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I. Introduction

It seems incongruous to present an essay based upon the canon law in a symposium devoted to the history of Christian baptism. Indeed, discovering that the classical law of the church dealt with the topic at all is surprising at first sight. Baptism is a theological subject, and it is common ground among historians that from the twelfth century forwards the canon law consciously separated itself from theology. It dealt with the regulation of human conduct and the governance of the church, not with theological doctrine. However, it is a fact that the canon law dealt with the sacrament of baptism, and it is equally true that it did so for good reasons. Uncovering the canonical treatment of baptism also has a relevance to understanding the inner nature of the classical canon law. It is my hope to make this clear by drawing a comparison between the canon law of baptism and its law of marriage and divorce.

1. *Baptism's Place in the Canon Law*

Several reasons impelled the authors of the law of the medieval church to deal with baptism. One was jurisdictional. With few exceptions, only those men and women who had been baptized were subject to the jurisdiction of the courts of the church. Although this seems rarely to have been the subject of litigation, baptism was a prerequisite for the exercise of control over the affairs of the laity, and this meant that there had to be a way to determine whether baptism had occurred in fact. Without it, legal proceedings were a nullity for lack of jurisdiction over the person. Another was purposeful. Although it is quite true that the courts of the church concerned themselves with human conduct rather than belief, that limitation did not eliminate the need to treat baptism. Baptism was both – a matter of conduct as well as of belief.

Determining how the sacrament should be conducted and deciding who should play each part in the rite came easily within the scope of the law of the church. For much the same reason, another title in the Gregorian Decretals dealt with the rules for celebration of the Mass (X 3.41.1–14). A regime of law was necessary to guide the clergy in both areas, and even to instruct the laity. A third justification was consequential. Baptism had effects on other aspects of human life. It created ties of kinship between families that were supposed to matter and sometimes did.¹ It also had defined legal consequences. One was the establishment a spiritual relationship between the person baptized and the sponsors, a relationship that barred subsequent marriage between them (X 4.11.1–8). Another was the effect of the sacrament on the status of antecedent crimes and debts of the person baptized. Did they survive baptism's cleansing from sin?² It turned out that some did and that some did not. It was therefore necessary to know whether a valid baptism had taken place. The canon law gave an answer to the question.

2. *Baptism in the Canonical Texts*

The topic of baptism is found in many places in the *Corpus iuris canonici*. It was also regularly discussed by the medieval and early modern commentators on the canon law. Gratian's *Decretum* (ca. 1140) devoted a long *Distinctio* to problems arising from baptism (De cons. Dist. 4 cc. 1–156). The subject also occupied two separate titles in the third book of the Gregorian Decretals (X 3.42.1–6; X 3.43.1–3) and also one in the Clementines (Clem. 3.15.1), although not in the *Liber sextus* or the other books in the second half of the *Corpus iuris canonici*. Baptism was also treated in local ecclesiastical legislation, being included in many diocesan and provincial statutes.³ It never became a favorite subject of the jurists; fewer monographs

1 BOSSY (1973) 129–143.

2 TUSCHUS (1605–1670) Lit. B, concl. 23; CHERICATO (1688) Mens Aprilis, quaest. 2.

3 E. g., GARCÍA Y GARCÍA (1984) Synods of Leon III, c. 26 (1303) 270–272;

AVRIL (2011) Synodal Statutes of Carcassonne (ca. 1270), tit. III, 417–20; POWICKE/CHENEY (1964) Statutes of Exeter II (1287) 2: 987–988; TREXLER (1971) 66–68.

about it were written than was true for most titles of the Decretals, but baptism did figure in most treatises on the law and also in the many *Summae* that were compiled for practical use by the clergy.⁴

