

### *Contracting Betrothals*

Ideally, couples in late medieval Italy contracted a valid Christian marriage in three stages: betrothal (*sponsalia*) through words of future consent (*consensus per verba de futuro*); marriage (*matrimonium*) through words of present consent (*consensus per verba de presenti*), which alone sufficed to establish a valid, indissoluble union; and consummation through sexual intercourse, which transformed a *de futuro* marriage into an indissoluble union, while it brought to full perfection a *de presenti* marriage. The minimum legal age for giving *de futuro* consent under canon and civil law was seven years; for *de presenti* consent, the couple had to have attained puberty: as a rule, twelve for girls, fourteen for boys<sup>1</sup>. Previous studies of *sponsalia* in medieval Europe have generally focused on canon law doctrines and the disputes adjudicated before ecclesiastical courts<sup>2</sup>. Our study differs in that it also highlights the varied ways in which betrothals were actually contracted and the municipal law procedures and civil law regulations and doctrines that applied to betrothals. In particular, we focus on betrothals contracted by merchant families in late Trecento Florence. To that end, we examine two opinions (*consilia*) of the distinguished Perugian jurist Angelus de Ubaldis (d. 1400), which offer valuable insights into the making and breaking of Florentine betrothal contracts. Apart from presenting new documentary data, our study offers new entry points for the study of betrothal contracts in late medieval Italy.

Knowledge of Florentine betrothals derives from two principal sources: private *ricordanze* and betrothal and marriage contracts drafted by public notaries. Compiled by the heads of merchant Florentine households, *ricordanze* constitute a unique record of business and financial transactions, vital events (births, marriages, and deaths), and observations on contemporaneous social and political events and personages<sup>3</sup>. Even though references in *ricordanze* to prenuptial, nuptial, and postnuptial acts and rites were usually formulaic, they nevertheless provide invaluable

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<sup>1</sup> R. METZ, "L'enfant dans le droit canonique médiéval", *L'enfant*, pt. 2: *Europe médiévale et moderne* (Recueils de la Société Jean Bodin, vol. 36) (Bruxelles 1976), pp. 23ff.

<sup>2</sup> For a general overview of Christian marriage, with an excellent bibliography, see J. GAUDEMET, *Le mariage en Occident. Le moeurs et le droit* (Paris 1987). On the legal issues and doctrines relating to *sponsalia*, see A. ESMEIN, *Le mariage en droit canonique* (Paris 1891), vol. I; J. DAUVILLIER, *Le mariage dans le droit classique de l'Église depuis le 'Décret de Gratien' (1140) jusqu'à la mort de Clément V (1314)* (Paris 1933); P. RASI, *La conclusione del matrimonio nella dottrina prima del Concilio di Trento* (Naples 1958), pp. 32-76; J. GAUDEMET, *Les étapes de la conclusion du lien matrimonial chez Gratien et ses commentateurs, sociétés et mariages* (Strasbourg 1980), pp. 379-391; ID., *Le mariage en Occident*, 169-171; C. VALSECCHI, "Causa matrimonialis est gravis et ardua. Consiliatores e matrimonio fino al Concilio di Trento", in *Studi di storia del diritto II* (Milan 1999), pp. 463-472. On the glossators, see P. RASI, "Il diritto matrimoniale nei glossatori", in *Studi di storia e diritto in onore di Carlo Calisse* (Milan 1939), vol. 1, pp. 129-158; C. DONAHUE, JR., "The Case of the Man Who Fell into the Tiber: The Roman Law of Marriage at the Time of the Glossators", *American Journal of Legal History* 22 (1978): 1-53. For actual cases, see J.-PH. LEVY, "L'officialité de Paris et les questions familiales à la fin du XIV<sup>e</sup> siècle", in *Études d'histoire du droit canonique dédiées à G. Le Bras* (Paris 1965), pp. 1266-1274; C. MEEK, "Women, the Church, and the Law: Matrimonial Litigation in Lucca under Bishop Nicolao Guinigi (1394-1435)", in *Chattel, Servant or Citizen. Women's Status in Church, State and Society*, M. O'Dowd and S. Wichert (edd) (Belfast 1995), pp. 82-85.

<sup>3</sup> A. CICHETTI and R. MORDENTI, *I libri di famiglia in Italia, I, Filologia e storiografia letteraria* (Rome 1985); C. KLAPISCH-ZUBER, *La maison et le nom. Stratégies et rituels dans l'Italie de la Renaissance* (Paris 1990); G. CHERUBINI, "I libri di ricordanze come fonte storica", in *Scritti toscani. L'urbanesimo medievale e la mezzadria* (Florence 1991), pp. 269-287; G. CIAPPELLI, *Una famiglia e le sue ricordanze. I Castellani di Firenze nel Tre-Quattrocento* (Florence 1995).

details on the circumstances engendering new unions. The leader among the historians employing *ricordanze* for family history is Klapisch-Zuber, whose essay “Zacharias, or the Ousted Father” has illuminated the sequence and meanings of the rites culminating in a legally valid marriage in Florence<sup>4</sup>.

The Florentine prenuptial scenario was premised on the primacy of the family - on the cultural conviction that marriages are generated by families, in contrast to today’s prevailing conviction, at least in the West, that families are generated by marriages. By convention the scenario began when a household head (father, widowed mother, senior male kinsman) enlisted the services of a marriage broker (*sensale*) to find a spouse for marriageable daughters and sons. Not only were marriages arranged for girls who were customarily thought of as weak-minded, it was legally and morally incumbent on a *paterfamilias* to arrange marriages on their behalf with men whose social worth approximated that of his own family. A marriageable son, who became a household head on the death of his father, also relied on marriage brokers. Other intermediaries (*mezzani*), normally immediate kin and friends, were enlisted to assist in the negotiations. A private meeting between the parties and their kinsmen followed successful preliminary negotiations. At this meeting the representatives of the prospective spouses concluded an alliance between the two families (*fermare il parentado*), which was emphatically affirmed by a ritual handclasp (*impalamento*)<sup>5</sup>. It was common for the parties, often after wheeling and dealing, to settle on the amount of the dowry the future bridegroom would receive upon marriage. From the fifteenth century on, prenuptial arrangements were normally recorded in a *scritta*, a private written agreement safeguarded by the intermediaries. There is no hint that Florentines cast horoscopes, as is done in India today, to determine the compatibility of the prospective spouses and the most auspicious time for the wedding.

The expression *fermare il parentado* was the social equivalent of *fermare una compagnia*, the expression for forming a business company. The commercial component of alliance making and matchmaking became a convenient target for moralists and was satirized by the *novellieri* Franco Sacchetti and Giovanni Sercambi and the poet Antonio Cammelli of Pistoia. In referring to prenuptial negotiations as *la mercanzia* Sacchetti meant to underscore that matchmaking in Florence was little more than a commercial venture<sup>6</sup>. Cammelli (1436-1502) was critical of the social script in which nubile girls were loveless pawns of venal parents and grubby marriage brokers. One of his sonnets depicts a widowed mother as reprehensibly impatient to find a husband for her daughter<sup>7</sup>. Pietro, the marriage broker, informs her that he has found a suitable groom who is not only rich but also “virtuous, polite, and well attired, and has never uttered a bad word”. She tells Pietro “he will have in exchange a charming girl. She can do what he wishes and in her behavior is chaste, respectable, docile, and beautiful”. Her mother promises a dowry of a

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<sup>4</sup> “Zacharie, ou le père évincé. Les rituels nuptiaux toscans entre Giotto et le Concile de Trente”, *Annales, E.S.C.* 34 no. 6 (1979): 1216-1243. We cite the English translation: “Zacharias, or the Ousted Father: Nuptial Rites in Tuscany between Giotto and the Council of Trent”, in *Women, Family, and Ritual in Renaissance Italy*, translated by Lydia G. Cochrane (Chicago 1985), pp. 178-212. On betrothal practices in the Roman world, see the engaging and informative discussion of S. TREGGIARI, *Roman Marriage. Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford 1991), pp. 83-160; and J. E. GRUBBS, *Law and Family in Late Antiquity. The Emperor Constantine’s Marriage Legislation* (Oxford 1995), pp. 140-182. See also R. ASTOLFI’s detailed *Il fidanzamento nel diritto romano* (Padua 1989). For comparisons between Italian and Northern European betrothal and marriage rituals, see L. SEIDEL, *Jan Van Eyck’s Arnolfini Portrait: Stories of an Icon* (Cambridge 1993); and E. HALL, *The Arnolfini Betrothal. Medieval Marriage and the Enigma of Van Eyck’s Double Portrait* (Berkeley, Los Angeles, and London 1994).

<sup>5</sup> The *Glossa* explained that the meaning of *pactum* derived from a striking of the palms. See the gloss *Percussit to I. Sciendum* (D. 50.15.1): “id est pactum fecit, nam dicitur a percussione palmarum”; and the gloss *Pactum to I. Huius edicti* (D. 2.14.1.1), after Accursius has given Isidore’s ethymology of “pactum”, he states: “Vel dicitur pactum a percussione palmarum”. The term *impalmare*, which is now a literary or facetious term, originally meant “to promise a girl as a bride” as well as “to shake someone’s hand as a sign of agreement”.

<sup>6</sup> F. SACCHETTI, *Il Trecentonovelle*, V. Marucci (ed) (Rome 1996), novella 189, pp. 638-641; G. SERCAMBI, *Novelle*, G. Sinicropi (ed) (Florence 1995), novella 8, pp. 127-140, esp. 127-128. For a discussion of young adolescent girls who were pressured into hasty marriages in the literary context of Shakespeare’s *Romeo and Juliet*, see B. W. YOUNG, “Haste, Consent, and Age of Marriage: Some Implications of Social History for *Romeo and Juliet*”, *Iowa State Journal of Research* 62 (1988): 459-474.

<sup>7</sup> *I sonetti del Pistoia, giusta L’Apografo Trivulziano*, R. Renier (ed) (Turin 1888), p. 53.

thousand gold ducats, half of which she agrees to pay in advance. Eager to conclude the match, she instructs Pietro to see to it “that the young man be informed. Act in earnest! Conduct the deal and let the contract be signed”. In order to be paid, Pietro quickly arranges the business, and the parties conclude the contract at breakneck speed (*in un punto il col scavezza*)<sup>8</sup>. Cammelli's disapproval of the marriage market most likely amused his knowing audience, yet, as we argue below, there were sound reasons for the rush to marriage.

Soon after the agreement to *fermare il parentado*, the couple was solemnly betrothed or espoused (*giuramento, compromesso*) in the presence of witnesses. It was the *sponsa's* (future bride's) legal and moral protector - father, widowed mother, brother, or kinsman - who publicly promised that he or she would ensure that the absent bride-to-be would give her future consent to take the *sponsus* (bridegroom) as her lawful husband, to contract marriage with him, and to receive from him a ring signifying the legitimate union of the couple. Faithfully reflecting practice, *sponsae* were typically absent in literary representations of prenuptial negotiations and the *giuramento*. Florentines would have undoubtedly endorsed Petrus de Ancharano's admonition that it was unnecessary for the prospective bride and bridegroom to know each other personally for the purpose of contracting betrothals or marriages<sup>9</sup>. Indeed, canon and Roman law sanctioned betrothals and marriages contracted between people who were absent (*inter absentes*)<sup>10</sup>. Marriage by proxy still remains a possibility in contemporary Italy. Courts have allowed them to occur when one of the parties lives abroad and compelling reasons exist for the marriage to proceed.

No indication is given in *ricordanze* or other sources that Florentine couples, as other couples in Europe, treated “betrothal as a trial marriage and normally slept together once they had exchanged future consent”<sup>11</sup>. While marriages *per verba de futuro carnali copula subsecuta* were fairly common throughout Europe before the Council of Trent<sup>12</sup>, Florentine merchant families intent on preserving their honor were successful in keeping contact between *sponsae/sponsi de futuro* to a minimum. The constraints on the sexuality of upper-class unmarried women, on the other hand, contrast with the lack of constraints on low-status rural and urban youth, for whom “premarital intercourse was evidently accepted and widespread, as long as relations were initiated with an intent to marry, or at least create a stable bond”<sup>13</sup>. High-status male predators, however, habitually seduced gullible low-status girls and women with promises to marry at a future time, which they had no intention of keeping.

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<sup>8</sup> The verse, “a tutti due in punto il col scavezza” is typically - and wrongly - understood by both editors and commentators to mean that the broker had broken the necks of the betrothed with one blow. See, for example, *Sonetti di Antonio Cammelli detto il Pistoia*, A. Cappelli and S. Ferrari (edd) (Livorno 1884), p. 271, n. 20. On this point, we appreciate the assistance of our colleagues Elissa Weaver and Gabriella Zarri.

<sup>9</sup> For Petrus de Ancharano's view, see J. BRUNDAGE, *Law, Sex, and Christian Society in Medieval Europe* (Chicago 1987), p. 497.

<sup>10</sup> J. BANCAREL, *Le mariage entre absents en droit canonique* (Toulouse 1919). According to Grubb, “Veneto memoirs ... indicate that the girl's consent to a future union, if indeed it was even sought, was not regarded as worth recording”. See J. GRUBB, *Provincial Families of the Renaissance: Private and Public Life in the Veneto* (Baltimore 1996), p. 9.

<sup>11</sup> Quotation from BRUNDAGE, *Law, Sex, and Christian Society*, pp. 436-437, who suggests that premarital sex was common in rural France, England, and Corsica. See also R. WEIGAND, “Ehe- und Familienrecht in der mittelalterlichen Stadt”, in *Liebe und Ehe im Mittelalter* (Goldbach 1993), pp. 343-387, esp. 372-73; E. LE ROY LADURIE, *Montaillou, Cathars and Catholic in a French Village, 1294-1324*, translated by B. Bray (New York 1980), pp. 139-178; P. J. P. GOLDBERG, *Women in England c. 1275-1525. Documentary Sources* (Manchester and New York 1995), p. 9: “The impression gleaned from church court records is that few young women would consent to sex until an agreement to marriage had been made”.

<sup>12</sup> A. LEFEBVRE-TEILLARD, “Regle et réalité dans le droit matrimonial à la fin du moyen age”, *Revue de droit canonique* 28 (1978): 210-217; G. ZARRI, “Il matrimonio tridentino”, in *Recinti: Donne, clausura e matromonio nella prima età moderna* (Bologna 2000), pp. 243-248.

<sup>13</sup> Quotation from M. ROCKE, “Gender and Sexual Culture in Renaissance Italy”, in *Gender and Society in Renaissance Italy*, J. C. Brown and R. Davis (edd) (London and New York 1998), p. 162. G. Ruggiero dubs Venetian antenuptial fornication as “fornication and then marriage”. See his *The Boundaries of Eros. Sex Crime and Sexuality in Renaissance Venice* (New York and Oxford 1985), pp. 16-44; and G. CAZZETTA's brilliant Praesumitur seducta. *Onestà e consenso femminile nella cultura giuridica moderna* (Florence 1999), pp. 51ff. For Aragon, see M. I. FALCON-PEREZ, “Le mariage en Aragon au XV siècle”, in *La femme dans l'histoire et la société méridionales (IX<sup>e</sup>-XIX<sup>e</sup> s.)* (Montpellier 1995), pp. 159ff.

