirate duty of a brother was a positive prescription of God, practiced widely in ancient Israel and even in the Holy Family itself. This would mean the correct manner of harmonizing Deuteronomy and Leviticus was to see Deuteronomy as the one exception to Leviticus; that is, marrying the wife of a brother is always prohibited as stated in Leviticus 20:21, save in the circumstance described in Deuteronomy 25:5, when a brother dies without offspring. In such a case, the dead man's brother has a positive obligation to marry the widow and raise up children for the dead brother. This approach has the benefit of harmonizing Deuteronomy and Leviticus and seems to be born out by other passages in the Bible. For example, in the Gospel of Matthew, St. John the Baptist chastises King Herod Antipas for marrying the wife of his brother Philip, who was still living.³⁶ This episode demonstrates that the ancient Israelites understood the prohibition against marrying a brother's wife to be absolute *except* in the case when the brother had died without issue, the very situation Henry found himself in.³⁷ These facts were pointed out to Henry's supporters by John Fisher, Bishop of Rochester and greatest defender of Queen Catharine, whose critique of

³³ Genesis 38:8.

³⁴ See Ruth 4 in which an elaborate ceremony is detailed for the purpose of absolving a man from his levirate duty. This concept actually provides the background for the story of Ruth's marriage to Boaz.

³⁵ In this view, Joseph is the biological son of Jacob (Matthew 1:16), but the levirate son of Heli (Luke 3:23), for when Heli died, Jacob married his wife in accordance with Leviticus and raised up children as seed for his brother, of whom St. Joseph was one. This was the opinion of St. Augustine and has been the traditional understanding of the divergent genealogies (see St. Augustine, *On the Harmony of the Gospels*, II.iii and *Retractions* II.vii).

³⁶ Matthew 14:1-3

³⁷ Dale Nau, *Henry VIII's 'Great Matter': A Synopsis of the Arguments for the Divorce* (J.C.L. diss.,) (Catholic University of America, 1986), 6-9.

Henry's argument from Leviticus was so devastating that Henry was soon compelled to modify the argument substantially.³⁸

Nor was this particular harmonization of Leviticus and Deuteronomy a novel idea of John Fisher, for many other Christian thinkers had studied the two texts and come to the same conclusion. The eminent theologian and contemporary of Fisher and Henry, Cardinal Cajetan, held the same view, and in an earlier work had even cited Henry's marriage to Catharine as an example of the Deuteronomic exception to the Levitical law in the case of the levirate.³⁹ St. Augustine, St. Hilary of Poitiers, St. Ambrose of Milan, St. John Chrysostom, St. Bonaventure and St. Thomas Aquinas had all addressed the issue and come down opposite Henry.⁴⁰ Not only Scripture and ancient Israelite custom, but the weight of traditional Catholic exegesis was also against the king.

The modern jurist may not be convinced by the line of argumentation presented above, but in a society where proofs from tradition and precedent were just as important as any other kind of evidence, Henry's argument stands out as novel and weak.⁴¹ But besides the fact that Christian tradition stood opposed to Henry, one could also point out the unreasonableness of any other understanding of Leviticus and Deuteronomy. If the levirate was not an exception to Leviticus, then the exegete is left with precious few options. Either Scripture contradicts itself, which was unthinkable,⁴² or the prohibition of Leviticus is redundant. It would be condemning relations with a brother's wife universally, simply another way of condemning adultery which is already done elsewhere and in simpler terms. The apparent contradiction of the two verses can only be satisfactorily resolved by assuming that a brother may never marry or have relations with his brother's wife *except* when that brother has died without issue. Whether the problem is approached by means of theology, biblical

38 Ibid., 9. See also Scarisbrick, *Henry VIII*, 170-171 and *Letters of Henry VIII*, 185.

39 In his *Commentaria super Summam Theologicam*, cited in Scarisbrick, *Henry VIII*, 166.

40 Ibid., 170.

41 For the relationship between theology and philosophy in the Middle Ages with regards to arguments from speculation versus authority, see DeWulf, *Philosophy and Civilization*, 149-178.

42 The axiomatic principle of Scripture scholarship in the Middle Ages, that there could never be a real contradiction among theological truths. "If we admit that theological doctrines are true," said Henry of Ghent, "we cannot admit that other doctrines can contradict them." Ibid., 168.

exegesis, common consensus of precedent or historical practice, the argument of Henry that his marriage to Catharine was null based on Leviticus holds very little weight.