What did these sources contain? Gratian's primary concern seems to have been to define the meaning of baptism and to establish its centrality for the Christian religion. This concern led him to deal with a great many, though not quite all, the subjects that would occupy later canonists. His treatment emphasized the necessity of baptism for salvation, made a connection between it and circumcision in the Old Testament, prescribed the proper times and persons for performance of the sacrament, stated the ancient prohibition against re-baptism, dealt with mistakes in recitation of the baptismal formula, and justified the baptism of infants who themselves had no knowledge of the Christian faith. Gratian's was a strong collection of texts, though a somewhat confused one, since the presentation was not organized along any discernible lines. His *Distinctio* on the subject contained 156 canons, but the same points were made repeatedly, and there was no logical progression or order apparent in their presentation – perhaps this was no more than a sign of the gradual accretion of texts added to the primitive text of the *Decretum* as it had left Gratian's hands.⁵

By contrast, the treatment of baptism in the later books of the *Corpus iuris canonici* was quite brief. The Gregorian Decretals' principal title on baptism contained only six chapters, and most of them were targeted at special problems. For instance, a decretal of Pope Innocent III clarified that the use of water was a requirement for baptism's validity. Even a severe drought was not reason enough to substitute some other liquid. Overall however, the Decretals and the later jurists accepted virtually all the principles found in Gratian's *Decretum*. Notably absent from this title in the Decretals, as in the *Decretum* itself, was any special concern for the problems raised by coerced baptism. At another place, the principle that no unwilling person was to be compelled to accept the Christian faith was stated clearly (X 3.42.5). But that is almost all, and some aspects of the

subject were left for local legislation, regional custom, judicial discretion, and learned commentators on the church's law.

II. The Laws of Baptism and Marriage Compared

This essay's aim is to come to grips with the basic nature of the canon law of baptism, as it was understood and developed by the medieval canonists. To do this, it compares the canon law's texts and general approach to baptism with its law on marriage and divorce. The comparison is a legitimate one. Both marriage and baptism were sacraments. Both were voluntary in the sense that the consent of the persons involved was required for entry into them. Both required an outward expression of that consent. There were differences, however, and they are useful in bringing to the fore the most salient features of the law of baptism. They also call attention to fundamental characteristics of the medieval canon law. The most obvious point of difference was that marriage was a universal institution, whereas baptism was not. Baptism was reserved to Christians. However, for understanding its basic place in the law of the medieval church that particular difference mattered very little, since the canon law dealt almost exclusively with Christian marriage. The medieval church recognized seven sacraments. For reasons of symmetry, the essay also treats seven aspects of the law, picking among those in which both differences and similarities existed. All of them are meant to be topics that shed light on the character of the church's law.

1. The Requirement of Words

With only minor exceptions,⁶ both marriage and baptism required the use of words, virtually always spoken words. In the case of marriage, the normal focus was placed upon what was said by the man and women themselves; the effective words were »I take thee, etc.« With baptism it was placed upon the words used by the officiating priest. No formal document was required in either

4 E. g., SYLVESTER DE PRIERO (1584) v. *Baptismus* I–VI.

5 See WINROTH (2000).

6 Such as *matrimonium presumptum*; see ESMEIN (1891) 2: 210–212.

case. Spoken words sufficed and seem to have been the norm in practice, most obviously in baptism. However, an intent to marry or to baptize that was not put into words was ineffective. Particularly for marriage, this rule rested upon the need for proof in the external forum. Without it, a passing wish or an internal sentiment, if shared by a man and a woman, might be enough to effect a basic change in their status. That would have been an impossible system to administer.⁷ Whatever the reason, this was the rule. As was true in many areas of the canon law, it was not without exception, though not enough of an exception to upset it. Those who by nature could not speak, as the deaf and dumb, could contract marriage by signs if they had been taught the meaning of what they were doing (X 4.1.23). This, however, was simply a concession to the reality of their condition, not an invitation to further exceptions.

In baptism, the exceptional case was that of the repentant thief on the cross (Luke 23:42–43), to whom Jesus himself had promised salvation. Perhaps canonists might have taken this example as an invitation to open a door to further expansion. One thinks of the hard case of stillborn infants. However, except in the most extreme situations, as where the intensity of desire to accept the Christian faith was matched by the impossibility of actual baptism (X 3.43.1), little expansion occurred. An infant had no strong desire to be baptized, as did the repentant thief. In practice, therefore, the canonical maxim, *De occultis non judicat ecclesia*, was applied in the administration of both sacraments.