In his turn, the *sponsus* promised that he would take the *sponsa* as his lawful wife. If the *sponsus* could not give his *de futuro* promise to marry, because he had not yet reached the age of fourteen, the promise would be made by his father or close kinsman. When a *sponsus* of legal age was absent from the city, the promise to marry at a future time would be given by a duly appointed agent, which was how the Florentine lay canonist Lorenzo d'Antonio Ridolfi was betrothed. On April 2, 1388, Niccolò Ridolfi, acting as Lorenzo's agent, made an agreement with the Barucci family committing his brother to future marriage with Caterina Barucci. At the time, the twenty-six-old Lorenzo was in Bologna, having just passed his doctoral examination in canon law at the city's university. The *giuramento* took place on April 20, with Niccolò again acting as his brother's agent, promising that Lorenzo would take Caterina as his lawful wife (*per verba de futuro*). The following July, having returned to Florence, Lorenzo met his wife for the first time<sup>14</sup>. The *giuramento* customarily included an agreement on the date of marriage and the composition of the dowry - namely, cash, credits in the public debt (*monte comune*), goods, and real property. If the betrothed had not yet reached puberty, the parties agreed to entrust mutually acceptable intermediaries (*prudentes et discreti viri*) with the decision of establishing the date of marriage and the composition of the dowry (as in Angelus's *consilium* II below).

The *sponsus* was not required to pledge his fidelity by placing a ring on the *sponsa*'s finger. Nor was the exchange of a kiss obligatory<sup>15</sup>. In Florence, the absence of the *sponsa* at the formal betrothal made the betrothal ring and kiss moot. The Roman law prohibition still in force against interspousal gifts did not apply to gifts exchanged by a couple betrothed but unmarried. After the *giuramento* was concluded, it was customary for the *sponsus* to pledge his fidelity by sending to his betrothed a chest (*forzerino*) containing rings, precious stones, belts, and other goods, and by celebrating the betrothal with a dinner at his future in-laws' house. A *sponsa*'s acceptance of gifts in anticipation of marriage established a presumption, unless contrary proof was produced, that she had given her consent to the betrothal made on her behalf<sup>16</sup>. Betrothal gifts were treated neither as the Roman *donatio propter nuptias*<sup>17</sup> nor as the Germanic *morgengabe*<sup>18</sup>, nor even as earnest money or a pledge, which the *sponsus* would forfeit in the event he failed to fulfill the betrothal contract. The betrothal gifts belonged to the husband, and he could demand the return of them at any time<sup>19</sup>. The 1372 statutes of Lucca likewise emphasized that ownership of both

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<sup>14</sup> BNF, Panciatichiano, 147 (Zibaldone di Lorenzo Ridolfi), fol. 2v: "Memoria insuper quod die II<sup>a</sup> aprilis 1388 Nicolaus germanus meus firmavit in uxorem pro me filiam Angeli de Baruccciis de Florentia, Caterine nomine, et vocatam Pichinam, et die XX<sup>a</sup> eiusdem, idem Nicholaus per verba de futuro, nomine meo, desponsavit eandem, et de III<sup>a</sup> maii anni predicti misit sibi forzerinum iuxta morem consuetum. Et ego eam vidi solum die XII<sup>a</sup> julii anni predicti". Our transcription slightly differs from F. MARTINO, "Umanisti, giuristi, uomini di stato a Firenze fra Trecento e Quattrocento. Lorenzo d'Antonio Ridolfi", in *Studi in memoria di Mario Condorelli* (Milan 1988), p. 186, n. 43.

<sup>15</sup> On the origins of these rituals, see the superb study of L. ANNE, *Les rites des fiançailles et la donation pour cause de mariage sous le bas-empire* (Louvain 1941), pp. 5-238. See also ASTOLFI, *Il fidanzamento*, pp. 143ff. For the Middle Ages, F. BRANDILEONE, "Contributi allo studio della *subarrhatio*", in *Saggi sulla storia della celebrazione del matrimonio in Italia* (Milan 1906), pp. 401ff; P. RASI, "La conclusione del matrimonio prima del Concilio di Trento", *Rivista di storia del diritto italiano* 16 (1943): 264ff; G. ZANETTI, "Sul valore giuridico della *subharrhatio anulo* nei riti nuziali del medioevo italo", *Rivista italiana di scienze giuridiche* 18 (1943): 3-134; E. CATTANEO, "La celebrazione delle nozze a Milano", *Archivio ambrosiano* 29 (1976): 142-180; K. STEPHENSON, *Nuptial Blessing. A Study of Christian Marriage Rights* (New York 1983); O. NICCOLI, "Baci rubati. Gesti e riti nuziali in Italia prima e dopo il Concilio di Trento", in *Il gesto nel rito e nel cerimoniale dal mondo antico ad oggi* (Florence 1995), pp. 224-244.

<sup>16</sup> ABBAS PANORMITANUS, *Consilia* (Venice 1578), fol. 32r, cons. 48. Prenuptial gifts were also treated as valid evidence in breach-of-promise suits in Victorian England. See G. FROST, *Promises Broken: Courtship, Class and Gender in Victorian England* (Charlottesville and London 1995), p. 30.

<sup>17</sup> M. BELLOMO, *Ricerche sui rapporti patrimoniali tra coniugi. Contributo alla storia della famiglia medievale* (Milan 1961), pp. 27-60 and 223-244.

<sup>18</sup> B. M. KREUTZ, "The Twilight of the Morgengabe", in *Portraits of Medieval and Renaissance Living: Essays in Honor of David Herlihy*, S. K. Cohn and S. A. Epstein (edd) (Ann Arbor 1996), pp. 131-47. See also R. BRACCIA, "Uxor gaudet de morte mariti: la *donatio propter nuptias* tra diritto comune e diritti locali", *Annali della Facoltà di Giurisprudenza di Genova* 30 (2000-2001): 76-128.

<sup>19</sup> T. M. IZBICKI, "Ista questio est antiqua: Two Consilia on Widows Rights", *Bulletin of Medieval Canon Law* 8 (1978): 48-49; M. T. GUERRA MEDICI, *L'aria di città: donne e diritti nel comune medievale* (Naples 1996), pp. 39ff; J. F. BESTOR, "The Groom's Prestations for the *Ductio* in Late Medieval Italy: A Study in the Disciplining Power of *Liberalitas*", *RIDC* 8 (1997): 141ff; and her "Marriage Transactions in Renaissance Italy and Mauss's Essay on the Gift",

prenuptial and nuptial gifts was not transferred to the wife (*non intelligentur esse mulieris nec intelligatur translatum dominium a sponso in sponsam*), and thus, apart from wedding rings, they had to be restored upon demand to the husband or his heirs<sup>20</sup>.

Later - sometimes days, sometimes months, and, on occasion, years later - the couple contracted marriage through an exchange of words of present consent, followed by the *annelamento*, the ringing of the bride. According to Florentine jurists, the groom's giving of the ring and bride's reception constituted extrinsic signs (*signa extrinseca*) or presumptive evidence of marriage<sup>21</sup>. Marriage vows were almost always performed in the bride's home. *Ricordanze* include details about the wedding festivities; the composition and exchange of nuptial gifts; the transfer of the dowry, in part or whole; the husband's acknowledgement of the dowry in a notarial instrument called *confessio dotis*; the time and place of the marriage's consummation; and the introduction of the bride into the husband's household.

As Klapisch-Zuber has observed<sup>22</sup>, before the decrees of the Council of Trent, which made the validity of the nuptial rite dependent on the presence of the priest and his blessing, it was the notary who officiated at the betrothal and marriage and who attested to the solemn exchange of consent between the parties<sup>23</sup>. As canon law validated not only the substitution of public notaries for priests at betrothal and marriage ceremonies, but also the legal effects of these solemn exchanges of consent, it is anachronistic to treat these ceremonies as civic and secular and distinct from religious rites. In contrast to the private setting of the ceremony of marriage, betrothals among upper-level families in the late Trecento and early Quattrocento were customarily celebrated in church and typically presided over by a notary. The betrothal of Lena di Bernardo Sassetti in 1384, for example, was celebrated in the church of the Cistercian Badia Fiorentina, the city's richest monastery (appendix 1). During this period, public notice of the impending marriage was not given. And objections to the marriage were seldom interposed, probably because betrothals violating the church's prohibition against consanguineous marriages, at least among Florence's merchant families, were rare<sup>24</sup>. The public and solemn setting of the Florentine betrothals, however, was designed to accomplish two critical tasks. First, the public betrothal announced to the community that a socially and politically consequential alliance between the two families had been sealed. Second, it announced that the betrothed were spoken for and that they had exited the marriage market. It was now difficult for one of the parties to unilaterally or

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*Past and Present* 164 (1999): 6-46; and, of course, C. KLAPISCH-ZUBER's classic essay, "The Griselda Complex: Dowry and Marriage Gifts in the Quattrocento", in *Women, Family and Ritual*, pp. 213-246.

<sup>20</sup> Archivio di Stato of Lucca, Statuti del Comune di Lucca, 6, fol. 144v, lib. IV, rub. CCXXXII, *De anulo sponsalatio et de donamentis sponse a sponso factis*.

<sup>21</sup> See the *consilium* of the lay canon lawyer, Stefano di Giovanni Buonaccorsi, with *subscriptions* by Filippo di Tommaso Corsini and Lorenzo Ridolfi in BNF, Magl. II, II, 370, fol. 7r-7v. The *consilium* was penned in March 1412/13.

<sup>22</sup> KLAPISCH-ZUBER, "Zacharias", pp. 184-186. See also D. D'AVRAY, "Marriage Ceremonies and the Church in Italy after 1215", in *Marriage in Italy. 1300-1650*, T. Dean and K. J. P. Lowe (edd) (Cambridge 1998), pp. 107-115.

<sup>23</sup> Perugia attempted to thwart breaches of promise of future marriage by requiring the redaction of *sponsalia* by a public notary. See *Statuto del Comune di Perugia del 1279*, S. Caprioli (ed) (Perugia 1996), vol. 1, p. 361, rubric 386: *Qualiter fiat contractus de sponsalitiis*: "Statuimus quod quando aliquis desposaverit uxorem, de sponsalitiis fieri faciat publicum instrumentum, ut ab aliqua partium in posterum non valeat negari". On the role of the notary in redacting *sponsalia* and marriage agreements, see P. LEISCHING, "Eheschliessungen vor dem Notar im 13. Jahrhundert", ZRG, Kan. Abt. 94 (1997): 20-46; M. G. DI RENZO VILLATA, "Il volto della famiglia medievale tra pratica e teoria nella *Summa totius artis notariae*", in *Rolandino e l'ars notaria da Bologna all'Europa*, G. Tamba (ed) (Milan 2002), pp. 384-396. A Bolognese *sponsalium* contract of 1210 is published by G. TAMBA, *Un'corporazione per il potere. Il notariato a Bologna in età comunale* (Bologna 1988), pp. 127-130. The statutes of Perugia and Rolandino Pasaggeri's notarial manual leave the impression that *sponsalia* contracts redacted by notaries were common. Our research in the notarial records of Trecento Bologna and Perugia, necessarily restricted and preliminary, does not lend support to this impression. In our investigation of several dozen *filze* in the Archivi di Stato of Perugia and Bologna we found countless contracts of marriage and *confessiones dotium* but not a single betrothal contract. We wish to express our appreciation to Paola Monacchia, Director of the Archivio di Stato of Perugia, and Maria Rosaria Celli Giorgini, Director of the Archivio di Stato of Bologna, for generously facilitating our research.

<sup>24</sup> KLAPISCH-ZUBER, "Zacharie", pp. 184-185; A. MOLHO, *Marriage Alliance in Late Medieval Florence* (Cambridge, Mass. 1994), pp. 256ff; G. A. BRUCKER, "Ecclesiastical Courts in Fifteenth-Century Florence and Fiesole", in *Renaissance Florence: Society, Culture and Religion* (Goldbach 1994), p. 320.

arbitrarily abandon the betrothal without losing honor and without inflicting dishonor on the aggrieved party<sup>25</sup>.

In his sample of Florentine betrothal and marriage contracts in the Trecento, Cohn found that contracts of marriage far outnumbered betrothal contracts, by nine to one<sup>26</sup>. What explains the large difference? Families in late medieval Italy, with some exceptions, practiced informal betrothals or simply married without prenuptial formalities. The large majority of individuals who married did not grasp (as Angelus observed in *consilium* II) the subtle and consequential distinction between *verba de futuro* and *de presenti*, to which medieval jurists and theologians devoted obsessive attention<sup>27</sup>. We agree with Cohn's suggestion that notarized betrothal contracts were commissioned "almost exclusively" by the wealthy and by families with surnames, a badge of prominence. Our own examination of sixteen Florentine *sponsalia* contracts recorded in the register of the notary Francesco di Piero Giacomini, spanning four years, from March 1418 to March 1422, supports Cohn's findings<sup>28</sup>. All the betrothals were celebrated in churches, including Or San Michele, Santa Trinita, San Pier Scheraggio, and Santa Maria sopra Porta, where the prenuptial negotiations satirized by Franco Sacchetti took place<sup>29</sup>. The betrothed, as their surnames (Bardi, Strozzi, Tornabuoni, Manelli, Del Caccia, and Guidetti) indicate, were members of upper-level families. Among the future bridegrooms we find the jurists Bartolomeo di Giovanni da Montegonzi and Francesco di Iacopo da Empoli<sup>30</sup>. Jurists, including Lorenzo Ridolfi, Stefano di Giovanni Buonaccorsi, and Pietro di Lionardo Beccanugi, appeared as witnesses<sup>31</sup>. Curiously, none of the betrothal witnesses belonged to the clergy, who appear as witnesses in testaments and other transactions.

On the other hand, our evidence somewhat differs from Cohn's finding that the acts of betrothal, marriage, and dowry acknowledgment were separated by a few days and seldom by more than a month. His finding is more applicable to the occurrence of marriage contracts and *confessiones dotium*, which were frequently recorded on the same day in Florence and its *contado*<sup>32</sup>, and less applicable to the interval between betrothals and marriages. For thirteen of the sixteen *sponsalia* contracts in our admittedly tiny sample, Giacomini recorded subsequent marriages. It is likely that the three remaining marriages were recorded by other notaries, or that conceivably the marriages did not occur owing to the death of a future spouse. Three betrothals and subsequent marriages occurred within one day<sup>33</sup>, all the rest within a matter of months<sup>34</sup>. The year-and-a-half lapse

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<sup>25</sup> Princes, it seems, had little compunction about breaking betrothal agreements on grounds of political expediency. See NICOLE CHAREYON, "De l'histoire à la chanson. Les fiançailles rompues de Louis de Male", *Moyen Age* 103 (1997): 545-559.