Henry relentlessly pressed his Levitical argument from 1527 through the end of 1528 while the universities and theologians of Christendom debated the issue in a war of pamphlets. Around January, 1529, after a series of fierce rebuttals by Fisher on the biblical problems of Henry's arguments, royal agents began a new line of attack: that the 1503 bull of Pope Julius II originally dispensing Henry to marry Catharine was itself invalid.⁴³

The Catholic canonical concepts of marital impediments and dispensations are complex ones that must be clearly understood in order to get any insight into Henry's line of argumentation.⁴⁴ As mentioned above, an impediment is any obstacle that impedes a man and woman from contracting a valid marriage and renders any attempted marriage null. Furthermore, some impediments could be impediments imposed by divine law (such as incest) and as such were indispensable even by the pope, while others were due to positive, ecclesiastical law and were dispensable by the pope. Figuring out who needed a dispensation from what impediment could be very taxing, and the best plan of action was generally to make sure one never needed a dispensation or annulment to begin with. Therefore it was a social and religious imperative that a man and a woman seeking marriage make certain that there were no impediments between them before they presented themselves to receive the sacrament of matrimony.

Impediments to marriage are of two types; *impeding* (or *prohibitory*) *impediments* and *diriment impediments*. An impeding impediment is the lesser of the two types, which renders a marriage illegal but not absolutely void. The impediment is said to "impede" the marriage so long as it exists, but once it is taken away, a valid marriage remains insofar as the obstacle has been removed. An example of an

⁴³ The first mention of any doubt about the validity of the bull is in a summary of Henry's arguments drafted for the English ambassadors to the Holy Roman Emperor Charles V in the first week of January, 1529. *Letters of Henry VIII*, 69-71.

⁴⁴ The following page and a half on impediments, annulments and dispensations is drawn primarily from Cicognani, *Canon Law*, 825-835; Peters, *Annulments and the Catholic Church*, 1-35 and Scarisbrick, *Henry VIII*, 163-197.

impeding impediment would be a formal betrothal; that is, by the man pledging himself to marriage a certain right arises on behalf of the woman he is engaged to, insofar as any other marriage to another woman would be a violation of that right.⁴⁵ If a man is betrothed but marries another woman, his marriage is considered illicit (that is, done illegally) but still valid. It acquires full legality once he formally and publicly breaks off his engagement with the first party.

But it is the second form of impediment, the diriment impediment, that really concerns the Henry VIII divorce case. A diriment impediment renders a marriage null and void from the beginning, unlike an impeding impediment which merely makes it illegal. The specific diriment impediment that Henry had to be dispensed from by the pope to marry his brother's widow was the impediment of *affinity*. Affinity is to one's in-laws as consanguinity is to those of one's own bloodline. Just as marriage between persons of the same family is prohibited within certain degrees by virtue of the impediment of consanguinity, so marriage is prohibited between a person and member's of their spouse's family by virtue of the impediment of affinity. For example, say A marries B. Person A is now not only in relation with B but with all of B's family as well, who become relatives "in-law." Should B die, A is not therefore free to contract marriage with B's sister or B's mother, because in a very real way B's sister has become A's sister by virtue of A's union with B. This is the legal origin of our concept of "in-laws." The Church's teaching on affinity sprang from a long tradition that incorporated elements of Roman and Mosaic law and was in essence an attempt to regulate what were commonly understood as incestuous unions.⁴⁶ However, canon law, following earlier precedents, recognized that other types of relationships besides consanguinity also fell under the ban of incestuous unions, namely those relationships that were not by blood but sprang from marriage. Thus, if a man's wife dies, he is prohibited from marrying his wife's sister or his mother-in-law because this was a kind of incest. This prohibition is referred to as affinity.

⁴⁵ See the Catholic Encyclopedia article for "Canonical Impediments", available online at <http://www.newadvent.org/cathen/07695a.htm>. [accessed 1 June 2009]