If the two sacraments were alike in requiring the use of words, they were quite unlike in defining what those words had to be. In the case of baptism, specific words had to be used and they had to be spoken aloud. This was a requirement based upon biblical texts. Jesus had commanded his disciples to baptize »in the name of the Father, and of the Son, and of the Holy Spirit« (Matt. 28:19). The canonists took him at his word. They understood this command literally, though they did have some difficulty with the equally biblical report stating that the apostles had sometimes baptized simply in the

name of Jesus (Acts 19:5). It was agreed that the words might be said in any language, but the settled rule was that use of the Trinitarian formula was essential, and the strictness of this requirement inevitably gave rise to difficulties. What if the celebrant made a slight mistake in pronouncing the verbal formula, or what if he added additional words to it? An example would be adding the name of the Virgin Mary to the Trinity or erring in referring to the Holy Spirit as feminine (i. e. *Spirita sancta*). I will not enter this confusing and fascinating field of distinctions today, but the tendency among the canonists was to decide against baptism unless the mistake or addition was a distinctly minor one.⁸ In most instances, as with the Roman law's *stipulatio*, the verbal formula had to be followed.

With the canon law of marriage, however, the reverse was true. No part of the Bible (or the Roman law) required the use of any specific words to constitute marriage. Neither did the classical canon law. As long as the intent of the parties was discernible from their words and external actions, a valid marriage would have been contracted. If the words as generally understood in the area adequately signaled that they intended to contract marriage, that was sufficient. The couple's behavior – as in giving each other presents, joining hands, or kissing and drinking together – counted too. These were the common actions of a man and woman who intended to enter into a marital relationship. Courts might treat them as evidence of that intent.⁹ In other words, the sacrament of marriage set a looser verbal standard for entry than did baptism, although except in a few special situations, both did require an external manifestation of intention.

2. Coercion and the Sacraments

The sacraments of baptism and marriage both required the free consent of the parties who entered into them and who would be bound by their consequences. In principle, entry into the Christian religion was to be a free choice. That no unwilling person was to be compelled to follow

7 See SANCHEZ (1739) Lib. II, disp. 30, nos. 1–2.

8 See, e. g., PANORMITANUS (1615) ad X 3.42.1, no 7.

9 E. g., *gl. ord.* ad X 4.2.14, v. *subarrata*; MASCARDUS (1593) Lib. II, concl. 1023–1026.

the Christian faith was stated clearly in the Decretals (X 5.6.9). Not only was the church committed to a regime of peace, the canonists recognized that feigned belief would be of no utility before God, who knows the secrets of human hearts. God sought only volunteers in his army.¹⁰ Similarly, marriage required the free consent of the parties. Both Roman law (Cod. 8.39.2) and canon law (X 4.1.17) held that matrimony was a matter of free choice. Of course, once chosen, marriage bound both parties till their death, but they were free to make the initial choice as they desired. The law of the church would respect and perhaps even guarantee that freedom of choice.

In the world as it was, both coerced marriages and coerced baptisms did occur. Canonists were not blind to this fact. And when coercion came into the picture, the law regulating the two sacraments diverged quite fundamentally. Both recognized that what had been done unwillingly might come in the course of time to please the person involved. They therefore left room for this possibility. But with baptism, the canon law came close to creating a non-rebuttable presumption that it would occur. The resolution of the question of the validity of a coerced baptism in the end depended upon the nature of the coercion used. If the force was absolute, no real baptism had occurred. Thus a person who was baptized while he slept or after he had been tied up and lowered into the baptismal waters would not have received the sacrament. However, the person who was baptized because he had been told that he would lose his patrimony or perhaps even his freedom if he refused would have been validly baptized. He would not be free to renounce the Christian religion. Baptism was a fact. »Forced consent is still consent« (Dig. 23.2.22). Here was a particularly telling example of the force of that ancient legal maxim. It was an objective test and was intended to be so.