<sup>26</sup> S. K. COHN, Jr., *The Laboring Classes in Renaissance Florence* (New York and London 1980), pp. 19-23.

<sup>27</sup> S. SEIDEL MENCHI, "Percorsi obbligati. Elogio del matrimonio pre-tridentino", in *Matrimoni in dubbio. Unioni controverse e nozze clandestine in Italia dal XIV al XVIII secolo*, S. Seidel Menchi and D. Quagliani (edd) (Bologna 2001), pp. 35ff; G. ZARRI, "Il matrimonio tridentino", pp. 204ff. For the case of a law student who, while attending the university of Bologna, was married *per verba de futuro* to his Palermitan bride (Violante Belingerio), see C. A. GARUFI, "Il matrimonio *per verba de futuro* di un siciliano studente leggi in Bologna nel 1349", *Il circolo giuridico* 28 (1897): 62-72, 161-173, 200-204. The instrument was drafted in Palermo in 1349.

<sup>28</sup> ASF, NA, 9039. Alphabetical lists of the betrothal and marriage contracts are found at the beginning of the *filza*.

<sup>29</sup> See above, note 6.

<sup>30</sup> ASF, NA, 9039, fol. 33r, 430r.

<sup>31</sup> *Ibid.*, fol. 69r, 430r.

<sup>32</sup> ASF, NA, 19768 (ser Taddeo Lapi), fol. 1v (27 Jan. 1353/4), fol. 3r (4 Feb. 1353/4), fol. 6rv (16 Feb. 1353/4), fol. 23r (20 Sept. 1353), fol. 30v (18 Jan. 1354/5), fol. 31r (1 Feb. 1354/5). The same practice is found in Arezzo and Perugia. For Arezzo, see ASF, NA 1921 (ser Bartolomeo di Taviano), fol. 5v (31 Mar. 1392), fol. 8rv (28 Apr. 1392), fol. 22rv (8 Jun. 1393), fols. 24v-25r (12 Oct. 1393), fols. 29v-30r (4 Mar. 1394/5), fol. 30rv (4 Mar. 1394/5), fols. 34r-35r (12 Aug. 1394), fol. 40rv (3 June 1394). For Perugia, see Archivio di Stato, Perugia, notarile 49 (Niccolò di Lucolo), fol. 29rv (16 May 1401), fols. 33v-34v (30 Jun. 1401), fol. 73r (23 Apr. 1403).

<sup>33</sup> The occurrence of betrothal and marriage on the same day was not so unusual as it may seem. For other examples, see *Ricordanze* di Niccolò del Buono Busini (1400-1413), ASF, Carte Stroziane, ser. 4, n. 564, fol. 30v (22 Dec. 1404); *Ricordanze* di Antonio di Leonardo Rustichi (1412-1436), Carte Stroziane, ser. 2, n. 11, fol. 13v (21 Jan. 1417); SUSANNAH KERR FOSTER, *The Ties that Bid: Kinship Association and Marriage in the Alberti Family 1378-1428* (Ph.D. diss., Cornell University, 1985), p. 400.

<sup>34</sup> Interestingly, the short intervals in Florence are similar to the intervals separating betrothals and marriages in the early Roman Empire. See TREGGIARI, *Roman Marriage*, pp. 153-155.

between the betrothal and marriage of Agostina di Zanobi de' Bardi to the banker Roberto di Buoni was unusually long and risky<sup>35</sup>. In Florence and other Italian cities, especially during this plague-infested period, the rush to marriage was prompted by fear that the longer the interval, the greater the possibility that the marriage, and therefore the family alliance, would not take place owing to the death of one of the *sponsa* or *sponsus*. But there were other good reasons for not waiting to contract marriage. *Sponsi* wanted the dowry promised them, which was customarily conveyed at the time marriage was contracted. To dampen suspicions invited by a long interval that the betrothed were behaving dishonorably, it was in everyone's interest to conclude the marriage in measured haste.

### *Breaking Betrothals*

Helmholz reminds us that canon law departed from Roman civil law by making a "contract by words of future consent ... specifically enforceable in church courts. Even where the espousals were entered into without the force of an oath, where the contract was a *nudum pactum*, the canon law granted an action to secure its enforcement"<sup>36</sup>. The proof text authorizing compulsion was the canon *Ex litteris Silvani* (X 4.1.10), in which a breaching party, under threat of ecclesiastical censure<sup>37</sup>, is compelled to fulfill the betrothal promise. If the breaching party disobeys the order to marry, he and his father are to be excommunicated, unless it can be shown that a legitimate cause exists impeding the marriage. Because of these conditions, we have deliberately avoided employing the terms "engagement", "fiancé" and "fiancée", and "fidanzamento", which in recent and current usage lack the binding force carried by medieval *sponsalia*, *sponsus*, and *sponsa*<sup>38</sup>.

Determining whether a breach of contract was committed when marriage did not follow the betrothal was a matter for legal experts and church authorities. No breach of contract ensued, the canonists agreed, where the *sponsa* and *sponsus* voluntarily and mutually consented to withdraw from the betrothal with authorization from their bishop, or where a party proved that the betrothal promise was coerced<sup>39</sup>, or where the death of a party made marriage an impossibility. A party's subsequent serious physical or mental infirmity or entrance into a religious order also constituted legitimate reasons for dissolving the betrothal contract. Recall that after his conversion to Christianity, Augustine withdrew from the betrothal that his mother Monica had arranged on his behalf with a ten-year-old heiress<sup>40</sup>. In other cases, a marriage might become impossible when a party had not yet reached puberty on the agreed-upon date of marriage, when the parties were related to each other within prohibited degrees or when they came to be related by affinity, or

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<sup>35</sup> ASF, NA, 9039, fol. 97v, 250r.

<sup>36</sup> R. H. HELMHOLZ, *Marriage Litigation in Medieval England* (Cambridge 1974), p. 35. On the enforceability of sworn promises to marry, see Innocent's III decretal, *Praeterea hi* (X 4.1.2). According to SEIDEL, *Jan Van Eyck's Arnolfini Portrait*, p. 70, betrothals in Ghent and Bruges "had the binding force of contracts". Like so many historians, HALL, *The Arnolfini Betrothal*, p. 61, minimizes the binding force of *sponsalia* contracts by accenting the legal reasons for breaking them. This approach creates the misleading impression that *sponsalia* are analogous to contemporary engagements to marry.

<sup>37</sup> Though compulsion may seem to be a flagrant violation of the principle of freedom of marriage, excommunication in this case was deemed legitimate because the parties made their promise under oath.

<sup>38</sup> As O. Di Simplicio points out, the expression *sponsalia de futuro* "non é assimilabile alla parola *fidanzamento*, come essa viene intesa nel XX secolo". Further, *fidanzamento* and its cognates, *fidanzato* and *fidanzati*, were not used in the Trecento and Quattrocento. See his *Peccato, penitenza, perdono. Siena 1575-1800. La formazione della coscienza nell'Italia moderna* (Milan 1994), p. 250.

<sup>39</sup> On the issue of parental consent and coercion, see C. F. O'DONNELL, *The Marriage of Minors: An Historical Synopsis and Commentary* (Washington, D. C. 1945); M. TOCCI, "Il *consensus parentum* alle nozze nella canonistica e nel pensiero dei teologi tridentini. Un caso di obbligo *de honestate*?", *Archivio giuridico* 120 (2000): 541-580; M. KORPIOLA, "An Uneasy Harmony: Consummation and Parental Consent in Secular and Canon law in Medieval Scandinavia", in *Nordic Perspectives on Medieval Canon Law*, M. Korpiola (ed) (Publications of Matthias Calonius Society, 2) (Saarijärvi, 1999), pp. 125-150; G. COZZI, "Padri, figli e matrimoni clandestini (metà secolo XVI - metà secolo XVIII)", *La Cultura* 14 (1976): 169-213; D. HACKE, "Non lo volevo per marito in modo alcuno. Matrimoni forzati e conflitti generazionali a Venezia fra il 1580 e il 1680", in *Tempi e spazi di vita femminile tra medioevo ed età moderna*, S. Seidel Menchi, A. Jacobson Schutte, and T. Kuehn (edd) (Bologna 1999), pp. 195-224.

<sup>40</sup> GRUBBS, *Law and Family in Late Antiquity*, p. 155.

when one of the parties was already betrothed or married<sup>41</sup>. A future marriage might be derailed if one of the parties was declared infamous or committed fornication with a third party, or if the future bridegroom was absent from the city for a protracted period - conventionally, two years<sup>42</sup>. In theory, ecclesiastical courts, operating under the presumption *matrimonium gaudet favore iuris*, should have been inclined to grant the petition of the party seeking to enforce the betrothal contract. In practice, church courts were disinclined to compel an obdurate party to marry, which would have undermined the sacred principle that choosing a spouse must be ultimately grounded in consent given freely with a clear mind<sup>43</sup>. Church courts in Paris and Regensburg allowed the dissolution of betrothals where one party repudiated the betrothal contract, but they ordered the breaching party to compensate the other party for expenses incurred in anticipation of marriage<sup>44</sup>. The available published evidence suggests that adjudication of disputes in Italian church courts of the validity and performance of betrothal contracts occurred infrequently, at least before the Council of Trent<sup>45</sup>. Only a handful of cases involving betrothal contracts were adjudicated before the diocesan courts in fifteenth-century Florence and Fiesole<sup>46</sup>. None of the litigants belonged to families of high social standing. In the middle of the fifteenth century, statutes enacted in Bologna, Carpi, Modena, and Piombino imposed penalties on parties contracting and breaking multiple betrothals<sup>47</sup>. These statutes were aimed at the chronic problems caused by clandestine betrothals and marriages. Incensed that their children were betrothed and married without parental and family approval, parents and relatives pressured the *sponsae* and *sponsi* to break their promises, so that they could be married to people who had received the family's approval. The statutes also refer to violent reprisals undertaken by

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<sup>41</sup> Parties who secretly married (*per verba de presenti*) a person other than the betrothed frequently appeared in the records of church courts. See LEFEBVRE-TEILLARD, "Regle et réalité dans le droit matrimonial", pp. 210-217; M. VLEESCHOUWERS-VAN MELEBEEK, "Aspects du lien matrimonial dans le *Liber Sentenciarum* de Bruxelles", *Revue d'histoire de droit* 53 (1985): 50-61.

<sup>42</sup> For a list of cases in which the *sponsalia* could be dissolved, see IOHANNES ANDREAE, *De sponsalibus et matrimoniis*, in *Tractatus universi iuris* (Venice 1584), vol. 9, fol. 2rv. For the absence of the *sponsus* for a protracted period, see *I. Si is qui puellam* (C. 5.1.2).

<sup>43</sup> A. LEFEBVRE-TEILLARD, "Ad matrimonium contrahere compellitur", *Revue de droit canonique* 28 (1978):210-217.

<sup>44</sup> L. POMMERAY, *L'officialité archidiaconale de Paris et sa compétence criminelle aux XIV<sup>e</sup> et XV<sup>e</sup> siècle* (Paris 1933), pp. 346-348; R. WEIGAND, "Zur mittelalterlichen kirchlichen Ehegerichtsbarkeit", in *Liebe und Ehe*, pp. 312-313; C. CHRISTENSEN-NUGUES, "Mariage consenti et mariage contraint: l'abjuration *sub pena nubendi* à Officialité de Cerisy, 1314-1346", *Médiévaux: langues, textes, histoire* 40 (2001): 101-111. The evidence on the frequency of disputes over the enforcement of betrothals in late medieval rural England is mixed: see M. INGRAM "Spousal Litigation in the English Ecclesiastical Courts c. 1350 -c. 1640", in *Marriage and Society. Studies in the Social History of Marriage*, R. B. Outhwaite (ed) (New York 1981), pp. 41ff; C. DONAHUE, "Female Plaintiffs in Marriage Cases in the Court of York in the Later Middle Ages. What Can We Learn from the Numbers?" in *Wife and Widow in Medieval England*, S. SHERIDAN WALKER (ed) (Ann Arbor 1993), pp. 183-213.

<sup>45</sup> G. DOLEZALEK, *Das Imbreviaturbuch des erzbischöflichen Gerichtsnotars Hubaldus aus Pisa: Mai bis August 1230* (Cologne and Vienna 1969); MEEK, "Women", pp. 82-85; ID., "Un'unione incerta: la vicenda di Neria, figlia dell'organista, e di Baldassino, merciaio pistoiese (Lucca 1396-1397)", in *Matrimoni in dubbio*, pp. 107-121.

<sup>46</sup> BRUCKER, "Ecclesiastical Courts in Fifteenth-Century Florence", pp. 244-245; ID., *Giovanni and Lusanna. Love and Marriage in Renaissance Florence* (Berkeley 1986), p. 129. For post-Tridentine Florence, see D. LOMBARDI, "Il matrimonio. Norme, giurisdizioni, conflitti nello stato fiorentino del Cinquecento", in *Istituzioni e società in Toscana nell'età moderna* (Florence 1994), pp. 787-805; and her "Intervention by Church and State in Marriage Disputes in Sixteenth- and Seventeenth-Century Florence", in *Crime, Society and the Law in Renaissance Italy*, T. Dean and K. J. P. Lowe (edd) (Cambridge 1994), pp. 142-156. On trials concerning breach of promise to marry adjudicated in the Archiepiscopal Court in pre-Tridentine Bologna (1544-1563), see L. FERRANTE, "Marriage and Women's Subjectivity in a Patrilineal System: The Case of Early Modern Bologna", in *Gender, Kinship, Power: A Comparative and Interdisciplinary History*, M. J. Maynes, et al. (edd) (New York and London, 1996), pp. 115-129, and the author's "Gli sposi contesi. Una vicenda bolognese di metà Cinquecento", in *Matrimoni in dubbio*, pp. 329-362. According to K. Stow, among Jews in the Roman Jewish ghetto "there were at least twenty-three broken engagements out of about 560 matches registered by Jewish notaries during the fifty years 1536-85, or 4.1%". See his "Marriages are Made in Heaven: Marriage and the Individual in the Roman Jewish Ghetto", *Renaissance Quarterly* 48 (1995): 473.

<sup>47</sup> T. DEAN, "Fathers and Daughters: Marriage Laws and Marriage Disputes in Bologna and Italy, 1200-150", in *Marriage in Italy, 1300-1650*, pp. 91-92; R. DEL GRATTA, *Giovan Battista de Luca e gli statuti di Piombino* (Naples 1985), p. 60, 259.



the jilted parties. As far as we know, Florentines who were victims of broken betrothal promises in the late Trecento and Quattrocento resorted to legal remedies rather than to violence<sup>48</sup>.