⁴⁶ Dale Nau, *Henry VIII's 'Great Matter'*, 10-13

Inasmuch as Catharine had been previously married to Henry's brother Arthur, a diriment impediment of affinity existed between Henry and Catharine. However, an impediment of affinity was not commonly considered an impediment of the divine law, and henceforth the pope was able to dispense Henry from it. Pope Julius II did so in a bull entitled *Ad Librum Secundum*, promulgated in 1503.⁴⁷ Papal dispensations from the impediment of affinity were quite common, especially among royalty. As the good of nations often required that nobility marry within the family to some degree in order to maintain dynastic bloodlines, popes dispensed from affinity (and sometimes even consanguinity) frequently. For example, in 1410 Pope John XXIII gave permission for the Duke of Clarence to marry his paternal uncle's wife.⁴⁸ A few years later, Pope Martin V dispensed the Count de Foix to marry the sister of his deceased wife. This case is interesting because the pope had scruples about whether or not such a marriage was against divine law and referred the matter to a panel of theologians, much as Henry would a century later. They concluded that Pope Martin did indeed have the power to dispense in that case. In 1500 Pope Alexander VI dispensed the King of Portugal from the impediment of affinity to marry his dead wife's sister, an act which served as a precedent for the similar dispensation of Henry and Catharine by Pope Julius II only three years later. Even Pope Clement VII, the pope reigning during the divorce case, had dispensed men from affinity to marry the sister of a previous wife on two occasions.⁴⁹

Despite this vast body of papal precedent, Henry nevertheless tried to attack the dispensation on the grounds that a diriment impediment of affinity was a matter of divine, not ecclesiastical law. Therefore, argued Henry, the pope had no power to dispense from such impediments. In a summary of his arguments for the divorce, issued in March, 1529 and borne to Rome by Peter Vannes, one of Henry's diplomats, it is stated that, "The marriage [to Catharine] is against human and divine law. If the papal dispensation is put forward as an argument, it may be answered that the pope's authority does not

⁴⁷ Gilbert Brunet, *The History of the Reformation of the Church in England*, Vol. 1 (W. Baynes: London, 1825), 11-12

⁴⁸ John XXII (1370-1419) is commonly considered an antipope.

⁴⁹ All cases cited above taken from Scarisbrick, *Henry VIII*, 177 and Nau, *Henry VIII's 'Great Matter'*, 35-36.

extend to degrees prohibited by divine law..."⁵⁰ In essence, Henry was asserting that the dispensation to marry Catharine that was granted to him in 1503 was not binding because Pope Julius II had exceeded his authority in granting it.

The subtle distinction between whether an impediment is according to divine law or ecclesiastical law brought another degree of complexity into the divorce case, but it ended up being the point that Henry built his whole argument upon. Impediments, besides being classified by whether they are impeding or diriment, could also be placed along a continuum of less severe to most severe depending on what the origin of the impediment. Some impediments arose due to the law of the Church; for example, marriages were forbidden to be contracted during Lent. However, as this was due not to any decree of God but to the law of the Church, the Church was equally able to dispense from this rule because it sprang from ecclesiastical, not divine origins.⁵¹ On the other hand, impediments originating in the divine law tended to be much more severe; for example, a brother attempting to contract an incestuous marriage with his sister.⁵² The prohibition of incest is rooted not in any man-made law of the Church but in the divine law revealed by God, declared in the Holy Scriptures and in the natural law.⁵³ Since the origin of this prohibition is not with men but from God, no man, not even the pope, can dispense from an impediment due to divine law.

The question, then, is whether or not the impediment of affinity arising between a man and his brother's widow came from ecclesiastical or divine law. If from ecclesiastical law, then Pope Julius II was perfectly within his jurisdiction to dispense Henry to marry Catharine. If, however, the impediment arose from divine law, then Pope Julius II had no authority to attempt to dispense Henry from affinity. In such a case, the marriage would be invalid, a declaration of nullity would have to be granted and

⁵⁰ *Letters of Henry VIII*, 98.

⁵¹ See the Catholic Encyclopedia article for "Canonical Impediments", available online at <http://www.newadvent.org/cathen/07695a.htm>. [accessed 2 June 2009]

⁵² *Ibid.*

⁵³ Incest is condemned in Leviticus 18:6: "None of you shall approach to any that is near of kin to him, to uncover their nakedness." Leviticus 20:11-14 also prohibits incest and decrees the death penalty for those guilty of it.

Henry would be legally and morally free to contract marriage with Anne Boleyn and raise up legitimate heirs by her. It was an intricate and highly specified line of argumentation, but one upon which the fate of the entire kingdom of England rested.

