Introduction

In a village of fourteenth-century England, there is rumor about an affair. People described as good and upright in the community fill the air with gossip. A certain couple is engaged in fornication, they tell the bishop’s judge on his visit to check on talk about sinful behavior. The alleged offenders, whose names may have been Michael and Mary, are summoned before the traveling court where Michael readily admits that the charge is true. Mary’s sworn statement reveals an important difference, however, because in her opinion intercourse did not occur until the two had traded promises to marry.

Based on his confession, Michael would have received penance for engaging in non-marital sex. Unless he was able to convert the sanction into a monetary payment, he risked being beaten with a stick and driven three times around the market square. Mary would have escaped shameful treatment after stating that she and Michael had just consummated their wedding vows as wife and husband. According to the rules of late medieval church law, sacramental marriage only required the legitimate consent of a man and a woman, which carnal union turned into an unbreakable bond for life. The final ruling was likely to deny Mary license to marry anyone but Michael, her rightful spouse as she had maintained. Michael was free to find himself a different bride. By taking their depositions at face value, the judge would have found Mary to be married to Michael and Michael still a bachelor.1

The history of sacramental marriage has generated a vast amount of scholarly literature. Focusing originally on the theory of the new institution crafted in the schools of canon law and theology between 1140 and 1215, the scope of research has widened decisively since 1974, when

Introduction

Richard Helmholz published his *Marriage Litigation*, the first monograph to treat the application of canonical standards in judicial practice. Helmholz provided ample illustration of how legal doctrine met with faithful implementation in the English ecclesiastical courts. He noted that trials consistently obeyed both, the procedures laid down in the handbooks (*ordinis iudiciarii*) of jurisprudence and the material norms conveying formal validity to matrimony. As a result, late medieval investigations implemented rules resembling the requirements of due process today. Adversaries had to confirm their claims with the help of witness testimony, notarized instruments, or admissible circumstantial evidence to prevail in a suit that examined allegations of a wedding vow. Hearsay did not constitute full proof unless it was supported by a limited repertoire of legal presumptions.

*Marriage Litigation* has become a true classic. Subsequent scholarship has consulted records pointing to the same, tight nexus between general doctrine and local practice. Investigators have also discovered much overlap in the typology of cases from one place to the next. In accordance with the model proposed by Helmholz, matrimonial proceedings (or *causae matrimoniales*) have allowed for classification under three categories. There were enforcement claims in which a plaintiff or court official sought confirmation that an alleged spousal commitment was valid, and annulment suits aimed at sentences of invalidity. A third group of separations and cohabitation requests involved partners who agreed to be canonically married but struggled to live together, in a legal environment that did not permit divorce in the current sense of the word.


At the same time, historiography has ignored cases like the one delineated above for Michael and Mary. In 1974, Helmholz was certainly aware of their existence, but seems to have considered them unfit for inclusion in his discussion of “litigious” matters. The “legal element” was missing, he would later remark, because validity claims of this kind did not rely on the formalities “promised by canon law”. Late medieval canonists would have concurred with his assessment. They also distinguished between a “judicial” forum in which proof had to be legitimate and a second sphere of “penitential” jurisdiction where hearsay and unilateral assertions like those of Michael and Mary sufficed to prompt public and formal determination. From a strictly juridical perspective, the rationale Helmholz chose for their exclusion was sound. Considering, however, that complaints touching on marital issues in the ecclesiastical tribunals relied in the vast majority on less than legal evidence, courtroom experiences along the lines of Michael and Mary merit the attention of social historians who wish to provide an adequately historicized account of sacramental marriage.

Although Helmholz defined his perspective on the subject as guided “by the interests and prejudices of a lawyer”, scholarship has copied his approach to matrimonial cases as if it addressed the whole phenomenon. For each suit warranting description as “judicial”, however, there were dozens of “penitential” ones that did not. This study seeks to address the imbalance. When marital disputes were examined by an ecclesiastical judge, Christians confronted the situation of Michael and Mary in overwhelming numbers. Allegations infrequently exceeded the level of “she said” versus “he said”, and many sentences spelled out canonical consequences reflecting what each party had voluntarily confessed, regardless of factual compatibility. Adjudication was largely based on personal admissions, and proceedings affording legal verification were few and far between.