The law of force and fear as applied to marriage was more open ended and subjective in character. Fear of serious bodily or financial harm might be enough to invalidate a marriage, at least if it had been sufficient to move a »constant man« – or

perhaps somewhat less in the case of a »constant woman«.¹¹ The canonists understood the danger that this impediment might become a convenient escape route for men and women who had second thoughts about their marriage. They sought to distinguish between acting unwillingly under coercion and acting foolishly under persuasion.¹² Only the first opened the door to divorce. They held to the »constant person« test nonetheless, even expanding its scope over the course of time. The party coerced had the right to invalidate the marriage. Today this right has become a settled part of the more subjective regime of the modern Catholic church's matrimonial law. »Reverential fear« of one's parents may be sufficient to secure an annulment. The medieval jurists found this a very difficult subject; mostly they rejected it.¹³ Many among them might have been happier if their law had endorsed the same objective regime used with coerced baptisms. But it did not.

3. *The Sacraments and Children*

Some of the same problems raised by coerced baptism and coerced marriage arose in a special way in dealing with the status of children, though the results were not identical. Both sacraments could be entered into by children, who almost by definition had less than full understanding of what they were doing. This was particularly true of baptism, of course. Infants were commonly baptized during the Middle Ages, as they are today, and it was held that the faith of their sponsors provided a sufficient substitute for the infant's own volition. The sacrament cleansed the person from original sin, also incurred without the person's knowledge, so that a point of symmetry existed between cause and effect (X 3.42.3). This approach was, although in a lesser sense, also applied to marriage. At least if a child was older than seven, he or she could enter into a valid marriage contract. The child might fully intend to fulfill it but have less than full comprehension of what it might entail and no ability to consummate the marriage by sexual union. The child's parents might even control the situation. In fact, a decretal recognized

10 TUSCHUS (1605–1670) Lit. C, concl. 25, no. 1. 13 SANCHEZ (1739) Lib. IV, disp. 6.

11 *Gl. ord.* ad X 4.1.14, v. *metus*.

12 See, e. g., SANCHEZ (1739) Lib. IV, disp. 1, no. 3.

and in a measure approved the father's choice for the child (X 4.2.1). In that sense, the two sacraments were on all fours. Children could enter into both, despite their deficiency in comprehension.

However, when this did happen, the consequences were quite different. No child baptized as an infant enjoyed a right to change his mind. He could not say, »I myself did not consent.« And if he did, the law would pay no heed to the protest. The canonists must have recognized that this amounted in substance to the textbook case of being baptized while one slept, because they raised the problem. However, they distinguished. In their eyes, the two were simply not the same. They stated that in baptism a different regime was to be applied to children than to adults.¹⁴ The law, then and now, often distinguishes between the rights of children and the rights of adults, giving greater room for the latter. So the canon law did here. Baptism imprinted an indelible mark on the child.

Marriage, by contrast, did not. In the law of marriage and divorce, a different regime obtained. The canon law afforded the child who had married as a child the chance to repent upon reaching puberty. The same decretal that recognized the father's right to enter into a marriage on behalf of a child, went on to state that once the child had reached majority, he was to be urged, but not compelled, to fulfill the matrimonial vows.¹⁵ This meant that if the child to such a marriage then wished to withdraw, he had the right to reclaim against it and then to marry someone else. The earlier marriage did not prevent this reclamation, even if it had been done when the child had earlier been a willing participant, for the child's actions were not taken in law to be the product of true and full consent.¹⁶ True individual consent was thus necessary in marriage, but not in baptism. There were procedural requirements attached to the exercise of this right, but its substance was clear and it was not unknown in medieval practice. The same privilege was not accorded to children who had been baptized as infants. They could not reclaim at any age.