Long gone were the days when the Florentine knight Buondelmonte de' Buondelmonti was murdered for breaking his solemn pledge to take as his wife an Amidei girl. Like many marriages among warring noble families in the early Duecento, Buondelmonte's marriage had been arranged to keep peace between the two families. However, he was enticed by Forteguerra Donati's wily widow to break his betrothal and marry instead her daughter, whose rare beauty captivated him. As an inducement, the widow promised that she would pay the penalty (*pena*) for Buondelmonte's repudiation, which, as we know, did not quench the Amidei's and their allies' thirst for revenge. According to Florentine tradition, the dramatic murder of Buondelmonte at the foot of Ponte Vecchio beneath a statute of Mars in 1215 ignited the Guelph-Ghibelline conflict, which devastated the city for generations<sup>49</sup>. The lesson of Buondelmonte's ill-fated betrayal was immortalized by Dante: "o Buondelmonte, quanto mal fuggisti / le nozze sue per li altrui conforti". (Paradiso, XVI, 140-141).

In Florence, the name Buondelmonte became synonymous with a groom who could not be trusted to fulfill his betrothal contract. The lead character in Giovanni Sercambi's satiric depiction of betrothal practices among noble Florentine families was purposefully given the name messer Renaldo de' Buondelmonte. He wants to marry Ginevra, the daughter of messer Lanfranco Rucellai, and after the standard preliminaries, the two families come to an agreement on the betrothal and marriage. Lanfranco's wife is delighted with her daughter's betrothal to Renaldo but wants them to marry immediately, for she is alarmed that he will change his mind. Sercambi's audience, familiar with the story of the nonfictional Buondelmonte, would have instantly appreciated the wife's shrewdness. Relating her fears to her dull-witted husband, she urges him to find the notary who had come with Renaldo and who had prepared the *sponsalitium*, so that he can draw up the marriage contract. Lanfranco finds Renaldo who is agreeable to the wife's plan. Soon afterward Renaldo arrives with his kinsmen and his notary at Lanfranco's house. The couple then exchange present-tense vows and the bride is given a beautiful ring, all of which is attested by the notary in the contract of marriage<sup>50</sup>. Later, Renaldo, amid pomp and circumstance, introduces Ginevra into his household.

### *Arrhae Sponsaliciae*

Breach of promise to marry in Roman law, unlike English common law, was not actionable. Under Codex 5.1.1, *Alii desponsata*, a *sponsa* was free to withdraw from her betrothal promise to one person and marry another. At the same time, Roman emperors and their jurists sought to deter breach of betrothal promises by requiring the *sponsus* or his family to put up *arrhae sponsaliciae* (earnest money), which became a standard feature of betrothal contracts in the late Roman Empire and of the notarized contracts in the Middle Ages. The standard Roman law model

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<sup>48</sup> The Florentine merchant Giovanni di Pagolo Morelli recounted in his *ricordi* that before he married Caterina d'Alberto Alberti in 1395, he originally wanted to marry another woman, and hoping to win her, he had forgone opportunities to marry into other prominent families. The woman's father, whose name was not divulged, promised that he would marry his daughter to Morelli and the alliance was affirmed by the ritual handclasp in Santa Croce. But before the *sponsalitium* took place, the father withdrew his promise. Still feeling rage at having been deceived and betrayed (*tradimento*), Morelli related that "I have seen, and I still see", revenge (*vendetta*) inflicted on both the father and his family. Significantly, the inflicted revenge was metaphorical: the "grandissima grazia" (greatest blessing) of having married Caterina and his prosperous financial position were his "revenge". See GIOVANNI DI PAGOLO MORELLI, *Ricordi*, V. Branca (ed) (Florence 1956), pp. 342-343.

<sup>49</sup> DINO COMPAGNI, *Cronica*, G. Luzzatto (ed) (Turin 1968), lib. I, cap. 2, pp. 7-8; GIOVANNI VILLANI, *Nuova cronica*, G. Porta (ed) (Parma 1990), vol. 1, lib. 6, cap. 38, pp. 267-269; LEONARDO BRUNI, *History of the Florentine People*, vol. I, Books I-IV, J. Hankins (ed. and trans.) (Cambridge, Mass. and London), Book 2, pp. 106-107; NICCOLÒ MACHIAVELLI, *Florentine Histories*, translated by L. F. Banfield and H. C. Mansfield, Jr. (Princeton, New Jersey 1988), pp. 55-56, lib. 2, chap. 3.

<sup>50</sup> SERCAMBI, novella 8, p. 129: "La donna contentissima disse a messer Lanfranco che trovasse uno notaio che venga con messer Ranaldo acciò che il matrimonio si fermi, pensando che messer Renaldo non si pentisse".

required the *sponsus* to consign the agreed-upon *arrahae* to the *sponsa*<sup>51</sup>. If he breached the betrothal, the *sponsa* would simply retain the earnest money. In the event the *sponsa* was the breaching party, she or her family was obligated to indemnify the *sponsus* with double, or quadruple, the amount she received from the *sponsus*<sup>52</sup>. The chief purpose of *arrahae* was to compel contractual performance by preventing a party from withdrawing from the betrothal contract with impunity. In contrast to the standard Roman law model, the Middle Ages saw the introduction of a consequential practice: the *arrahae* came to be simply promised, not given, by both parties. In the model betrothal contract included in the 1391 Florentine formulary of ser Iacopo Toschanelli (appendix 2), both parties affirm and acknowledge receipt of two hundred florins as *arrahae*, with the stipulation “that the violating and breaching party will give, pay and restore double this amount to the aggrieved party”. The clause for the reciprocal and simultaneous exchange of *arrahae* had been a standard feature of Florentine and Tuscan betrothal contracts since at least the middle of the thirteenth century<sup>53</sup>. More importantly, it was a legal fiction, since obviously the parties did not exchange anything<sup>54</sup>.

In Florence, the fictional exchange of the same amount of *arrahae* seems, at first glance, illogical. Yet, upon closer inspection the *via fictionis* taken by our merchant families was, in fact, an effective way of managing risk. Florentine merchant families - fearing loss of *arrahae*, no matter which party defaulted - were wary and often incapable of transferring large sums to another party. Nor was it feasible for them, even if they had the cash on hand, to tie up large amounts of capital that were indispensable for business undertakings. Just as the size of the dowry increased in the fifteenth century<sup>55</sup>, so did the amount of *arrahae* that was required to secure the performance of betrothals contracted by the wealthy and prominent. We were able to match *sponsalia* and dowry contracts of eight couples in the register of Francesco di Piero Giacomini cited above. In four cases, the amount of *arrahae* slightly exceeded the amount of the dowry, in three cases the amount was slightly lower, and in one case the amount was identical. By way of illustration, in a betrothal contracted between the Lipacci and Alessandri, the amount was 1,500 florins, while the corresponding dowry was 1,600 florins<sup>56</sup>. In the betrothal contracted between the Carocci and the

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<sup>51</sup> Needless to say, the father of the *sponsus* also could give the *arrahae* on behalf of his son. Though Roman legislation considered various possibilities - for instance, whether the *sponsa* was *sui iuris* and whether she had reached puberty - for our purpose, part of this legislation is irrelevant, for, especially in the Middle Ages, it was the parents of the *sponsus* or *sponsa* who gave or promised the *arrahae*.

<sup>52</sup> On Roman *arrahae sponsaliciae*, see C. 5.1.5, *Mulier iuris sui*; ANNE, *Les rites des fiançailles*, pp. 122-125, 425-426; GRUBBS, *Law and Family*, pp. 163-164; 174-182. See also R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Deventer and Boston 1990), pp. 230-234.

<sup>53</sup> *Un formulario notarile fiorentino della metà del dugento*, S. P. P. Scalfati (ed) (Florence 1997), pp. 83-84: “De promissione et iuramento dandi aliquam in futurum in sponsam uxorem sub arris sponsalitiis”. For later examples, see *I notai fiorentini dell'età di Dante: Biagio Boccadibue (1298-1314)*, vol. 1, fasc. 3 (novembre 1305-maggio 1309) (Florence 1984), pp. 1-2 (doc. 480); pp. 49-50 (doc. 531); p. 62 (doc. 545); p. 63 (doc. 546); p. 125 (609); pp. 132-133 (doc. 618). In Pisa and its *contado* the breaching party was required to pay double the *arrahae* and all litigation expenses. The injured party was also authorized to have the breacher's property seized in satisfaction of the claim. See the *sponsalia* contracts in ASF, NA (ser Meo Buonfigliolo), fol. 3rv (20 Jun. 1401/2); fol. 5rv (2 Jun. 1402), fols. 25v-26v (8 Nov. 1403); fol. 28v (9 Nov. 1403), fols. 35r-36r (26 April 1404). For Siena, see a *consilium* of the Perugian jurist, Onofrio Bartolini, on a dispute over the nonperformance of a betrothal contract that occurred in Siena around 1408. Its *punctus* refers to the mutual exchange of one thousand florins of *arrahae* money, which was acknowledged by the parties in the *sponsalia* contract. See BNF, Magliabechiano XXIX, Cl. 165, fols. 39v-41r, 39v: “Insuper dictus Deus [the father of the *sponsa*] ex una parte et dictus Antonius [the *sponsus*] ex alia, videlicet una pars ab alia et econtra, confessi fuerunt habuisse et recepisse et eis datum et numeratum fuisse et cetera nomine arrarum sponsalitarum florenos auri mille”. The party failing to observe the terms of the contract was obligated “redere duplicatus” that amount to the aggrieved party.

<sup>54</sup> Since the acknowledgment of *arrahae* was a fictitious transaction, we have chosen not to translate *arrahae* in this context as “earnest money” for this last term conveys the idea of an actual cash transfer from one party to the other.

<sup>55</sup> L. MARTINES, *The Social World of the Florentine Humanists, 1390-1460* (Princeton, New Jersey 1963), pp. 37-39; MOLHO, *Marriage Alliance*, pp. 324ff; L. FABBRI, *Alleanza matrimoniale e patriziato nella Firenze del '400. Studio sulla famiglia Strozzi* (Florence 1991), pp. 71ff.

<sup>56</sup> ASF, NA, 9039, fol. 255rv (17 Feb. 1419/20), fol. 395rv (22 Nov. 1421). The observation that *arrahae* and dowry tended to be roughly equivalent has been made by Hughes in connection with the Zaccaria family of Genoa between 1271 and 1282. It is not clear from Hughes's incomplete description whether the stipulation of *arrahae* was mutually binding and whether it was fictional or involved a real transfer of cash. See D. O. HUGHES, “Il matrimonio nell'Italia

Barucci, the amount was 800 hundred florins; the corresponding dowry 720 florins<sup>57</sup>. In a late-fifteenth-century Florentine formulary, the exemplar *arrhae* were set at 1,000 florins<sup>58</sup>.

To more fully appreciate the doctrinal context in which Angelus de Ubaldis rendered his two *consilia*, it is necessary to complement our brief account of *arrhae sponsaliciae* in Florence with a summary of the debate that erupted in the Middle Ages over the validity of attaching penalties to *sponsalia* contracts. From their Middle Eastern or Semitic origins to their incorporation into Justinian's *Corpus iuris civilis*, *arrhae sponsaliciae* have attracted considerable attention from historians of ancient and Roman law. Koschaker, Cornil, Volterra, Brandileone, and Astolfi have focused on the reception of *arrhae* by Roman society, the efforts of legislators to include them in the system of Roman law, and the subsequent legislative developments, including the legislation of the Eastern Empire<sup>59</sup>. Anné produced a nuanced study of their origins and diffusion, first in the eastern and then in the western part of the empire, and of the influence of Christianity on them<sup>60</sup>. In contrast to this profuse attention, *arrhae* under the *ius commune* remain a largely uncharted territory.

For the Middle Ages we focus on a few broad issues gravitating around both doctrine and practice. From a theoretical point of view, one of the first issues jurists had to face was that of determining the differences between *arrhae* and a penalty. Next, especially in view of canon law, came the problem of the compatibility of *arrhae* with the sacred principle that marriage should be based on the free will and consent of the contracting parties. The custom of promising and acknowledging the fictitious receipt of substantial *arrhae* made the jurists examine not only whether the promise and acknowledgment of *arrhae* were legally valid, but also whether the amount should be limited to a token whose loss would be financially negligible. If, instead of a cash transfer, the *arrhae* consisted of a pledge (*pignus*), how should the pledge be construed in view of the imperial legislation on *arrhae*? With regard to the so-called Romano-canonical procedure, jurists had to face the question of what action could be granted to the aggrieved party when the *sponsalia* were unilaterally broken.

The chief piece of legislation regulating the system of *arrhae* was *l. Mulier* (C. 5.1.5) - a constitution originally promulgated by Emperor Leo in 472 and then inserted in the Codex<sup>61</sup>. Classic Roman law recognized that the stipulation of a penalty for the party who unilaterally withdraws from the *sponsalia* violates the customary principle of free marriage. While endorsing this principle, *l. Mulier* permitted *arrhae* and regulated their restitution<sup>62</sup>. Since both *arrhae* and a penal stipulation violate the principle of freedom of marriage, a coherent piece of legislation

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medievale”, in *Storia del matrimonio*, M. De Giorgio and C. Klapisch-Zuber (edd) (Bari 1996), pp. 26-27. For the rough equivalence between dowry and *arrhae*, see *The Society of Renaissance Florence: A Documentary History*, G. Brucker (ed) (New York 1971), pp. 32-37, especially 36. In a marriage negotiation involving the Del Bene family, Lemmo Balducci, whose daughter was betrothed to Amerigo Del Bene, objected to setting the penalty for breaking the *sponsalia* at 2,000 florins. Among other reasons, the bride's father alleged that a penalty of 2,000 florins would spread the rumor that he had given a corresponding dowry (“ogni persona spererà ch'io dia di dota fiorini II<sup>M</sup> d'oro”). For the transcription of the original documents, see GENE A. BRUCKER, *Firenze nel Rinascimento*, translated by M. R. Bertelli (Florence 1980), pp. 253-257, for the citation, p. 256. For another example of the parity between *arrhae* and dowry, see the *consilium* of the fourteenth-century consultant, Andreas de Monte Ubbiano (=Monte Vibiano, a *castello* on a hilltop south of Perugia). Here, Corrado, father of the *sponsa*, promises to pay the *sponsus* a dowry worth 300 florins upon consummation of the marriage. In addition, Corrado acknowledges receipt of 300 florins in *arrhae* from the guardians of the *sponsus*, and in turn promises to pay the *sponsus* 600 florins (*reddere duplicitas*) if and when the *sponsa* does not fulfill the terms of the betrothal contract. The jurist determined that the guardians had not actually paid the *arrhae* (*numeratio non probatur*) and therefore had no claim against the *sponsa*. The *consilium* is located in the Biblioteca Nazionale Universitaria of Torino, Cod. H. I. 13, fol. 73rv.

<sup>57</sup> ASF, NA, 9039, fol. 201r (30 May 1419), fols. 239v-240r (22 Dec.1419).

<sup>58</sup> *Formularium diversorum contractuum* printed at Venice in 1506, fols. 49v-50r (*instrumentum sponsalitiū*).