Three Themes

The ensuing investigation is built around three observations that previous scholarship has insufficiently stressed. The first concerns a stark geographical divide in adjudication patterns depending on whether

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6 Helmholz, *The Oxford History v.*
Introduction

A church tribunal operated in the “North” or “South” of Latin Christendom (Map 0.1). The Southern sphere included Iberia and the Mediterranean, the North extended from England and the Francophone “lands of customary law” (pays de droit coutumier) eastward into German-speaking areas.

To capture the essential differences between the two regions, moreover, it is instructive to look at select diocesan jurisdictions and their way of handling the causae matrimoniales. Each court recorded outcomes in surviving fourteenth- and fifteenth-century registers. The data refer to the conclusion of enforcement suits, annulments, separations, and cohabitation requests in quantities that vary enormously (Table 0.1).

The absolute figures in Table 0.1 indicate that Northern ecclesiastical judges were about ten, if not fifty or 100 times busier than their Southern colleagues resolving questions of sacramental validity and spousal cohabitation in public court proceedings. Territorial size, population, and wealth distribution possibly drove the totals higher or lower. But the second theme awaiting exploration in the present book is chiefly responsible for the numerical discrepancies. Penitential investigations decisively affected the size of caseloads. Unsubstantiated confessions of

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7 The Appendix below, pp. 218–227, 230–240, informs comprehensively about the numbers presented here. They are based for Regensburg on five registers of 1489, 1490, 1500, and 1514–1515; for Augsburg on one from November 1348 to May 1352; for Cambrai on seven (1438–1439, 1442–1443, 1444–1447, 1449–1450, 1452–1453), along with two (1449–1450, 1452–1453) from the officialatus of Brussels carved out of Cambrai in 1447; and a Paris register (November 1384 to September 1387).

8 See the Appendix below, pp. 244–245. The total for Venice is from the oldest extant register of sentences (1465); for Lucca, from twelve registers of 1341, 1346, 1349, and 1352–1361. The oldest act-book from Girona is available for 1510–1511 (below, Chapter 5, note 12); it does not contain matrimonial decisions, although the bishop often conducted proceedings in execution of papal dispensations; between 1455 and 1461, three to four of them were recorded each year in the Apostolic Penitentiary (Chapter 6, note 31 below).
the type associated above with Michael and Mary were practically absent from Italian jurisdictions, for example, but plentiful and pervasive across Southern Germany, two areas separated not only by the Alps, but also by dramatically different recourse to church authority.

The availability of “less than legal” tools to track sin and the validity of sacramental obligations has largely escaped modern scrutiny. Inspired by research traditions with an exclusive focus on juristic criteria, historians have treated witness depositions and cross-examinations for the ascertainment of facts as a mark of operations everywhere. In addition, they have surmised that there was a neat separation between adjudication in the name of the law and, alternatively, the spiritual “forum of conscience”, in which confessors advised laypeople “privately” on conduct risking God’s wrath and eternal damnation. The sources reveal, however, that priestly supervision occurred under the sacramental seal of secrecy as well as in the public sphere, to the effect that openly staged penitential proceedings interfered with the life of ordinary Christians until the end of the Middle Ages. Judges launched inquiries based on proof comprising (as with Michael and Mary) self-incrimination and cleansing oaths, in a course of action that received minimal coverage in the procedural handbooks yet continued to be of tangible consequence.⁹

Public penitential charges went on to dominate the matrimonial case-load in many ecclesiastical judiciaries while straddling the divide between the pastoral and the judicial. Evidence did not have to be clearer than daylight or concede the benefit of the doubt to defendants, and parties who disobeyed summonses or were found to live in canonically invalid partnerships had to reckon with sentences that amounted to lawful decisions as the *ordo iudiciarius* proposed them. How did late medieval jurists understand the difference? Most of them kept their responses brief, acknowledging that the process was predicated on legally insufficient indicators such as neighborhood gossip.¹⁰ Others tried to understand it as a variation of so-called “summary” trials, investigations in the ordinary Romano-canonical format albeit stripped to their barest essentials to speed up sentencing. The eminent lawyer Bartolus speculated in the fourteenth century that, as a minimum, a libel containing the main points