4. *The Sacraments and Reaching Maturity*

Both marriage and baptism involved continuing obligations as well as continuing benefits, and for the person who changed his mind over the course of his life, the obligations would have come to seem greater than the benefits. That situation certainly happened, but the canon law took little account of it. Once validly entered into, neither could be revoked. Marriage was indissoluble. So was baptism. The modern practice of declaring oneself free from religion – which I understand is now a constitutional right in Germany as it certainly is in the USA – would have seemed quite illogical and wicked to the medieval canonists. Equally alarming was the possibility of easy or collusive divorce. The canonists sought earnestly to prevent it. Marriage and baptism were sacraments that depended upon individual choice, but once that choice had been made, the freedom to choose was at an end. The baptized Christian who converted to Islam was an apostate; the married man who left his spouse to marry another was a bigamist. Neither had made a choice the law would recognize as valid. A text in Gratian's *Decretum*, taken from St. Augustine, equated the two: even if the faith (or the affection) had disappeared from the lives of the baptized (or the spouse) as a matter of fact, the effects of the sacrament itself had not (C. 32 q.7 c.28).

Into this stern regime, only a few exceptions were admitted and they came in the law of marriage. One was that if both parties to a marriage were willing, either could forsake the marriage in favour of entry into a religious order. A lengthy title of the Gregorian Decretals was devoted to the subject (X 3.32.1–20). A higher calling, as it seemed, monastic life could still be chosen despite the prior choice of marriage, at least if the other partner consented and was willing to live a chaste life. A second was the so-called Pauline Privilege. Roughly speaking, in any marriage between two unbaptized persons, if one subsequently became a Christian but the other did not, the convert could remarry. The first marriage did not prevent this. A decretal of Pope Innocent III allowed it, citing

14 GAIL (1595) Lib. I, obs. 93, nos. 4–6.

15 *Gl. ord.* ad X 4.2.1, v. *debet*.

16 See, e.g., RICCIO (1621) Resol. 411, no. 2.

Scripture (1 Cor. 7:15) and distinguishing between a merely valid marriage and a Christian marriage (X 4.19.7). The first – available to all – left more room for manoeuvre than the second. A third was the ability to end the effects of marriage (though not the marriage itself) in cases of cruelty or matrimonial misconduct. This was the divorce *a mensa et thoro*.¹⁷ It did not require mutual consent, though often enough agreement, or at least acquiescence, did exist in fact. Nor did it allow either party to remarry. It did, however, end the mundane and daily obligations that marriage entails. The spouses could live apart. They were not bound by the marital debt. Nothing of the sort existed for baptism. No one was excused from the daily obligations of a Christian by anything resembling a divorce *a mensa et thoro*. Only death ended its worldly consequences.

5. Freedom of Choice and Parental control

A difficult question running through the canon law was the extent to which parents should control the »life choices« of their children. It was never treated as a special subject in the canon law, but it arose (though in slightly different ways) in both baptism and marriage. Specifically, could parents determine whether their children were to be baptized or not, and could they decide whether and with whom their children were to be married? The starting point, based upon the law of nature itself, was that parents had a duty to care for their children (Inst. 1.2.1). This was in some sense a reciprocal obligation, for the children were also under an obligation towards their parents, and this was regarded as including a duty to follow parental commands, at least their reasonable commands. A contemporary definition of justice – that meant it giving to each person what was due – included the obligation of obedience which children owed to their parents.¹⁸ The medieval canon law did not endorse the regime of *patria potestas*. That was one part of the civil law peculiar to the Romans.¹⁹ But

it did not reject all the legal consequences that accompanied it.

Given this starting point, it is somewhat surprising to find that decisions about marriage were left to the children themselves. The maxims *libera debent esse matrimonia* and *consensus facit nuptias* were carried that far, at least where the marriage's validity was concerned (X 4.1.29; Dig. 35.1.15).²⁰ Marriage was contracted by the couple's consent alone, any local custom to the contrary notwithstanding (X 4.1.1). The more limited freedom endorsed in Gratian's *Decretum* was swept away in favour of this strong rule. Many secular statutes later sought to make inroads into this regime, and the realities of life made inroads into its effectiveness in fact,²¹ but it remained the canonical rule, at least until the Council of Trent. The marriage in Shakespeare's *Romeo and Juliet* illustrates its potential. Headstrong children, marrying for love alone, may not have been favorites of the jurists, but they were acting within their legal rights. The marriage the contracted was binding upon them and their parents.