Henry and his counselors argued that the impediment was from divine law and vigorously asserted that the pope had no power to dispense from it.⁵⁴ This seemed easily provable by the fact that the prohibition against marrying a brother's widow came from Scripture, not any positive law, and thus the argument from Leviticus was tied into Henry's attacks on the bull. But as we have seen, Henry's interpretation of Leviticus does not hold up to scriptural exegesis or patristic consensus.⁵⁵ The argument grew more complex, as it was evident that popes had dispensed from affinity many times before. Henry introduced yet another degree of complexity into the case by making a distinction on the point of the marriage's consummation. Thus the king's official stand became that affinity was an impediment by divine law, indispensable by the pope if the prior marriage had been consummated.⁵⁶ However, if the prior marriage had *not* been consummated, then a dispensation was possible. This threw up a further smokescreen against the pope rendering a negative judgment and placed the crux of the argument on whether or not Catharine was a virgin when she married Henry in 1509, a difficult thing to prove legally one way or another, especially nineteen years after the fact. Nevertheless, all throughout 1528 "a rag-bag of gossip" was collected from those who had been with Prince Arthur on his brief honeymoon, "half-remembered kitchen talk and snippets of coarse bravado" with which Henry sought to establish that the marriage between Catharine and Arthur had been consummated (Catharine steadfastly maintained under solemn oath that she had never consummated the union with Arthur, who was ill for most of their brief marriage).⁵⁷ In addition to all this, Pope Julius' bull was attacked as "vain

⁵⁴ *Letters of Henry VIII*, 110. Henry ordered his counselors to find an eminent friar or theologian who would "firmly stick" to the argument *quod pontifex ex jure divino non potest dispensare* (The pope is not able to dispense from that which is of the divine law).

⁵⁵ See page 9 above.

⁵⁶ Scarisbrick, *Henry VIII*, 188. The logic behind this argument was the medieval belief that the impediment of affinity arose not just from marriage as such, but from coitus. Therefore, if Catharine had not consummated her marriage with Arthur, there would be no affinity and she would thus be free to wed Henry. This explains the tenacity with which Henry tried to disprove her vow that she came to him a virgin in 1509 (*Ibid.*, 189).

⁵⁷ *Ibid.*, 188-189 One such example of "coarse bravado" found in the testimony collected by Henry is the

and suspicious" and a whole team of legal sophists were employed to find technical or procedural errors in it.⁵⁸

However, in pinning his case on the argument that the pope had exceeded his authority in dispensing him to marry Catharine, Henry committed a fatal flaw and backed himself theologically into a corner. It was Bishop Fisher who, in a letter to Wolsey, pointed out the problem with Henry's refined argumentation. After admitting that there were various interpretations of the issue and that some learned men had come down both for and against Henry, Fisher goes on to say that he

"Cannot see any sound reason to show that it is prohibited by divine law for a brother to marry the wife of a brother who has died without children; and considering the fullness of authority given by our Lord to the pope, who can deny that the latter may give dispensation to that effect, for any serious cause? But even admitting the arguments to be balanced on either side, [the case] would be decided by this: that it belongs to the pope to clear ambiguous passages of Scripture, after hearing the opinions of the best divines; otherwise it is in vain that Christ has said, *Quicquid solveris in terra erit solutum in coelis, etc.*⁵⁹ As the pope, therefore, has more than once by his act declared that it is lawful to dispense in this case...this alone should determine the question....that the dispensation is within the pope's power."⁶⁰

A simple yet powerful answer to all Henry's attacks. Is there any doubt on how to resolve Deuteronomy with Leviticus? Christ has entrusted to the successors of St. Peter, the popes, the authority to resolve difficult passages of Scripture, and the popes had resolved it already, and not in Henry's favor. Fisher,

deposition of a Sir Anthony Willoughby, who reported on the morning after his wedding that Arthur called for a cup of ale and said, "I have been this night in the midst of Spain." Upon such gossip did Henry attempt to base his arguments. *Letters of Henry VIII*, 170.

58 *Ibid.*, 74.

59 A quote from Matthew 19, when our Lord says to St. Peter, "Whatsoever you bind on earth shall be bound in heaven."

60 *Letters of Henry VIII*, 25-26.

like any good Catholic bishop, was a firm believer in the "fullness of authority" (*plenitudo potestatis*) of the pope to interpret Scripture and impose or relax disciplines. To those who take seriously Christ's guarantee to St. Peter that his "faith may not fail," the evidence that a pope was able to do something was in the fact that he had done it.⁶¹ Thus, regarding whether or not the pope could dispense Henry's case, the proof was that previous popes had already dispensed from affinity in the first degree, and this established its legality, irrespective of what any motley assortment of Scripture scholars might say to the contrary.⁶²