<sup>59</sup> P. KOSCHAKER, “Zur Geschichte der *arrha sponsalicia*”, ZRG, Rom. Abt. 33 (1912): 383-416; E. VOLTERRA, “Studio sull'*arrha sponsalicia*”, *Rivista italiana per le scienze giuridiche*, n.s., t. 2 (1927): 581-615; n.s., t. 4 (1929): 3-33; n.s., t. 5 (1930): 155-245; ID., s.v. “Sponsalia”, *Nuovissimo digesto italiano* (Turin 1971), vol. 18, pp. 34-37; G. CORNIL, “Die *arrha* im justinianischen Recht”, ZRG, Rom. Abt. 48 (1928): 51-87; ASTOLFI, *Il fidanzamento*, pp. 181-208.

<sup>60</sup> ANNE, *Les rites des fiançailles*, pp. 87-135.

<sup>61</sup> On the content of this fragment, see ASTOLFI, *Il fidanzamento*, pp. 190-197.

<sup>62</sup> For the *arrhae* in the early Middle Ages, especially in Germanic law, see P. L. REYNOLDS, *Marriage in the Western Church* (Leiden, New York, and Köln 1994), pp. 67-100, 113-114.

would require the prohibition of both<sup>63</sup>. The inconsistent treatment to which *arrhae* and a penalty were subjected by imperial legislation became a conundrum for civil and canon lawyers in the Middle Ages.

In *c. Gemma* (X 4.1.29), the locus classicus for discussing *arrhae*, Pope Gregory IX reiterated the principle of freedom of marriage and prohibited forcing an unwilling partner into marriage by the threat of a penal stipulation. In his decretal, the pope prohibited the future groom's father from extorting (*extorsio*)<sup>64</sup> an agreed-upon penalty from the future bride's mother (*Gemma*) on grounds that the marriage had not been contracted after the *sponsalia* had been made. The case and the papal response are patterned after *l. Titia* (D. 45.1.134). According to this fragment, where either spouse refuses marriage, a penal stipulation attached to the betrothal contract is invalidated, because the penalty runs counter to the commonly accepted standards of a community (*boni mores*) requiring that marriages, present and future, not be secured by the threat of a penalty<sup>65</sup>. The text of the decretal has nothing specific to say on *arrhae*, and *sponsalia* are mentioned as a *fait accompli*. Note that, even without papal intervention, a reason existed for invalidating the suit, as both the *sponsus* and *sponsa* had not yet reached the minimum legal age of seven years for contracting lawful *sponsalia*<sup>66</sup>.

While the pope looked ahead to marriage, Bernardus of Parma in his gloss to *c. Gemma* looked back to *sponsalia*, asking whether or not *arrhae* are compatible with the principle of freedom of marriage. Torn between a theological principle and an institution sanctioned by Roman law, and compelled to take into account the custom of giving *arrhae*, his gloss is a conceptual jumble and amounts to little more than a convenient repository of opinions that could be useful to canonists<sup>67</sup>. "Attaching a penal stipulation to *sponsalia*", he wrote, "makes that stipulation invalid for the reason given in the text". Shifting to a series of Roman law texts, he went on, "*arrhae* given at *sponsalia* are lost, if the giving party withdraws without producing a just reason". "Since the reason<sup>68</sup> for giving the *arrhae* and establishing a penalty is the same", he observed without supplying the reason for treating them in the same fashion, "both should be subjected to the same prohibition". The two laws, civil and canon, were on a collision course. In an attempt to avoid the conflict, Bernardus sought another reading of *arrhae*: they may be understood as an incentive (*res favorabilis*) to marriage; penalties were not. Worse, penalties were hateful<sup>69</sup>.

How Bernardus worked was immaterial; it mattered how he was understood. For civilian jurists, including Angelus de Ubaldis, the glossator, by treating *arrhae* as if they were a penalty, had

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<sup>63</sup> The prohibition of penalties should not be taken to mean that they were not attached de facto to betrothal contracts. At the end of the ninth century, Emperor Leo the Philosopher recognized the lawfulness of inserting a penal stipulation in a marriage contract. On his legislation on *sponsalia*, see G. FERRARI, "Diritto matrimoniale secondo le Novelle di Leone il filosofo", *Byzantinische Zeitschrift*, 18 (1909): 159-175.

<sup>64</sup> The term *extorsio* aptly conveys the strong condemnation of the practice of exacting a penalty from the party in default. In 1517, the Florentine Synod reiterated the prohibition to attach any penalty to marriages and, in the same context, the bishops forbade people from acknowledging and promising *arrhae*. Moreover, in order that everybody would fully understand the content of the norms, the decrees related to marriage and *sponsalia* were published in vernacular. For the text, see MANSI, vol. 35, col. 252, Cap. IX: "Et il medesimo dichiarò haver luogo nelle arre promesse o confessate in fraude di detta pena".

<sup>65</sup> D. 1.45.134: "Ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta".

<sup>66</sup> See, for instance, HOSTIENSIS to *c. Gemma* (X 4.1.29), (Venice 1581), fol. 9r, n. 1. For this canonist, the major issue (*principale*) is the *sponsalia*, which were invalid because of the age of the two partners, and the *accessorium* is the penal stipulation, which violated the principle of freedom of marriage. If the main element is invalid, then a subsidiary one - the penal stipulation is all the more so. Though medieval canonists gave various reasons for invalidating the penal stipulation, they concurred that the pope grounded his decision in the sacred principle of freedom of marriage and suggested that in this case age was not a contentious issue.

<sup>67</sup> Later canonists, for instance, Iohannes Andreae and Abbas Panormitanus, attempted to defend Bernardus's method, saying that he did not intend to give a solution (*resolvere*) to the case, but only to present the legal arguments (*allegare*) that jurists may use in such a case.

<sup>68</sup> For the principle "ubi eadem ratio ibi idem ius" that Bernardus applied to a penal stipulation and *arrhae*, see E. CORTESE, *La norma giuridica. Spunti teorici nel diritto comune classico* (Milan 1962), vol. 1, pp. 297-338.

<sup>69</sup> Gloss *Stipulatio* to *c. Gemma* (X 4.1.29), (Venice 1572), col. 849.

misunderstood their distinctive character. Jurists loudly lamented his misunderstanding<sup>70</sup>, and canonists, too, reprimanded the glossator<sup>71</sup>. For civilian jurists, an unexpected helping hand came from Sinibaldo Fieschi, later Pope Innocent IV. In his commentary to *c. Gemma*, Innocent turned out to be more Romanist than the Romanists. Although he addressed the delicate theological issue of freedom of marriage, he disregarded the Glossa, piling up citations of Roman law without a single reference to canon law<sup>72</sup>. On grounds of *l. Titia* penalties are forbidden but *arrae* are permitted. On grounds of *l. Mulier*, the party who gives the *arrae* loses them if, because of the party's fault, the marriage is not contracted, while the party who receives them must return double or fourfold if likewise the marriage is not contracted. On grounds of *l. Si quis*<sup>73</sup>, if a pledge (*pignus*) is given, it should be treated like *arrae*. On grounds of *l. Si is qui* and *l. Saepe*<sup>74</sup>, if within two years after the *sponsalia* marriage is not contracted, the dispositions on *arrae*<sup>75</sup> become ineffective and the *sponsa* is free to marry another. Similarly, on grounds of *l. Arrhis*<sup>76</sup>, if marriage is prevented by the death of one of the parties, the dispositions on *arrae* are inapplicable. On grounds of § *Hoc quoque* and § *Sin vero*<sup>77</sup>, the same applies if there is a lawful impediment to marriage<sup>78</sup>. It is no wonder that Bartolus counted Innocent IV among the *nostri* (civilian jurists) who recognized that a cardinal difference existed between *arrae* and a penalty<sup>79</sup>.

The equation Bernardus of Parma made between a penalty and *arrae*, coupled with the canonists' suspicion of *arrae* as a possible peril to the freedom of marriage, prompted both civil and canon lawyers to dwell on the difference between giving *arrae* and promising to pay a penalty. Their task was not easy and, as Petrus de Bellapertica aptly noted, "jurists have their hands full" in searching for a convincing difference<sup>80</sup>. For Odofredus, the difference was plain: *arrae* constituted a cash payment, distinguished from a penalty, which constitutes a promise to pay. When one promises to pay a penalty if the marriage is not contracted, the promisor has not drawn anything from his purse (*non extrahit aliquid de marsupio*). As Odofredus quipped, human beings are generous when handing out mere words. In a worst-case scenario, one would take a blind wife rather than pay the thousand pounds he promised on breach of contract, which was tantamount to forcing the promisor into a marriage he would not have otherwise contracted. Moreover, since in

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<sup>70</sup> ODOFREDUS to *l. Alii desponsata* (C. 5.1.1), (Lyon 1550), fol. 262v, n. 3: "Sed canoniste per suum textum dicunt et glossant ... quod idem est in arris quod in pena, quia sicut debent esse libera matrimonia a vinculis penarum, sic etiam et arrarum, quia non videmus differentiam inter penam et arram". CYNUS to *l. Mulier* (C. 5.1.5), (Frankfurt am Main 1578), fol. 287v, n. 15: "Dicunt canoniste quod nulla reperitur ratio diversitatis, et ideo dicunt, idem iuris in arris quod est in pena, et ideo non servant istam legem... Sed ipsi non intelligunt nos". BALDUS to *l. Titia* (D. 45.1.134), (Lyon 1498), fol. 56r, n. 4: "Bernardus ... videtur dicere quod nulla est diversitas. Ideo idem ius, secundum canones, licet secus secundum leges". ANGELUS DE UBALDIS to *l. Mulier* (Venice, 1579), fol. 109r, n. 6: "Canoniste tamen in cap. Gemma, ... dicunt quod non est differentia inter arram et penam".

<sup>71</sup> HOSTIENSIS to *c. Gemma* (X 4.1.29), fol. 9r, and ARCHIDIACONUS (Guidus de Baisio) to *c. Ubi* (C.30 q.2 c.1), (Venice 1601), fol. 436r. That Hostiensis's note - namely, his note that no decretals or canon prevents the aggrieved party from asking for the return of the *arrae* - was a reprimand of the glossa is asserted by Iohannes Andreae; see his commentary to *c. Gemma* (Venice 1581), fol. 13v, n. 7: "et sic esset reprehensio". For a defense of Bernardus's position, see ANTONIUS DE BUTRIO to *c. Gemma* (Venice 1578), fol. 13r, n. 6.

<sup>72</sup> The dense construction of Innocent's commentary to *c. Gemma* poses several questions to which we cannot give satisfactory answers. Was his silence on the gloss a disavowal of Bernardus's position? Or, was he working with a *repertorium* from which he abstracted only the relevant sections on Roman law? Or did he think that *arrae* pertained to civil law and were therefore of no concern to the canonists?

<sup>73</sup> C. 5.2.1. The printed text has "C. de re. pig., l. i". - a scribal error for C. si rector provinciae vel ad eum pertinentes sponsalia dederint (C. 5.2). Hostiensis had doubts about the correctness of the allegation (C. de remissione pignorum) and indicated "de dona. inter vir. et uxo". as a more pertinent citation, see HOSTIENSIS to *c. Gemma* (X 4.1.29), fol. 9r, n. 1.

<sup>74</sup> C. 5.1.2; D. 23.1.17.

<sup>75</sup> Note that the text of the printed edition uses the expression *pena arrarum*.

<sup>76</sup> C. 5.1.3. The edition has ff, de sponsa[libus], [l.] arre, which is inappropriate.

<sup>77</sup> C. 5.1.5.3-4.

<sup>78</sup> INNOCENTIUS IV to *c. Gemma* (Frankfurt am Main 1570), fol. 466rv.

<sup>79</sup> BARTOLUS to *l. Titia* (Venice 1516), vol. VI, fol. 56r: "Ego autem ab opinione gl. nostrarum et Inno. non recedo, scilicet quod est differentia inter penam et arras".

<sup>80</sup> PETRUS DE BELLAPERTICA to *l. Titia* (D. 45.1.134), (Frankfurt am Main 1571), fol. 353r, n. 4: "Doctores satagunt rationem reddere".

the case of *arrhae* only a small amount of money is disbursed to a mutual friend of the parties, it is unlikely that one would unwillingly contract marriage out of fear of losing it<sup>81</sup>.

Iacopus de Arena also distinguished between a penalty that obligates one to give something, which is permitted, and a penalty that is merely stipulated, which is invalid. The reason behind the distinction is that “it is easier to make a promise [to pay] than to make an actual cash payment”<sup>82</sup>. Petrus de Bellapertica concurred and thought that the stipulation of *magnae arrhae* was invalid. Yet he allowed a significant exception to *l. Titia*. Instead of giving *arrhae*, kings may promise a substantial penalty, for the fear of a loss would not force these potentates into marriage<sup>83</sup>. In general, jurists recognized the essential difference between a stipulation consisting of words and a cash payment (*facto bursali*)<sup>84</sup>. Arguments about the validity of small amounts of *arrhae* were not entirely convincing, since any amount paid in case of withdrawal from the betrothal contract is after all the functional equivalent of a penalty. That civil and canon lawyers referred to *arrhae* as a “penalty” is an indication they realized that both were an obstacle to freedom of marriage.

Canonists likewise found nothing in the body of decretals and canon law forbidding an aggrieved party from asking the counterpart to return double or fourfold the amount of *arrhae*<sup>85</sup>. In particular, for Hostiensis *arrhae* were tacitly allowed, a penalty explicitly forbidden. The reason to treat *arrhae* and a penalty differently was that *arrhae* are actually conveyed and upon conveyance one may make an agreement that the receiving party may retain them if marriage is celebrated<sup>86</sup>. But in a penal stipulation nothing is conveyed and, since there is no conveyance, no agreement may be made as to the penalty’s disposition. Accordingly, in the case of a penalty, if marriage is contracted, there is no gain (*lucrum*) or hope of retaining something. If marriage is not contracted, there is the fear of having to restore the agreed-upon sum or the pledge to the aggrieved party. The *arrhae* serve as an amicable incentive to contract marriage; the penalty induces fear, which abolishes free consent (*liber consensus*). In a doubtful case, he held that the hope of a gain rather than the fear of a loss was the reason prompting the parties to enter into marriage. Yet Hostiensis thought that not only giving but also asking for the restitution of the *arrhae* was favorable (*favorabilis*) to marriage<sup>87</sup>. His ingenuous explanation works only if marriage follows the *sponsalia*, for then the law presumes that the parties are induced to contract marriage by the hope of a gain.

Hostiensis’s construction pleased neither Iohannes Andreae nor Antonius de Butrio. The fear of losing *arrhae* and the onerous restitution of double or fourfold the amount were obviously a penalty and an impediment to a free marriage. “I have seen”, Andreae wrote, “*arrhae* of four thousand pounds”. His solution, therefore, was to cut short legal speculation and fix *arrhae* to the social status of the persons contracting *sponsalia* (*qualitas personarum*). “Who doubts”, he asked, “that it is an impediment to marriage if a poor person gives big *arrhae*”. Since “gives” meant “promises”, Andreae alleged that such a promise was invalid. Conversely, wealthy persons or magnates may stipulate a small penalty, for the loss would be negligible. Though the canonists

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<sup>81</sup> ODOFREDUS to *l. Alii desponsata* (C. 5.1.1), 262v; and to *l. Titia* (D. 45.1.134), fol. 136v, n. 3. See also CYNUS to *l. Mulier*, fol. 207v, n. 15.