With baptism, the legal situation was different. For Christian parents, baptism of their children was both a privilege and a duty. They could not experiment. But what about the children of Jewish or Moslem parents? The starting point was that the parents could decide. Except in rare circumstances, the canon law held that children of Jewish parents were not to be forced into baptism.²² However, where one of the parents had become a Christian, things changed. In that situation the canon law took what might be described as an instrumental approach.²³ If the father had been converted, but the mother had not, the father's will controlled. But if it was the mother who had been converted and the father had not, then it was the mother's will that controlled (X 3.33.2).²⁴ This was an exception to the normal rule that the father's will took precedence. It enabled the converted mother to have her child baptized, no matter what the father wished.²⁵ It was a decision »in favour of the

17 English examples appear in HELMHOLZ (1974) 100–107; French in KARRAS (2012) 165–208; German in DEUTSCH (2005) 266–288; Italian in CRISTELLON (2006) 101–22.

18 See *Vocabularium utriusque iuris, v. iustitia*.

19 *Gl. ord. ad Dist. 1 c. 12, v. nulli*.

20 The reasons for this policy have been disputed; see, e. g., DONAHUE (1976) 251–281.

21 See, e. g., SCHMUGGE (2006) 289–298.

22 TUSCHUS (1605–70) Lit. B, concl. 25.

23 CAFFIERO (2012) 44–60; ROWAN (1975) 3–25.

24 See also SANCHEZ (1739) Lib. VII, disp. 73, no. 16.

25 See also NAZ (1937) 2: 139–141; KISCH (1949) 200–204.

faith». Putting a brave face on it, one might claim that it showed a preference for the interests of the child over those of the parent.

6. *The Role of the Clergy*

Because both baptism and marriage were Christian sacraments, one might expect that both should have called for active administration by the clergy and passive involvement by the laity. Only priests could celebrate the Mass or give absolution to penitents. Should not the same rule have applied in the other two sacraments?

In fact it was not. At least it was not as to questions of validity. The ministers of the sacrament of marriage were the couple themselves. Before the Council of Trent, no ordained person was required to officiate or even to be present when a man and woman entered into a marriage. Witnesses were required if the marriage was to be enforced in a public court, but that was only the awkward result of the law of proof. Even without witnesses the marriage was binding in conscience upon the parties. The more difficult question was sexual consummation, but even there the dominant view was that it was not essential; only the present consent of the couple counted. Likewise, baptism's validity did not depend on its being administered by a priest. The canonists said repeatedly that even laymen, women, hermaphrodites, Jews, pagans, or heretics could validly baptize as long as they used the correct baptismal formula and intended to baptize.²⁶ Some drew the line at baptism conferred by demons who had assumed human form,²⁷ but that was an exercise in scholasticism. The only exception that might occasionally have mattered was that no person could validly baptize himself.²⁸ Jesus himself had been baptized by John, and he had directed the apostles to baptize others, not to encourage others to immerse themselves.

The matter stood differently on questions of full compliance with the law. As it did in several other areas, the canon law separated what was licit from what was valid. The canonists endorsed punishing those who had acted illicitly, but they did not declare their unlawful actions ineffective. This was so with both sacraments, although with somewhat different results. The matrimonial law prohibited clandestine marriages, but it never determined exactly what was meant by clandestinity. Various definitions were possible. It might be one without witnesses, one without banns, or one without due solemnization.²⁹ Since priests were specifically enjoined not to be present at a clandestine marriage (X 4.3.3), it was at least clear that the presence of a priest was not in itself enough to make the difference. The principal concern of the canonists was placed on substance rather than form. Prevention of secret unions between a man and woman who were actually married to others or who were related within the prohibited degrees of affinity and consanguinity was the paramount goal. The presence of priestly formalities was simply a reliable way of accomplishing it. That was also the basic reason for *Tametsi*, the Council of Trent's decree requiring the presence of the parish priest for a marriage's validity.