Despite this point, Henry could still legitimately make the case that though the popes had dispensed from affinity before, they had not dispensed from Henry's *particular* case - a man marrying his brother's widow.⁶³ But had they? In fact, there was a case which Henry's opponents dug up from the thirteenth century in which a pope dispensed men to marry their brother's widows, and the pope in question was none other than Innocent III, the most eminent pope of the Middle Ages and the greatest jurist of the thirteenth century. In a bull to the bishop of Riga in Latvia entitled *Deus qui Ecclesiam*, Innocent had allowed converted Latvians to remain in marriages with their brothers' widows, providing the brothers had died childless.⁶⁴ This ruling proved definitively that a levirate marriage was not opposed to God's law and that the pope had the power to dispense men to marry their brother's widows. So important was this case, as Scarisbrick says in his biography of Henry, that "this letter, from one of the most authoritative of the canonist-popes of the Middle Ages...passed into Canon Law and became the *locus classicus* for subsequent judgments by canonists and theologians that first degree affinity, if it impeded by divine law, did so in all cases save one...that for sufficient cause the pope could dispense a man to marry his brother's widow provided the latter was childless."⁶⁵

Fisher made this bull of Innocent the center of his defense of the queen and asserted that its

61 Luke 22:32.

62 Scarisbrick, *Henry VIII*, 179.

63 The recent papal precedents included a man marrying his uncle's wife and a man marrying his wife's sister (see pg. 13 above), both impediments of affinity but neither Henry's exact case.

64 Nau, *Henry VIII's 'Great Matter'*, 26 and Scarisbrick, *Henry VIII*, 179.

65 *Ibid.*, 179.

implications were unavoidable.⁶⁶ The existence of this bull was catastrophic for Henry's position, for Fisher had called Henry's bluff and in the face of the precedent clearly set by Innocent III compelled the king to either accept that his marriage was indeed valid or else take the step of denying the authority of the pope as the final arbiter in disputed canonical and theological matters, which would move Henry into heresy. This is the point in the controversy at which the legal argument over the king's divorce transmutes into a theological argument about papal authority in general, leading ultimately to the Act of Supremacy and the breaking off of the English Church from Rome. Catharine sensed this coming break from the Church, and lamented to her nephew Charles V as tensions were mounting that "the King's sin produces other sins every hour, as appears from the recent attempt against the authority of the Holy See."⁶⁷

What can be made of Henry's arguments against the original bull of Julius II? To the main charge, that to marry a brother's widow was prohibited by divine law and that the pope did not have the authority to dispense, anybody working within the framework of late medieval canon law must admit that this line of thinking was seriously flawed. First, as we have seen from Scripture, it is true that marriages within certain degrees of affinity are prohibited by divine law, but with the exception of one: the levirate marriage, commanded in Deuteronomy as a noble and praiseworthy thing. In the end, Henry could only get around the difficult verse in Deuteronomy by ignoring it altogether and focusing on Leviticus to the exclusion of all others.⁶⁸ Furthermore, as Fisher pointed out, it fell under the jurisdiction of the pope to resolve any such disputed points of theology or Scripture. Since Innocent III had already resolved the issue by dispensing in favor of the levirate obligation, Henry's attacks on the pope's authority must be considered groundless.

The dispute dragged on for the next four years with such an astonishing degree of subtlety and

⁶⁶ Ibid.

⁶⁷ *Letters and Papers, Foreign and Domestic, Henry VIII, Volume 7: 1534* (1883), Ed. James Gairdner, Available from: British History Online, <<http://www.british-history.ac.uk/report.aspx?compid=79295> (accessed 29 April 2009).

⁶⁸ See pg. 9-11 above.

sophistry that even a modern lawyer might find himself lost amidst the argumentation. But with all of Henry's firepower against his marriage exhausted by 1532 and still no decision forthcoming from Rome, the king took matters into his own hands, prompted if nothing else by a very simple biological reality - his mistress Anne was pregnant.⁶⁹ This set the king in action to get his divorce case settled with the utmost haste at any cost and put in motion a chain of events that rapidly led the nation towards schism with Rome. The situation was urgent because it was possible that the child in Anne's womb could be Henry's long sought after son. If so, the king must marry Anne Boleyn before the birth of the child to legitimize it as his heir; but not only this, he needed to marry her as quickly as possible for reasons of propriety, attempting to keep secret insofar as was possible the fact that the child was conceived out of wedlock. Thus he resolved to marry Anne immediately, but in secret. In the meantime, he would get Parliament to pass an act forbidding all appeals to the papal court at Rome for ecclesiastical cases tried in England. This would make the final arbiter on the matter not Pope Clement VII but Thomas Cranmer, Archbishop of Canterbury and loyal ally of Henry. Cranmer would try the divorce case in England and rule in Henry's favor, giving the judgment that the king's marriage was and had always been against the law of God, despite the dispensation of 1503. Since he would then be a bachelor, he would be free to be wed to Anne as his lawful wife and queen.⁷⁰