<sup>82</sup> IACOPUS DE ARENA to *l. Mulier* (C. 5.1.5), (Lyon 1541), fol. 32r. Iacopus’s commentary is followed by an addition attributed to Oldradus [de Ponte]. The addition is significant, for it lists a series of further differences between *arrhae* and penalty.

<sup>83</sup> PETRUS DE BELLAPERTICA to *l. Titia* (D. 45.1.134), fol. 353r, n. 4. The ramifications of this exception can be seen in Cynus de Pistorio and, more explicitly, in Iohannes Andreae, for whom the *arrhae* and their amount were set in accordance with the social status of a person.

<sup>84</sup> The colorful expression “facto bursali” comes from Odofredus. On the difference, see also ALBERICUS DE ROSATE to *l. Titia* (D. 45.1.134), (Venice 1585), fol. 94r, nn. 4-6.

<sup>85</sup> For other canonists who accepted that a difference existed between *arrhae* and a penalty, see GULIELMUS DURANDIS, *Speculum iudiciale* (Basel 1574), vol. 2, p. 440, lib. III, part. IV, De sponsalibus et matrimoniis, § Primo, n. 4; GOFFREDUS DE TRANI, *Summa super titulis Decretalium* (Lyon 1517), fol. 170v, De sponsalibus, n. 1; ANTONIUS DE BUTRIO to *c. Gemma*, fol. 13r, n. 7.

<sup>86</sup> For the principle that, with respect to delivery, whatever has been agreed upon is undoubtedly valid, see *l. In traditionibus* (D. 2.14.48).

<sup>87</sup> HOSTIENSIS to *c. Gemma* (X 4.1.29), fol. 9r, n. 2.

attributed this opinion to an unidentifiable<sup>88</sup> group of jurists (*dicunt quidam*), Andreae endorsed it on grounds that *l. Mulier* was based on frequently occurring cases and applied to ordinary circumstances; kings, nobles, and very rich people may be treated differently and allowed to stipulate a small penalty if a party broke the betrothal contract<sup>89</sup>. Abbas Panormitanus, too, approved of the two criteria (status and amount) proposed by Iohannes Andreae<sup>90</sup>. Canonists were willing to gloss over the prohibition of inserting any penalty, for they thought that a small penalty would not force a person with means into an unwanted marriage. The rationale of the law (*ratio legis*) was to safeguard the freedom of marriage; its literal interpretation (*verba legis*) was the prohibition of attaching a penal stipulation to a betrothal contract. For them, the *ratio* was preferable to the *verba*.

In the end, neither civil nor canon lawyers succeeded in producing a persuasive analytical distinction between *arrhae* and a penalty. Toward the end of the fifteenth century the Milanese jurist Jason del Maino neatly summarized the impasse. He found that jurists had devised five basic reasons but, on close inspection, none of them was convincing<sup>91</sup>. The Florentine jurist Pietro Aldobrandini echoed him: “there is a big dispute among doctors on the differences ... and none of them is conclusive, if they can persuade at all”<sup>92</sup>. In short, jurists elaborated a distinction without difference, and that distinction could be supported only by persuasive, not convincing, reasons<sup>93</sup>. Despite the impasse, we can neither deny the jurists’ efforts to establish a real difference nor accuse them of being mere nominalists. Roman law had bequeathed them an inconsistent set of norms and they had to make the best of it.

Jurists required actual conveyance (*traditio corporalis*) of *arrhae*. The wording of *l. Mulier* made clear that the mere acknowledgment (*confessio*) was insufficient to ground a future claim. The expression “received” (*accepit*), which recurred several times in the fragment, meant that a thing had been actually conveyed to the other party. The term “to receive” was understood to signify reality (*veritas*) not fiction<sup>94</sup>. The standard formula regularly used in betrothal contracts, “I promise you that I will ensure that A will take B as his wife and, if I do not so, I promise one hundred as *arrhae*, which I acknowledge that I have received”, was plainly invalid, for this was a promise to pay a penalty, and *arrhae* had to be actually transferred. Reciprocal acknowledgment of *arrhae* between *sponsus* and *sponsa* was also invalid, Bartolus de Sassoferrato declared, for one acknowledgment caused the other and no actual payment occurred<sup>95</sup>. Yet a unilateral acknowledgment of *arrhae* was considered valid and sufficient, unless fraud was proved, on grounds that any *confessio* is prejudicial to the person who makes it but not to a third party<sup>96</sup>.

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<sup>88</sup> Probably Cynus de Pistorio. Antonius de Butrio and Niccolò dei Tedeschi, when reporting Iohannes Andreae’s argument, cited Cynus, too.

<sup>89</sup> IOHANNES ANDREAE to c. *Gemma*, fol. 13v, n. 9. Iohannes’s suggestion presupposes the knowledge of the exemption Petrus de Bellapertica granted to kings - that is, upon contracting marriage they may promise a big penalty instead of *arrhae*.

<sup>90</sup> ABBAS PANORMITANUS to c. *Gemma* (X 4.1.29) (Venice 1591), fol. 12, n. 8: “Multum mihi placet opini[onem] Io. An., ut consideretur qualitas et quantitas personarum, maxime respectu recipientis”.

<sup>91</sup> JASON DE MAINO to *l. Titia* (D. 45.1.134), (Turin 1573), fols. 186v-189v: “nulla concludens ratio diversitatis sed tantum persuasiva potest assignari”, citation at fol. 197v, n. 22.

<sup>92</sup> Petrus Aldobrandini in a marginal addition to ROLANDINUS, *Summa totius artis notarie* (Venice 1546), fol. 81v.

<sup>93</sup> On the difference between “persuading” and “convincing”, see CH. PERELMAN and L. OLBRECHTS-TYTECA, *The New Rhetoric. A Treatise on Argumentation*, translated by J. Wilkinson and P. Weaver (Notre Dame and London 1969), pp. 26-31.

<sup>94</sup> BALDUS to *l. Mulier* (C. 5.1.5), s.f.: “Et primo circa arras [quero] utrum requiratur vera traditio? Et dicunt doctores quod sic, ut patet hic in litera in verbo ‘accepit,’ quod verbum est repetitum in multis partibus huius legis. Nam hoc veritatem significat”.

<sup>95</sup> BARTOLUS to *l. Titia* (D. 45.1.134), vol. 6, fol. 56r; and, for a *consilium* in which he reiterated the same position, see *Consilia*, vol. 9, fol. 15r, cons. 45. The case involved the daughter of a prominent family, the Petrucci (probably of Siena). In presenting Bartolus’s doctrine, Niccolò dei Tedeschi noted “et maxime hoc procedit hodiernis temporibus, in quibus contrahentes confitentur recepisse alter ab altero magnam quantitatem arrharum, que in veritate nunquam fuerunt numerate, sed est nuda et simplex confessio”, see ABBAS PANORMITANUS to c. *Gemma*, fol. 12r, n. 8.

<sup>96</sup> For a discerning analysis of the issues involved in a unilateral acknowledgment of *arrhae*, see JASON DE MAINO to *l. Titia* (D. 45.1.134), fol. 188v, n. 26-27.

Moreover, the reciprocal acknowledgment of any actual cash payment (*numerata pecunia*) made between the parties contracting *sponsalia* was considered a fraud<sup>97</sup>.

For Baldus de Ubaldis, in a doubtful situation, the reciprocal acknowledgment was valid only if the parties renounced their right to raise an *exceptio non numerate pecunie* - that is, in court they would not object that the payment was not made<sup>98</sup>. Angelus de Ubaldis found an additional reason to distrust the reciprocal acknowledgment: the *confessio* occurred between two parties who by law are barred from making such a declaration<sup>99</sup>. In one of his opinions, Honofrius de Bartolinis of Perugia maintained that since the fictional exchange of *arrae* was invalid, the aggrieved party had no basis for suing the breaching party<sup>100</sup>. Paulus de Castro granted that cases where both parties make a reciprocal acknowledgment of *arrae* occurred daily, but the legal presumption was that the transaction was fraudulent, even if cash was actually transferred from one party to the other. That presumption that fraud existed was the advice he gave in one of his *consilia*. "To any persons endowed with discernment", he asserted, "it should occur that this [meaning Bartolus's view] is the sounder view"<sup>101</sup>. Canonists, too, sided with Bartolus. Abbas Panormitanus wrote that "On this matter, I have seen *consilia* against Bartolus, but I did not endorse them, for, then and now, I believe that his opinion is truer"<sup>102</sup>.

The intricacies of a reciprocal acknowledgment of *arrae* transferred figments of the court debate into the classroom. Suppose, Baldus told his students, "the *sponsa* acknowledges a hundred as *arrae* and the *sponsus* does the same". "You answer", he went on, "that obviously nothing has been received"<sup>103</sup>. But for the jurist things were not as they appeared at first sight. "If I give you a hundred as a loan", he argued, "and you give me a hundred as a loan, there are undoubtedly two loans. Here we have two contracts and two causes"<sup>104</sup>. It was like the case of a donation made in anticipation of future marriage (*donatio propter nuptias*) and the dowry. Though according to *ius commune* the amount of both must be the same they may not be confused<sup>105</sup>. Again, Baldus asked, "suppose that two parties reciprocally acknowledge that they have received a hundred for the *sponsalia* and then one party withdraws. What is the effect of this transaction"? For the jurist, the party in default may be summoned on grounds of having given *arrae* but not on their acknowledgment. Once in court, the defendant argues, "I compensate you by losing the hundred I gave, as it appears from the acknowledgment". The other party replies, "You lost those hundred because you withdrew from the *sponsalia*. And you deserve a double penalty. Because of the reciprocal giving of the *arrae*, you lose what you gave and must return double of what you received". Baldus called attention to this case, for questions of this kind were raised time and again<sup>106</sup>. The "reply" of the aggrieved party shows how risky the reciprocal acknowledgment of *arrae* in cash was. The question whether or not a double penalty - that is, the loss of the given

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<sup>97</sup> BARTOLUS to *l. Titia* (D. 45.1.134), vol. 6, fol. 56r: "Quid si in veritate ego numeravi tibi pecuniam nomine arrarum, et mihi eandem vel aliam eiusdem quantitatis? Respondeo: fraus est, et data non videntur".

<sup>98</sup> BALDUS to *l. Mulier* (C. 5.1.5), s.f.: "Nam in dubio standum est confessioni si est renunciatum exceptioni non numerate pecunie".

<sup>99</sup> ANGELUS to *l. Titia* (D. 45.1.134), (Venice 1579), fol. 88r, n. 1, citing the gloss *Data* to *l. Assiduis* (C. 8.18.12).

<sup>100</sup> His judgment was rendered on the case cited in note 53: "quod non valet talis confessio quoniam aparet quod fui confessus habere a te, quia fuisti confessus habere a me, non autem intervenit vera numeratio". Ibid., fol. 41r. For other *consilia* on the same line, see FEDERICUS DE SENIS, *Consilia et questiones* (Paris 1513), s.f., cons. 184: "Tamen quia hodie in fraudem pene stipulantis arras in maxima quantitate et promittit quis restituere duplicatas, et tamen nihil recepit, crederem de iuris rigore et mente iuris talem stipulationem arrarum fraudulentam fore, et sic alias consului, et in hac opinione erat bone memorie dominus Ugelius, episcopus Perusinus decretorum doctor"; ANTONIUS DE BUTRIO, *Consilia* (Venice 1575), fols. 243-244. cons. 71; and MARIANUS SOCINUS, *Consilia* (Venice 1579), vol. 1, fols. 3r-4r, cons. 3.

<sup>101</sup> PAULUS DE CASTRO to *l. Titia* (D. 45.1.134), (Venice 1582), fols. 43v-44r.

<sup>102</sup> ABBAS PANORMITANUS to *c. Gemma*, fol. 12r, n. 8.

<sup>103</sup> On grounds of *l. Si qui sic solvit* (D. 46.3.55): "Qui sic solvit ut reciperet, non liberatur".

<sup>104</sup> On how jurists used the term *causa*, see CORTESE, *La norma giuridica*, vol. 1, pp. 183-255.

<sup>105</sup> BALDUS to *l. Mulier* (C. 5.1.5), s.f.

<sup>106</sup> BALDUS to *l. Perfecta* (C. 4.45.2), s.f. Perhaps aware that Baldus had gone into too much speculation, Jason del Maino wrote "de quo scribentes non faciunt mentionem" - meaning that on purpose jurists ignored Baldus's view when discussing *arrae*. See his commentary to *l. Titia*, fol. 188v, n. 24.



*arrhae* and the obligation to return double or fourfold the received *arrhae* - may be imposed in the case of a reciprocal acknowledgment of *arrhae* attracted the attention of speculative jurists<sup>107</sup>. The increase of the amount of *arrhae* also preoccupied the jurists. The most sustained and coherent effort to reduce them to a “token” was made by Bartolus. He started with the presumption that *sponsalia* and *matrimonium* do not have the same importance. Consequently, the penalty imposed for unilaterally withdrawing from a marriage should not be the same as the one for withdrawing from *sponsalia*. The established penalty for breaking up a marriage was the loss of the dowry and the gifts given in anticipation of marriage (*donatio propter nuptias*). No penalty was imposed for withdrawing from *sponsalia* where the *arrhae* had not yet been given. If they had been given, the penalty was that established by *l. Mulier*. “It is an absurdity”, he argued, “if the law penalizes more severely the breaking of *sponsalia* than *matrimonium*”. Hence, the amount of *arrhae* ought not to exceed that of the dowry or the gifts given in anticipation of marriage, which, as we have noted above, sometimes occurred<sup>108</sup>. Dissenting, Angelus pointed out that Bartolus’s argument was unacceptable, for Roman law did not establish any limit on the amount of *arrhae*<sup>109</sup>. Though Bartolus’s opinion remained isolated, jurists agreed that an actual cash payment could be the effective way to stop the inflation of *arrhae*: any person can make a big promise but things change drastically when one has to spend money from his or her purse. Sometimes *arrhae* were constituted as a pledge (*pignus*), such as an immovable, like a house or a piece of land, or a movable, like jewelry<sup>110</sup>. In case of default, what were the rules for the restitution of a pledge, and was one bound to restore double or fourfold? Among medieval jurists these questions became the object of dissenting opinions<sup>111</sup>, especially between Bartolus and his student, Baldus. Bartolus asked: “What is the law if I give you a piece of land as *arrhae* and appoint myself as its owner on your behalf”? Done in this form, the transaction is invalid, for actual conveyance of the property is required, just as in the case of money<sup>112</sup>. Furthermore, he asserted that when a piece of land or an individual thing (*species*) is given, the dispositions of *l. Mulier* do not apply for the text spoke of things that can be doubled or quadrupled. A sum of money or, more precisely, its numerical equivalent can be doubled or quadrupled; an object in itself, never<sup>113</sup>. Though movables and immovables have a value, this aspect was immaterial for the jurist, because it was the object

<sup>107</sup> See, for instance, the lengthy examination of this issue Jason del Maino made in his commentary to *l. Titia* (D. 45.1.134), fol. 189r, n. 29-30; and PAULUS DE CASTRO to *l. Titia*, fol. 44r, n. 4, who also did not see favorably the idea of a double penalty as proposed by Baldus.