The canon law's treatment of baptism also drew a distinction between what was licit and what was invalid, but with much greater determination to secure adherence to preventing evasion of the rule. The rule was simple. Except where the person baptized was close to death, only a priest could lawfully administer the rite of baptism.³⁰ The canonists insisted on this. Laymen who baptized outside those circumstances were required to do penance.³¹ Clergy who did so incurred canonical *irregularitas* (X 5.28.1). According to one opinion, a deacon, even if he were a Cardinal Deacon of the Roman church, could not lawfully confer the sacrament.³² Something like the same concern to

26 E. g., HOSTIENSIS (1574) Lib. III, tit. *De baptismo*, no. 7.

27 SYLVESTER DE PRIERO (1584) tit. *Baptismus* III, no. 3.

28 PANORMITANUS (1615) ad X 3.42.4, no. 1.

29 LYNWOOD (1679) 276, v. *clandestine*.

30 PANORMITANUS (1615) ad X 3.42.1, no. 3.

31 *Gl. ord.* ad C. 30 q. 1 c. 7, v. *cogente*.

32 SYLVESTER DE PRIERO (1584) v. *Baptismus*, III, no. 1.

ensure that the correct formula would be used probably lay behind this approach to baptism, but the urgency of ensuring its application was quite different than in the law of marriage.

7. *The Problem of Legal Uncertainty*

The two sacraments raised problems of legal uncertainty – i. e. uncertainty as to whether a man and woman were validly married and uncertainty as to whether an individual had been validly baptized. The law of proof must deal with questions like this in every age and in almost every area of the law. Allocation of the burden of proof, acceptance of legal presumptions, and development of rules of evidence are commonly used to deal with them. Often these means fall short of establishing the truth; they do no more than bring an end to litigation. The medieval *ius commune* had only these imperfect tools at its disposal. That marriage and baptism were sacraments did not make the problems easier.

In the law of baptism, uncertainty arose in two common situations.³³ One happened when godparents and other witnesses had died or disappeared. This might easily occur when a person baptized as a child moved to a new location; he would not remember accurately whether or not he had been baptized, and he certainly could not prove it one way or the other. No parochial registers were compiled before the late sixteenth century. This source of information could not have come to the rescue. The other situation arose when there was uncertainty about the proper use of the baptismal formula. Had the Trinity been rightly invoked? Had the celebrant used the words »I baptize thee«? No one might be sure. In baptism, the canon law made an exception to its normal requirement of two witnesses to prove a fact; one was sufficient.³⁴ But even if one or more witnesses had been available, their memories about details would not always have been reliable. Baptism could not be repeated; that had been decided in the earliest days of the church's existence (C. 1 q. 1 c. 57). Nor could it be presumed to have occurred. There had to be proof.³⁵ So it was a real problem.

To this problem, the medieval canon law also had a solution: conditional baptism. It was authorized and described in a decretal letter of Pope Alexander III (X 3.42.2). In cases of doubt, the priest was instructed to say »If you are baptized, I do not baptize you etc.«, adding »But if you are not baptized, I do baptize you, etc.« Thus was the problem solved by a verbal distinction. Conditional baptism has lived on into the modern world to become a source of hard feelings and theological controversy.³⁶

No such solution was hit upon in the canon law of marriage, where the problems of uncertainty were, if anything, greater than they were in the law of baptism. Most of the difficulties were caused, not by the limitations inherent in infancy, but by the law itself. It left much uncertain in defining what made a marriage. Or so it seems today. Over the years, historians have criticized the canon law's indeterminacy on this score in quite strident tones. F. W. Maitland, for instance, dismissed the law's distinction between the use of *verba de praesenti* and *verba de futuro* in contracting marriage as »no masterpiece of human wisdom«.³⁷ He went on to describe the law of marriage as »a maze of flighty fancies and misapplied logic«.³⁸ A more recent historian summed up the deficiencies of the church's law with a rhetorical question: »Were [a man and woman] really married? Who could tell?«³⁹ His sad conclusion was that, too often, no living person could be certain.