This plan was immediately put into action, beginning with the secret wedding of Henry and Anne on January 25, 1533. Parliament passed Henry's anti-papal acts that March, removing ahead of time any possibility that Catharine could appeal to Rome. Seeing the situation rapidly spiraling out of control and realizing that the English Church was slipping away from him, Pope Clement VII summoned the full consistory of cardinals on March 24, 1533, and finally gave his sentence: the marriage of Henry and Catharine was "good and valid" in the eyes of God and the Church.⁷¹ Ignoring the pope they had struggled so long to appease, a solemn court met at Dunstable Priory on May 23,

⁶⁹ Retha Warnicke, *The Rise and Fall of Anne Boleyn* (Cambridge: Cambridge University Press, 1989), 120.

⁷⁰ This chronicle of the actions of Henry in the winter-spring of 1533 is taken from Ridley, *Henry VIII*, 214.

⁷¹ Mattingly, *Catherine of Aragon*, 363.

1533 under the headship of Cranmer and declared the marriage of Catharine and Henry null and void. Catharine was not present at the proceedings.⁷² Two months later, on July 11, Clement issued a bull of excommunication to Henry ordering him to take back Catharine and renounce Anne.⁷³ The split with Rome was complete.

In actual history, the story of the divorce ends there, with the clandestine marriage to Anne, the violent repudiation of papal authority with the whole bloody saga of the English Reformation that followed over the next forty years. But there is one more angle of the divorce case that merits attention, especially since it was relatively ignored during the actual proceedings. As early as 1527, when Catharine was first making her protestations that she came to Henry a virgin, Cardinal Wolsey had noted a third possible argument that Henry might use against his marriage. So far we have discussed only the impediment of affinity, which arises between the relatives of a married couple. However, there is another similar impediment that arises, not from marriage but from betrothal, called the impediment of *public honesty*. Public honesty means that if A is betrothed to B but then breaks off the engagement, A is still not free to marry any of the relatives of B without a dispensation.⁷⁴ The impediment of public honesty was well-known in Henry's time, and papal dispensations for it were relatively common.⁷⁵ The argument Wolsey crafted for Henry concerned the manner in which they were dispensed.

It often happened that a person needed to be dispensed from affinity *and* public honesty. For example, A is engaged to B, and after a standard period of engagement marries B and consummates the marriage. But B later dies and A wishes to marry C, the sister of B. Because of A's former marriage to B, there is an impediment of affinity between A and C. But, in addition to this, because A and B were once engaged before their marriage, an impediment of public honesty also exists between A and C that needs to be dispensed from before they can be married. In such cases, since affinity was the major

⁷² Ibid., 387.

⁷³ Scarisbrick, *Henry VIII*, 318-320.

⁷⁴ "Public Honesty (Decency)," The Catholic Encyclopedia [online encyclopedia] (New Advent.org, 2009); available from <<http://www.newadvent.org/cathen/12554a.htm>> (accessed 29 April 2009).

⁷⁵ Scarisbrick, *Henry VIII*, 188-191.

impediment (insofar as marriage is greater than betrothal), person A would be issued what was termed an "implicit dispensation", which meant that a bull dispensing from affinity was issued but public honesty, though unnamed, was implied and also dispensed. This was possible because public honesty was presumed since marriage always follows engagement, and if necessarily presumed then with equal necessity dispensed.⁷⁶

This alone could not help Henry, but for the addition of one vital fact. The whole centerpiece of Catharine's defense was that she had not consummated her marriage with Arthur, and thus there was not any impediment of divine law prohibiting her marriage to Henry. But, according to medieval canonical tradition, the impediment of affinity sprang from the physical *consummation* of a marriage, not the solemnization of the marriage vows.⁷⁷ In other words, if A was engaged and then married to B but the marriage was never consummated, then an impediment of public honesty existed between A and the relatives of B but *not* an impediment of affinity since the marriage was never consummated. Person A would still need a dispensation to marry the sister of B, but a dispensation from public honesty, not affinity. Normally, public honesty would have not been mentioned since it was implicit in a dispensation of affinity. But where there was no affinity, it was necessary that the dispensation mention public honesty specifically.⁷⁸