<sup>108</sup> BARTOLUS to *l. Titia* (D. 45.1.134), vol. 6, fol. 56r, n. 5.

<sup>109</sup> ANGELUS to *l. Titia* (D. 45.1.134), fol. 88r: “Quia l. ultima [l. Mulier] concedit simpliciter potestatem tradendi arras quascumque et vult eas reddi duplicatas. Unde non est restringenda ad certam summam, quia hoc non reperitur l. cautum”. See also BALDUS to *l. Titia*, where Bartolus’s position is dismissed without giving a reason.

<sup>110</sup> The question whether instead of cash a pledge may be given, which was of paramount importance in a society with limited availability of cash, was addressed by Accursius in his gloss *Matrimonia* to *l. Titia* (D. 45.1.134). He admitted that a pledge may be given instead of the *arrhae*, but not as a penalty.

<sup>111</sup> As Albericus de Rosate pointed out, the use of the term *pignus* itself is not without problems. Since a *pignus* was given so that it would remain with the receiver, except where marriage is not contracted, calling it *pignus* contradicts the definition given in the title *De pignoribus et hypothecis* (D. 20.1). See ALBERICUS DE ROSATE to *l. Titia* (D. 45.1.134), fol. 94r, n. 4. Admittedly, this term was improperly used.

<sup>112</sup> For an example of a model notarial instrument on *sponsalia* containing such a clause, see G. MOSCHETTI, *Il cartularium veronese del Magister Ventura del secolo XIII* (Naples 1990), pp. 6-8, rubr. Carta nuptiarum futurarum cum dote arrarum, and rubr. De sponsalibus. Quot modis contrahantur; ZACCARIA DI MARTINO, *Summa artis notarie*, R. Ferrara (ed) (Bologna 1993), p. 261, rubr. Carta arrarum sponsalium; and ROLANDINUS, *Summa*, fols. 80v-83r, where the parties respectively pledge a house and a piece of land. The legal device Rolandinus employed for this transaction was the so-called *constitutum possessorium*, by which a party transfers possession of an immovable to another but continues to hold it under another title. While the party who receives the immovable as *arrhae* enjoys possessory protection, the giving party remains therein as a tenant. For a *quaestio* by the jurist Oldradus de Ponte on a piece of land given as *arrhae*, see M. BELLOMO, “Tracce di *lectura per viam quaestionum* in un manoscritto del *Codex conservato a Rovigo*”, RIDC 8 (1997), 255-257, where the *quaestio* has been partially edited.

<sup>113</sup> BARTOLUS to *l. Titia* (D. 45.1.134), vol. 6, fol. 56r, n. 10. And D. 31.1.88.7, for the rule that a bequest may be doubled only when it is a quantity, not a thing (*species*). And also the gloss *Casus* to *l. Plane* (D. 30.1.34.1), for the difference between *species* and *quantitas*. A *species* is an individual thing, analytically distinguishable from a *genus*, which are kinds of things possessing common qualities. *Genus* indicates fungibles, where one thing may be replaced by another of the same quality, since all the objects included in this category exercise the same economic function.

itself that constituted the pledge<sup>114</sup>. Baldus strongly dissented. “Suppose that not cash but a movable or immovable is given as *arrahae*”, he asked, “does the penalty of the double or fourfold apply”? Pledges given as *arrahae*, being quantifiable, increase (*crescunt in certo corpore*)<sup>115</sup>. When money is given as a pledge, money is traded not as a *genus* but as a fixed thing, and pledges exist not as a *genus* but as a fixed thing<sup>116</sup>. “Supposing that Bartolus’s view is true”, Baldus went on, “in a sum given as a species there is no duplication, which is false”. When considered as an object or individual body, a sum of money cannot be multiplied. Yet its value (*estimatio*) may be doubled. “On this point”, he concluded, “my master (*doctor meus*) was wrong”<sup>117</sup>. Baldus’s reductionistic approach was not entirely convincing. His brother Angelus, endorsing Bartolus’s view, stated that things that cannot be doubled or quadrupled fell outside the purview of *l. Mulier*<sup>118</sup>. Paulus de Castro, on the other hand, qualified Bartolus’s view. If Bartolus thought that one giving an individual thing as *arrahae* might not lose it where the marriage was not contracted owing to the fault of the giver, he was wrong, because the loss of the thing applied to both quantity and the individual thing itself. If he thought that the person receiving the pledge was bound to return the thing itself rather than double its value, if he or she withdrew from the marriage, Bartolus’s opinion is plausible (*habet colorem*)<sup>119</sup>. Yet Paulus was forced to admit that individual things can be quantified.

Canonists, too, admitted that a *pignus* was a difficulty-ridden issue around which contrasting opinions swirled. Abbas Panormitanus, following Bartolus, accepted the view that a pledge cannot be multiplied. If so, it could not be treated like *arrahae*, which could be doubled, tripled, or quadrupled. Furthermore, *l. Mulier* did not contemplate the case of a pledge, but only the transfer of money from one party to another. Accordingly, pledges could not be used, unless their value was supplemented in case of default (*pro interesse prestando*)<sup>120</sup>. Women in Italy today who, upon breaking their engagement, opt to keep the engagement ring and restore its monetary value, while welcoming Baldus’s opinion, would nonetheless be receptive to Bartolus’s insight into the uniqueness and symbolic value of things.

Without examining a large sample of notarial *sponsalia*, it remains difficult to assess how frequently pledges were used. Indirect evidence that they were used can be gleaned from the commentaries of jurists and model notarial *sponsalia* contracts. Odofredus reported that upon contracting *sponsalia* giving pledges to a commonly trusted friend was a Bolognese custom<sup>121</sup>. This custom bears a resemblance to Jewish customs, which required the betrothing parties to consign equivalent amounts of earnest money to a third party. Upon breach of contract, the earnest money would be duly conveyed to the nonbreaching party<sup>122</sup>. Moreover, according to Odofredus, canon lawyers counseled people to give pledges instead of *arrahae*<sup>123</sup>. For other jurists, there were no basic objections to giving pledges, provided that they were in fact transferred, not just promised<sup>124</sup>. After

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<sup>114</sup> On the symbolic value of land in medieval culture, see P. GROSSI, *L'ordine giuridico medievale* (Roma-Bari 1995), pp. 74-75.

<sup>115</sup> In Roman law, *certum* means a fixed sum or quantity of things constituting the object of a transaction, obligation, or claim.

<sup>116</sup> For a pledge as an identifiable object (*res certa*), see the gloss *Quod magis est* to *l. Pignus* (D. 13.7.1).

<sup>117</sup> BALDUS to *l. Mulier* (C. 5.1.5), s.f.

<sup>118</sup> See, for instance, ANGELUS to *l. Titia*, fol. 109r, n. 6.

<sup>119</sup> PAULUS DE CASTRO to *l. Titia* (D. 45.1.134), fol. 44, n. 4.

<sup>120</sup> ABBAS PANORMITANUS ad c. *Gemma*, fol. 13v, n. 10, where he lists the major jurists who supported the pledge and their reasons.

<sup>121</sup> ODOFREDUS to *l. Titia* (D. 45.1.134), fol. 136v, n. 3: “Sed pignora, ut fit in civitate ista, trado amico communi, ut si stet per me vel ex parte mea, pignus perdat; vel si per te mulierem vel ex parte tua pignus tuus perdat”. Note that Odofredus speaks of returning the pledge; there is no discussion of returning double its value.

<sup>122</sup> I. ABRAHAMS, *Jewish Life in the Middle Ages* (1896) (Philadelphia and Jerusalem 1993), p. 177; S. D. GOITEIN, *A Mediterranean Society. The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza, 3: The Family* (Berkeley 1978), pp. 65ff. For examples of broken promises of future marriage among Jewish families, see A. TOAFF, *Love, Work, and Death. Jewish Life in Medieval Umbria*, translated by J. Landry (London 1996), pp. 27-28.

<sup>123</sup> ODOFREDUS to *l. Alii desponsata* (C. 5.1.1), fol. 262v, n. 3: “sed dicunt quod debent dari pignora ad invicem, sicut fit tota die in civitate ista”.

<sup>124</sup> RAINERIUS DE FORLIVIO to *l. Titia* (Lyon 1523), fol. 86v.

all, since Roman law did not prohibit them; they were allowed<sup>125</sup>. Among the notaries, Rolandinus furnished a model *sponsalium* contract in which *arrhae* consisted of a house and a piece of land. He also explained why and when the parties opted for immovables or cash. If the interval between *sponsalia* and marriage was long, the parties opted for immovables such as land or houses. If the two events were close in time, the parties opted for cash. But in an explanatory note to his *Ars notarie*, the author qualified this view as a “personal view, not a necessary one” (*voluntarium dictum non autem necessarium*) and asserted that the parties could not be forced to choose a particular option<sup>126</sup>.

In contrast to the dowry, where an action (*actio rei uxorie*) for the recovery of the dowry lay against the husband, Roman law did not grant any specific action to enforce a penal stipulation attached to *sponsalia*<sup>127</sup>. The rules regulating *arrhae* probably sufficed. The progressive importance *sponsalia* assumed in the Middle Ages stirred jurists to consider the question of whether an action for breach of a promise to marry may be granted. Their quest faced an insurmountable obstacle in *l. Mulier*, which prohibited inserting any penal stipulation, except the *arrhae*, in *sponsalia* contracts, since no one could enter marriage under the threat of penalty. Azo searched the *Corpus iuris* for an answer to the question, but in the end was forced to admit: “I cannot find one” - thereby indicating that Roman law did not recognize a specific action in cases of broken betrothal promises<sup>128</sup>. Accursius thought that an action *ad interesse* - that is, for damage - might be granted to the aggrieved party<sup>129</sup>. While leaning toward Azo’s view, Odofredus thought that Accursius’s concession required qualifications. Ordinarily, an action *ad interesse* was out of the question, for it was tantamount to stipulating a penalty. But there was one exception to withholding the *actio ad interesse*: when a poor young man contracts *sponsalia* with a rich widow and she refuses to marry him, he may sue for *interesse*<sup>130</sup>. Petrus de Bellapertica flatly rejected Accursius’s view. If an action is granted, he stated, “marriages would be contracted on the basis of *interesse*”. Just as stipulating a penalty was forbidden, so granting an action *ad interesse* amounted to allowing the parties do in one way what was forbidden by another<sup>131</sup>.

Dynus de Musiello made the telling distinction between an action directed at recovering *lucrum* and an action directed at recovering *damnum*<sup>132</sup>. An action for the recovery of any loss directly resulting from the broken promise was not a penalty but a *rei persecutio* - an action by which a thing is sued for. An action aiming at a future gain (*lucrum*), or the future advantages marriage might have brought to a party, is prohibited, on the grounds that the marriage was not yet contracted and granting the action would be comparable to a penalty. The challenge medieval jurists faced was aptly presented by Cynus de Pistorio. Granting an unqualified action *ad interesse*, as Accursius thought, meant that an action for a penalty was available to the aggrieved party, which was forbidden by *l. Mulier*. At the same time, it was difficult for a jurist to think that a stipulation bereft of force could exist, as such a stipulation was utterly useless. But the truth was that an unenforceable stipulation indeed existed, because by law a penal stipulation in *sponsalia* contracts worked only with regard to the *arrhae*<sup>133</sup>. The distinction between a future *lucrum* and a

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<sup>125</sup> BALDUS to *l. Perfecta* (C. 4.45.2), s.f.

<sup>126</sup> ROLANDINUS, *Summa*, fol. 83r.

<sup>127</sup> Emperor Theodosius granted an action (*ex bono et aequo*) for withdrawing from the *sponsalia*. This action was granted to a *sponsa* who had reached puberty and was *sui iuris*, against the person who contracted the *sponsalia* for her. On this, see C. Th. 3.5.11.4.

<sup>128</sup> AZO, *Summa codicis ad tit. De sponsalibus* (C. 5.1), Venice 1581, coll. 771-774.

<sup>129</sup> Gloss *Matrimonia* to *l. Titia* (D. 45.1.134): “forte valet interesse”. See also the gloss *Si sororem* to *l. Si stipulor* (D. 45.1.35), for the assertion that a stipulation violating the accepted ethical standards of a community (*boni mores*) is not binding. Since the reiteration of this principle occurred in relation to marriage, Accursius’s view seemed inconsistent to other jurists.

<sup>130</sup> ODOFREDUS to *l. Alii desponsata*, fol. 262v, n. 2.

<sup>131</sup> PETRUS DE BELLAPERTICA ad *l. Titia*, fol. 354, n. 5.

<sup>132</sup> On these two concepts, which were also widely employed in the debate on usury, see A. SPICCIANI, *Capitale e interesse nei teologi e canonisti dei secoli XIII-XIV* (Naples 1990), pp. 17-48; see also H. J. WIELING, *Interesse und Privatstrafe vom Mittelalter bis zum Bürgerlichen Gesetzbuch* (Cologne and Vienna 1970), pp. 26ff.

<sup>133</sup> CYNUS to *l. Alii desponsata* (C. 5.1.1), fol. 286v, n. 5.

past *damnum* enabled jurists to overcome the impasse<sup>134</sup>. Canon lawyers, as well, accepted the distinction and recognized that the aggrieved party could bring an action to recover the loss<sup>135</sup>.

The always-imaginative Baldus recast the debate. Suppose that there are two *sponsae*, one rich and the other richer, and both are willing to contract *sponsalia* with me by words of future consent. I choose the richer, who promises me thousands as *interesse* in the event she fails to marry me because of the loss I suffer for not marrying the rich one. May the aggrieved party legitimately bring an action *ad interesse*? Baldus proposed that if the promise reflects an actual loss suffered, the *sponsus* can bring an action for compensation, where, for instance, he expended a great amount of money in preparation for the impending marriage. If the promise reflects a future gain conditional on the marriage, the *sponsus* cannot bring any action, since that would be a condition forcing one into marriage. An action claiming that the richer party had committed fraud (*dolus*) was also available to the *sponsus*. But if an agreement violated the ethical standards of a community (*boni mores*), as in *sponsalia* carrying a penal stipulation, one who disregards it does not incur *dolus*. A finer distinction was needed. Clearly, if the agreement is construed as a penalty, it has no validity. If, on the other hand, the agreement is construed as true *interesse*, it is considered just and reasonable and does not violate the ethical standards of the community. Its purpose, Baldus asserted, was not “ad impediendum matrimonium” but “ad impediendum calumniam” - that is, to prevent dishonor. With an eye to practice, he advised against construing *interesse* in a formalistic way or in strict accordance with the agreement and in favor of proving its validity in court by presumptive evidence (*verisimiles coniecturas*). The grounds for suing for *interesse* did not rest on the unwillingness to contract marriage but on the agreement and the damage one suffered because the other party broke the agreement without legitimate cause<sup>136</sup>.