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of accusation and the final verdict had to be submitted in writing to the judges. The restriction, he explained, even applied in litigation aimed at penance and occurring “daily” in his urban Italian environment. Bartolus also invoked the canonistic concept of “Evangelical Denunciation”. It required Christians to intervene should bad rumor affect an individual, based on the exhortation of the Gospel (Matthew 18:3) to rebuke sinners fraternally and “tell the Church” if triple admonition did not persuade them to mend their ways. In this way, God was viewed as conferring official powers to the faithful, which obliged them to denounce spiritually damaging behavior.

Although some theorists considered public inquiries in foro conscientiae to be an abbreviated version of ordinary legal proceedings, they stopped short of conceding that unilateral oaths, decisory or purgatory, were enough to bolster judicial outcomes. Especially in matrimonial affairs, they agreed that sworn affirmations were not suited to distinguish rightful from wrongful claims. Nobody could be assigned to another as a spouse by his or her word alone. Nevertheless, one-sided testimony repeatedly determined cases in which statement stood against statement, as prosecutions of manifest sin set the threshold for admissible evidence significantly lower (see Figure 0.1). Aimed at penance, the typical complaint departed from anonymous imputations of ill fame (mala fama) and did not have to commit to accurately stated points of accusation. Alleged sinners were cited, say, on account of illicit sex and eventually claimed to have acted legitimately as spouses. Facts were not at issue, but rather the good name of individuals and the silencing of poisonous words in the community. The subjective belief of a person was assessed, often requiring a specific number of oath-helpers (compurgators) to vouch for the defendant’s innocence. Failure to do so led to the imposition of a second oath (of abjuration) in which culprits promised under pain of added penalties not to commit the previous offense again. For being agnostic, the approach frequently prompted decisions that defied logical plausibility. One freely

11 “Est et alia denuntiatio privata quae locum habet solum in foro ecclesiasticop introductaperlegem Evangelicam quae quotidianae est . . . , ut . . . ad penitentiam cogat . . . ; super hac denuntiatiocer tobatur libellus, lis contestatur et sententia in scriptis tertur”; cited from the “Tractatus super constitutionem extravagantem Ad reprimendum”, s.v. Denuntiationem, in: Barolus de Saxoferrato, Consilia, quaestiones et tractatus (Venice: Giunta, 1585) fol. 96va (no. 5–7).
confessing partner could be declared guilty of non-marital intercourse while his or her alleged mate was dismissed after formally rejecting the charge by way of (com)purgation.

Under the label of certification, there is a third argumentative thread running through the pages of this monograph. Once again, it appears inseparable from the ubiquity of penitential proceedings in the Northern jurisdictions, which characteristically took on mere hearsay and unilateral assertions unsupported by legal evidence. Modern scholarship has noted that widespread reliance on allegations of the weakest sort led to elevated loss ratios for claimants asserting the validity of marriage ties. In many courts, the cohort of defeated plaintiffs was conspicuously gendered in that female accusers initiated the bulk of suits ending in failure to enforce a wedding vow. Older research has tended to explain the numerical bias by depicting the women as hapless victims, deceived by lustful seducers who deserted them as soon as there were signs of a pregnancy.\(^\text{14}\) More

\[\text{Figure 0.1: Penance – private and public}\]

recently, studies have begun to discern greater agency behind the narratives of abandonment and betrayal, acknowledging that evidentiary deficiencies had a way of setting the stage for subsequent trials in which the losing party demanded from the winner payments of alimony or bridal support. As a result, matrimonial cases occupying ecclesiastical officials could unfold in connection with schemes that anticipated or even presupposed negative judicial outcomes.