This was good news for Henry. Catharine and Arthur had been betrothed and then married, but on Catharine's own solemn testimony, the marriage had never been consummated. If this were the case, then an impediment of public honesty existed between her and Henry. However, the bull of Julius II dispensing Henry to marry Catharine mentioned only the impediment of affinity (*impedimento affinitatis*), leaving open the question as to whether the previous marriage with Arthur had or had not

⁷⁶ "By the early sixteenth century canonical opinion and curial practice were firmly agreed that where an impediment of public honesty arising out of a valid contract of marriage coexisted with an impediment of affinity resulting from the *consummation* of that marriage, it was enough if the bull of dispensation mentioned only the affinity. The other was necessarily presumed because necessarily present." *Ibid.*, 187.

⁷⁷ Following St. Thomas, who said affinity could also arise from *societas conjugal*is, simple living together regardless of intercourse. *Ibid.*, 190. Also, see Thomas Aquinas, *Commentary on the Sentences of Peter Lombard IV*, dist. xli, q. i art. i.

⁷⁸ Scarisbrick, *Henry VIII*, 188.

been consummated, saying only that "perhaps it had been consummated" (*forsan consummavissetis*).⁷⁹ But we know from Catharine's subsequent testimony and circumstantial evidence that the marriage had not been consummated. Therefore, the bull of Julius dispensing from affinity would have been insufficient to clear Henry to marry Catharine; a second bull mentioning public honesty specifically would have been needed. Henry could plead the nullity of his marriage on these grounds.

Wolsey brought this argument to Henry's attention in the summer of 1527 and assured the king that there was a great chance of success in using it. Yet astonishingly enough, Henry disregarded Wolsey's advice and failed to investigate the public honesty argument any further as he continued his attacks on the bull forwarding the Levitical argument.⁸⁰ What could possibly account for Henry's apparently flippant disregard for the one argument that had the most canonical weight behind it? We can only speculate, but it is not difficult to imagine a few important factors. First, in summer of 1527, during the initial frenzy of public argumentation about the divorce, Henry had been going to extreme lengths to prove that Catharine was *not* a virgin when she wed him in 1509; yet Wolsey's argument stood upon the presumption that Catharine was telling the truth about her virginity, which would involve giving ground to the queen over the king and forcing him to admit that his prior accusations had been false, neither of which could have sat well with Henry. Second, Wolsey was already falling from grace by 1527. The king was already suspicious of much of his counsel and had taken active steps to circumvent him at the court. It was only three years until Wolsey would be arrested and charged with treason, and by 1527 Henry was already likely to discount much of what the Cardinal told him. Third, Henry's other attacks were much more in keeping with the spirit of the times than the public honesty argument. Henry's assault on papal authority and arguments from Scripture over tradition caught on like a firestorm in Reformation-torn Europe and were a popular topic of discussion and debate. A purely canonical and technical argument such as Wolsey proposed, while perhaps being legally valid,

⁷⁹ Gilbert Burnet, *The History of the Reformation of the Church of England*, 12.

⁸⁰ Scarisbrick, Henry VIII, 190 and Nau, *Henry VIII's 'Great Matter'*, 40-41.

would not have possessed the same sweeping populist appeal as Henry's other arguments.⁸¹ Finally, and no less important than the preceding factors, Henry VIII preferred his own arguments to Wolsey's because they were *his* arguments. The king regarded himself as a scholar, and by all contemporary accounts was a very learned and erudite man; his education coupled with his legendary ego make it probable that any argument personally put forward by himself was most likely to be regarded as the best argument, anything to the contrary notwithstanding.⁸² Whatever his reasoning, the king never pursued the argument based on public honesty and it is a matter of conjecture how it would have been received by Pope Clement VII.

It is an established fact of history that Henry VIII ended the whole drama of the divorce by putting away Catharine of Aragon and taking Anne Boleyn as his wife, this in open defiance of Rome and only by means of breaking England off from communion with the Roman Catholic Church. Essentially, circumstance coupled with impatience compelled Henry to take the matter out of the hands of the Church and press forward according to his own designs, making the long fought over question of the validity of his first marriage a moot point by 1534 that was thankfully cast aside by his ministers, most of whom were grateful to be free of centuries of Roman canonical tradition and eager to get down to the business of erecting what would become the institutional Anglican Church. But was the marriage truly invalid? Was there any way Henry could have won his case without having to break from Rome?