It would be idle to add to these strictures, but a reminder of the main sources of uncertainty about the formation of marriage remains useful. There were at least five: one, a marriage could be contracted without ceremony or formality, in theory even without witnesses; two, no workable definition of what words were sufficient to create a binding marriage was ever given and the difference between statements of mere intention, words of actual present or future consent could be paper thin; three, there was very limited acceptance of the rule of *res judicata* in matrimonial litigation, with the result that no court's decision was ever final; four, no records were kept, no license required, and no formal registration required as part

33 PANORMITANUS (1615) ad X 3.42.2, no. 3.

34 MASCARDUS (1593) Lib. I, concl. 163, nos. 2, 4.

35 Id. Lib. I, concl. 163, no. 6.

36 See STEHFEN (1908).

37 POLLOCK and MAITLAND (1968) 2: 368–369.

38 Id. 389.

39 TIERNEY (1988) 68.

of a valid marriage, although some were encouraged; and five, the initiative for enforcing marriage contracts was largely left to the initiative of the parties themselves; no »Defender of the Bond« existed. These features did not render the canon law of marriage unworkable. Most of them in fact could be used to describe the modern law of contracts. However, they did create practical problems that were not solved in the medieval law. This lack of solution contrasts markedly with the canon law of baptism. There, conditional baptism filled the gap.

III. Conclusion

It sometimes seems to historians that the law consists of miscellaneous and trivial rules and distinctions. In this instance, I hope this is not so. The examples and comparisons made in this essay lead to a fairly clear conclusion. For both marriage and baptism, the canon law adopted an objective approach. It was Augustinian in character. It did not depend upon the interior desires of individuals. Still less did it seek to satisfy them. It depended upon objectively verifiable actions. Only in the law of marriage did the canon law's texts leave an opening for a more subjective – one might almost say a more individualistic – approach. I have given some examples of this. It is true to say that the formal law on both subjects contained the seeds from which a concern for individual rights could grow. The difference was that in the canon law of baptism these seeds did not sprout. In the law of marriage, a few did.

Explaining the policies that supported this difference in outcome was not something in which the medieval canonists excelled. They preferred an approach tied to the texts of the canon and Roman laws. They did not favor speculation arising from

subjective preferences or even from social policy. However, they did leave a few hints. Explaining why a relatively relaxed standard of coercion was enough to allow a divorce but not enough to invalidate a baptism, for example, the canonists wrote that »forced marriages commonly lead to unhappy outcomes.«⁴⁰ Such outcomes were to be avoided, if a way could be found under existing law. They were willing to tolerate some loose results in the law of marriage, because the alternative was worse.⁴¹

However, they wrote nothing of the sort in describing the results of coerced baptism. And they could not have. From their perspective, it was inconceivable to think that the results of being baptized would have been unhappy. Baptism was the one thing every person should desire. It was the highest good. Marriage was not. Indeed, in some ways marriage more of a danger than an aid to advancement of the *salus animarum*. Sometimes, they concluded, it was simply a remedy against the vice of fornication.

In my understanding, this was an additional reason the canon law took an interest in baptism, a seemingly theological subject. Although it did not purport to penetrate the secret of men's hearts, the canon law's purpose was not simply to keep order in society. It was to lead men and women to the good. »The purpose of the canon law,« repeated a much used medieval handbook, »is felicity of the soul.«⁴² With particular clarity, the canon law of baptism illustrates that purpose. It led to results that are quite incompatible with a law founded upon the recognition of individual rights. Comparing baptism with the law of marriage is only one way of demonstrating that feature of its inner nature.

40 See *gl. ord.* ad X 4.1.17, v. *Requisivit*.

41 *Gl. ord.* ad X 4.1.2, v. *tolerari*.

42 CLAVASIO (1520) v. *consuetudo*, no. 2.

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