Only unmarried persons walked away from judgments with church certificates permitting them to wed someone of their own choice or allowing them to seek (through additional rounds of litigation if necessary) financial support for children born out of wedlock and the like. The tacit or express calculation of ulterior benefits goes far in explaining why Northern caseloads easily grew to multiples of the Southern ones. Women claiming a husband in hopes of securing monetary compensation were not alone in embracing penitential proceedings with a contingent objective in mind. Because they allowed for mobilization in the absence of lawful corroboration and afforded rapid results, demand was equally heavy for written declarations stating that an alleged spousal obligation did not constitute matrimony in the legal sense. Compromised enforcement suits and successful annulments clearly prevailed among the causae matrimoniales of the North, and the opening three chapters of this study offer considerable illustration of how prominently the quest for confirmation of nubile status figured in the agenda of litigants. In dealing with the South, Chapters 4 to 6 argue the opposite. They emphasize that Western Christians of Iberia and the Mediterranean felt little need to approach ecclesiastical jurisdiction for formal attestations. Public lay notaries were well established in the area, so that the documentation of marriage transactions hardly depended on priestly intervention.

Six Chapters

Chapter 1 concentrates on two archives with serial data from different locales. The first preserves “act-books” or logs of daily court activity as well as fiscal information compiled by officials from the archdeaconry of Xanten on the Lower Rhine between 1387 and 1517. The second keeps

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16 Xanten, Stiftsarchiv, Archidiakonat und Propstei, A 14 to A 24 (Accounts, 1387–1517); ibid. A 64, fol. 1–24 (Act-Book, 1516–1517); the study by Joseph Löhr, Die Verwaltung des kölnischen Grossarchidkanats Xanten am Ausgange des Mittelalters (Stuttgart: Enke, 1909), remains fundamental.
registers of sentences and individual suits or “cause papers”, which the bishop’s tribunal at Basel in Switzerland assembled from 1458 onward.\textsuperscript{17} Their examination shows what Christians from both regions expected canonical adjudication to deliver in disputes over the validity of marriages. The ordinary judges of Basel and Xanten were heavily involved in preliminary inquests that did not exceed pastoral verification. Decisions emanating from them established with the greatest frequency that a supposed spousal union did not rise to the level of lawful proof. Many of the defeated plaintiffs took advantage of the outcome by bringing another suit in the same judicial venue. At Xanten, it was women who lost claims to a spouse on a routine basis. They often returned to sue the adversary for alimony, bridal money, or compensation due to the loss of their virginity.

Chapter 2 explores caseloads from an area defined as Franco-Germanic. Extending from Northern France to German-speaking regions, it deals with court business of penitential rather than judicial characteristics. The analysis of the material utilizes a distinction from late medieval Xanten between “simple” and “double” suits. The former pitted claimant against defendant; the latter showed several parties competing for one and the same partner. The massive preponderance of individual petitions especially across jurisdictions in Germany is indicative of ordinary judges passively waiting for litigants to approach them.\textsuperscript{18} The initiative typically rested with people in search of litigious opportunities beyond sacramental marriage. The lack of evidence aside from unilateral assertions led to certain rejection, which plaintiffs were likely to have factored in from the start.

Research has found the strongest evidence of prosecutorial resolve in fifteenth-century Cambrai and Brussels, where the bishop installed not only an officialis as his deputy judge, but also a promotor for expert management of the accusations. He served to support persons whose case he found worthwhile, took over from them, or acted as instigator in the way of a modern state attorney. Still, closer inspection diminishes the judicial impact of his intervention and magnifies its fiscal importance. Double proceedings at Cambrai nearly matched the simple ones in quantity and considerably outnumbered them at Brussels.\textsuperscript{19} Most of the

\textsuperscript{17} Basel, Staatsarchiv des Kantons Basel-Stadt (= SAKBS), Ältere Nebenarchive, Gericht des officialis curiae, AA 1 (Sentences, 1458–1470); ibid. AA 2 (Cause Papers, 1486[?]–1509).

\textsuperscript{18} At Augsburg (1348–1352), there were eight “double” (or combined) versus 471 “simple” enforcement suits; at Regensburg (1489–1490, 1500, 1514–1515), the ratio was thirty-six to 726; see the numbers in the Appendix below, pp. 230–233, 235–238.

\textsuperscript{19} The seven fifteenth-century registers from Cambrai in the Appendix below, pp. 222–225 (without Brussels), have 145 simple and 132 double or combined claims. For Brussels,