Wolsey's argument from public honesty remains an intriguing possibility, but it has the weakness of remaining on the level of pure conjecture, since it was never pushed at Rome. Henry's two arguments, that Leviticus prohibited marriage to a brother's widow and that the pope did not have the power to dispense for such a marriage, were considered weak even at the time they were first proposed and are demonstrably false based on history, canonical tradition and common consensus of theologians. Nor can we forget that the pope did in the end rule against Henry. It may be argued that this ruling was

81 Ridley, *Henry VIII*, 163.

82 "Henry VIII's character was fascinating, threatening, and sometimes morbid. His egoism, self-righteousness, and capacity to brood sprang from the fusion of an able but second-rate mind with what looks suspiciously like an inferiority complex." John Guy, *Tudor England*, 81

meant to be a "safe" ruling, sent down after Henry had already determined to break from the Church and the matter was already decided, nothing being gained or lost from ruling against Henry. It is feasible that Clement may have taken into account the timing of his pronouncement, but there is no evidence to suggest that this affected the content of it. In fact, in a letter of Clement VII to Henry in October of 1529, four years before the final ruling, Clement made it clear that he already regarded Henry's case as baseless and the marriage to Catharine entirely valid.⁸³

Therefore, if we take into account only the arguments put forth by Henry, there can be no other conclusion than that his marriage to Catharine of Aragon was *valid*, meaning the 1503 bull of Julius II dispensing Henry from the impediment of affinity was legal and binding and that no law, either divine or human, was being violated by the marriage. This was what the pope communicated to Henry privately in 1529 and stated publicly in 1533.

If we factor in the argument from public honesty, however, there is the question of whether or not the pope would have agreed to annul Henry's marriage to Catharine had this argument been presented.⁸⁴ As stated above, it is pure conjecture, but nevertheless suffers from two weaknesses: first, it is highly unlikely that Clement VII didn't know about this impediment. Papal dispensations were such common occurrences that most popes would have been very familiar with what goes into a valid dispensation and what specifically needs to be dispensed from. Surely Pope Clement VII was aware of the impediment of public honesty, especially since Catharine swore she had never known Arthur, a fact which would have naturally brought the impediment of public honesty to the mind of Clement as it had to Wolsey. It cannot be responsibly asserted that Clement was ignorant of this potential line of argumentation, and the fact that it failed to come up suggests it was viewed as a weak one.

Why would it have been considered weak when Wolsey thought otherwise? Though most canonists argued that affinity arose from intercourse, a growing segment in the sixteenth century

⁸³ "The dispensation was a positive and not a divine law; and if the queen, as she affirms, was not known by Prince Arthur, there is no doubt that the dispensation was perfectly sound *in foro conscientiae*." *Letters of Henry VIII*, 196.

⁸⁴ The argument of Dr. Scarisbrick (*Henry VIII*, 187-190).

(notably the Thomists) asserted that affinity came not from intercourse but from *societas conjugalis*, simple cohabitation as man and wife, regardless of whether or not the union was consummated. If Clement applied this school of thought to the case, then the fact that Arthur and Catharine had lived together as man and wife was enough to bring forth the impediment of affinity irregardless of Catharine's virginity.⁸⁵ If so, then the bull, which mentioned only affinity but not public honesty, would have been considered an implicit dispensation of the latter by virtue of the explicit mention of the former and the inclusion of the word 'perhaps' (*forsan*) to cover any uncertainty. Thus, no separate dispensation for public honesty would have been needed and Henry's marriage to Catharine would still be sound.

Many persons in England and abroad during the years of the divorce suspected as much, but no one dared say so in the presence of the king, who was bound and determined to have the pope rule in his favor regardless of the consequences, who used the threat of schism and Protestantism as a club with which to beat Clement into submission,⁸⁶ so much so that the pontiff never issued a decision until the die was already cast. The religious and social turmoil of the time made how one spoke about the king's great matter an immensely important issue, one of life and death as St. John Fisher and St. Thomas More would find out. But removed from Henry's reach by a span of almost five centuries, we enjoy the relative freedom and security to be able to say without fear that the marriage of Henry VIII to Catharine of Aragon was indeed valid in the eyes of God and the Church and that all Henry's arguments to the contrary were groundless and futile, "for what God has joined, let not man put asunder."⁸⁷

⁸⁵ See note 78, page 21 above.

⁸⁶ *Letters of Henry VIII*, 120

⁸⁷ Mark 10:9