Baldus's doctrine stressed the need to penalize the party whose breach of the *sponsalia* served to humiliate and shame the jilted party. The breaching party was not only liable for causing damages, but also incurred *infamia*. The action *ad interesse* was the basis on which ecclesiastical courts in the fourteenth and fifteenth centuries compelled the breaching party to compensate the jilted party for expenditures made in connection with the marriage and litigation. The action *ad interesse* remains behind the *articuli* of Italy's *Codice Civile* of 1865 and the present *Codice*, which grant an action to the aggrieved party to sue for the recovery of the expenditures in preparation of marriage (see below, 000). It also remains behind the Japanese Civil Code, which leaves to custom the field of engagement (*konyaku*) but allows a party to recover the gifts (e.g., rings and expensive items) given in anticipation of marriage. In contrast, the French Civil Code ignores altogether the “promise of marriage” and protects the party who suffers loss because of an unjustified breach of the *sponsalia* by granting an action grounded in Aquilian responsibility. It has been pointed out that this approach opens the way to suing for unreasonable damages.

### *Preceptum Guarentigie*

Under Florentine law, the obligation to pay even large sums of *arrahae* was enforceable and served as an effective deterrent. Since the early thirteenth century, Florentines and other Tuscans had placed their confidence in the summary procedure known as *preceptum guarentigie* to compel the defaulting party to pay *arrahae*. As Briegleb and Campitelli have remarked, this popular procedure, which derived from Germanic law, was used to compel the timely payment of debt obligations in myriad commercial and credit contracts without undergoing time-consuming court proceedings<sup>137</sup>.

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<sup>134</sup> The distinction was accepted also by Albericus de Rosate, who included the fee for the mediators among the losses a party may suffer; see his commentary to *l. Alii desponsata* (C. 5.1.1), fol. 245r, n. 4; and to *l. Mulier* (C. 5.1.5), fol. 245v, n. 6.

<sup>135</sup> IOHANNES ANDREAE to c. *Gemma* (X 4.1.29), fol. 13v, n. 7; ANTONIUS DE BUTRIO to c. *Gemma*, fol. 23r, n. 7; ID., *Consilia* (Venice 1575), fols. 243-44, cons. 70; FRANCISCUS DE ZABARELLIS to c. *Gemma* (Venice 1602), fol. 6v, n. 6; ABBAS PANORMITANUS to c. *Gemma*, fol. 12v, n. 11.

<sup>136</sup> BALDUS to *l. Mulier* (C. 5.1.5), s.f.

<sup>137</sup> H. K. BRIEGLEB, *Geschichte des Executiv-Prozesses (über executorische Urkunden und Executiv-Prozesses, 1. Teil)*, (2<sup>nd</sup> edition Stuttgart 1845), pp. 35-83; A. CAMPITELLI, *Precetto di guarentigia e formule di esecuzione parata nei documenti italiani del secolo XIII* (Milan 1970); and the same author's “Una raccolta di *quaestiones* in tema di documenti guarentigiati e il *Tractatus de guarentigiato instrumento* attribuito a Guido da Suzzara”, in *Studi sulle*

Municipal statutes sanctioned this institution and made it into a powerful tool in the hands of merchants and bankers. Widely utilized, it was attached to contracts and transactions to ensure the prompt execution of the clauses therein contained, including the payment of *arrae*. The procedure worked as follows. The parties acknowledged to a public notary that they willingly submitted to summary procedure, and their acknowledgment was duly inserted in the contract. In effect, they promised, as if in a court of law, to accept full liability in the event of any future breach of contract they might commit. Further, they simultaneously agreed to waive their right to contest the entry of judgment ordering them to pay the *arrae*. In a betrothal contract the breaching party was treated as the debtor, who had to indemnify the damaged party, the creditor.

What the parties wished to accomplish with such betrothal contracts containing a *preceptum guarentigiatum* is aptly described by Odofredus. “Everyday citizens of this city (Bologna) and of all the world”, he stated, come to a jurist wishing that “one’s son would contract *sponsalia* with the daughter of another. And both children are minors”. The parties, then, ask the jurist “to make the *sponsalia* between my son and the other party’s daughter and bind us in such a way that we cannot withdraw from the contract with impunity”. He advised his students to avoid such arrangements and forthwith to explain to the parties that their wishes could not be executed, because the insertion of a penal stipulation in a betrothal contract violates the principle of the freedom of marriage. Yet, if the parties persisted, Odofredus offered a solution: in contrast to the canonists “we, the civilian jurists, handle the situation in the following way”<sup>138</sup>. He recommended *arrae*, to which an oath could be added, as it was “customary in Pisa and all Tuscany”, as an effective legal device for binding the parties in such a way that neither one could break the carefully planned strategic alliance between the two families<sup>139</sup>. A century later, Baldus continued to refer to the widespread custom confirming the (fictitious) acknowledgment of *arrae* and to the statutes sanctioning that custom by making available to the parties the *preceptum guarentigie*<sup>140</sup>.

### *Consilia*

In truth, the large majority of notarized Florentine betrothals, propelled forward by social pressures, and the prospect of losing *arrae*, culminated in marriages. Where marriage did not follow, the death of a party or other uncontrollable circumstances were usually responsible. Still, a small, and probably unquantifiable, number of cases involving alleged breaches of notarized betrothal contracts were adjudicated in the court of the *podestà*. At issue was the operation of the *preceptum guarentigie* and payment of *arrae*. Given the jumble of conflicting rules on betrothals, civil law judges and litigants routinely asked local jurists to present *consilia* addressing and resolving the issues of fact and law that had caused the dispute. We examine two such *consilia* composed by Angelus de Ubaldis, which we have edited and included in appendix 3. From internal evidence, it is almost certain that the two *consilia* were rendered during the period when Angelus was teaching at the University of Florence from 1387/88 until the beginning of October 1391, when he left to teach at Bologna<sup>141</sup>. In 1398/99, he resumed his chair in Florence, where he taught until

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quaestiones civilistiche disputate nelle università medievali, M. Bellomo (ed) (Catania 1980), pp. 57-96. For many examples of disputes over contracts carrying the *preceptum guarentigiatum*, see M. CHIANTINI, *Il consilium sapientis nel processo del secolo XIII: San Gimignano 1246-1312* (Siena 1996).

<sup>138</sup> ODOFREDUS to *I. Alii desponsata* (C. 5.1.1), fol. 262v, n. 2.

<sup>139</sup> Adding an oath to the *sponsalia* was more problematic; see ODOFREDUS to *I. Titia* (D. 45.1.134), fol. 136v, n. 4; and to *I. Alii desponsata*, fol. 262v, n. 2. Bartolus also agreed that an oath could not be introduced to validate the will of the parties, when the betrothal contract could not be redacted within the parameters of law. See his commentary to *I. Titia*, vol. 6, fol. 56r, n. 11: “Quero an in predictis casibus, ubi de iure non valet, potest firmari iuramento? Respondeo: non”. On the oath, see P. PRODI, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente* (Bologna 1992), pp. 63-160.

<sup>140</sup> BALDUS to *I. Mulier* (C. 5.1.5), s.f.: “Et ideo consuetudo generalis approbat istam confessionem et istam dationem arrarum, et maxime statuta Italie ubi intervenit guarentigia, id est preceptum”.

<sup>141</sup> On the jurist, see L. CHIAPPELLI, “Un *consilium* inedito di Angelo da Perugia”, *Archivio giuridico* 36 (1886): 102-115; O. SCALVANTI, “Notizie e documenti sulla vita di Baldo, Angelo e Pietro degli Ubaldi”, in *L'opera di Baldo, per cura dell'Università di Perugia nel V centenario della morte del grande giureconsulto* (Perugia 1901); pp. 279-98; T. CUTURI, “Angelo degli Ubaldi in Firenze”, *Bollettino della R. Deputazione di Storia Patria per l'Umbria* 7 (1901): 189-221; H. DENLIFLE, *Die Entstehung der Universitäten des Mittelalters bis 1400* (Berlin 1885), pp. 564-565; P. COLLIVA,

his death in 1400. During his Florentine years, Angelus was an active consultor, rendering opinions on cases in both the city and its territory and lending his endorsement (*scriptio*) to *consilia* penned by colleagues<sup>142</sup>.

### *Consilium I*

The facts provided in the *punctus*, along with the terms of the *sponsalium*, which both notaries and jurists knew by heart, were, as a matter of course, abbreviated. Male and female ascendants of two families promised each other to see and ensure (*facturos et curaturos*) that the son of one would take as his wife the daughter of the other. Since the instrument was a *sponsalium*, it is obvious that the *sponsus* and *sponsa* were more than seven years old but had not yet reached the canonical age for contracting a legally valid marriage. In the same instrument of betrothal the parties reciprocally acknowledged that they had received a thousand florins as *arrahae* with the understanding that, in the case one of them failed to fulfill the terms of the contract, the breaching party would return to the aggrieved party double the amount of *arrahae*. It happened that one party unilaterally broke the contract. The aggrieved party sued for the simple amount of *arrahae*. Since the parties had attached a *preceptum guarentigiatum* to the contract, the court official who drafted the *punctus* also transcribed part of the relevant rubric of the Florentine statutes on the *preceptum guarentigiatum*. The *punctus* ends with the question of whether or not the *preceptum guarentigiatum* is enforceable.

We are left in the dark about the precise ages of the *sponsus* and *sponsa*, the names of their families, the reason for breaking the contract and who broke it, and why the aggrieved party sued only for the simple amount of *arrahae* and not double, as originally stipulated. The court official was obviously puzzled, too, because the reciprocal stipulation on *arrahae* was inserted in the instrument. Was that Florentine practice? Did the reciprocal acknowledgment mean that both parties had exchanged a thousand florins or had deposited them with a trusted person? Or was the reciprocal acknowledgement a mere promise to pay a penalty in the event a party breached the contract? The skeletal outline of the *punctus* and the lack of information were no obstacle to Angelus, an expert on disputes in which the competence of civil law, canon law, and statutory dispositions overlapped. The structure of the opinion follows the pattern of arguments *pro-et-contra*. Judging from the style of the argumentation, we regard it as a *consilium sapientis*, an impartial opinion commissioned by the court, not an opinion written at the request and on behalf of one of the parties.

The technical question on enforceability did not at all prevent Angelus from casting his net wider than the immediate issue of whether or not one party should be compelled to pay a thousand florins. Theoretically, the *preceptum guarentigiatum* could be attached to a stipulation for performing acts prosecutable under criminal law - for example, hiring someone to commit homicide or steal, or to commit a sinful and immoral act like sacrilege. Since municipal legislation made the *preceptum* unconditionally executable, was it enforceable even in the case of an immoral act or a crime? And, if not, why? In view of the principle upholding the freedom of marriage, are *arrahae* permitted, or should they be treated as a penalty? Lastly, what distinguishes *arrahae* from a penalty<sup>143</sup>?

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"Angelo degli Ubaldi e le *Constitutiones Aegidiane*", *Archivio giuridico* 184 (1973): 103-120; E. SPAGNESI, *Utiliter edoceri: Atti inediti degli ufficiali dello Studio Fiorentino* (1391-96) (Milan 1979), pp. 52-54, 105-107, 109; V. VALENTINI, "L'ordine degli apparati accursiani in una notizia di Angelo degli Ubaldi", *Revue d'histoire de droit* 53 (1985): 99-134; and CUTURI, "Angelo degli Ubaldi in Firenze", pp. 219-220, for the date of Angelus's death.

<sup>142</sup> Some examples: J. KIRSHNER, "A Question of Trust: Suretyship in Trecento Florence", in *Renaissance Studies in Honor of Craig Hugh Smyth* (Florence 1985), vol. 1, pp. 129-45; Id., "Materials for a Gilded Cage: Non-Dotal Assets in Florence, 1300-1500", in *The Family in Italy from Antiquity to the Present*, D. I. Kertzer and R. P. Saller (edd) (New Haven and London 1991), pp. 192-193; ID., "Citizen Cain of Florence", in *La Toscane et les Toscans autour de la Renaissance. Mélanges offerts à Charles de la Roncière* (Aix-en-Provence 2000), pp. 175-92; and O. CAVALLAR and J. KIRSHNER, "*Licentia navigandi ... prosperis ventibus aflantibus*. L'esonzione dei *doctores* e delle loro mogli da norme suntuarie", in *A Ennio Cortese* (Rome 2001), vol. 1, pp. 204-227.

<sup>143</sup> For the sake of brevity and operating on the assumption that his fellow jurists, the judge, and the court would be familiar with earlier doctrines and opinions, Angelus reduced the extensive debate over the permissibility of *arrahae* to the opinions of Bernardus of Parma and Innocent IV.

“At first sight”, Angelus began, “it seems that the said instrument containing a *preceptum guarentigiatum* deserves no implementation at all, for the contract violates the commonly accepted standards of a community (*boni mores*) requiring that present and future marriages not be secured by the fetters of a penalty”. More generally, all contracts and agreements violating the accepted community standards have no force, do not entitle either party to bring an action or raise an exception, and do not create even a natural obligation<sup>144</sup>. Such agreements may not be secured by taking an oath. In short, the standard doctrine on agreements, by which any agreement involving illegal and immoral matters was voided by law, made the betrothal contract invalid and unenforceable<sup>145</sup>.

Next, Angelus considered an objection grounded in the unconditional enforceability of instruments containing a *preceptum guarentigiatum*. On details, one may argue that, since the statute aimed at expediting the payment of debts, a betrothal contract falls outside the statutory dispositions. More substantially, a rigid application of the statute produces absurd consequences. Paradoxically, if the *preceptum* is attached to a contract, no matter how shameful and wrong its content may be, it follows that the contract must be implemented. Perversely, marriages between ascendants and descendants would be permissible, a sacrilege or a crime would be allowed, and detestable deeds would be performed, as they were all secured by the *preceptum*. But this was an absurdity violating divine and human law, as well as canon and civil law. A literal interpretation and application of the statute would lead to impermissible consequences<sup>146</sup>.

Reversing course, Angelus now argued in favor of enforcing the betrothal instrument. He conceded that, as matter of general principle, attaching a penal stipulation to a betrothal or marriage contract is prohibited by civil and canon law alike. Yet, “though we may call *arrahae* a penalty, nonetheless they do not have the same effect as a penalty”. What distinguished *arrahae* and a penalty was “the reason for which *arrahae* were not given” - that is, they were not given as a penalty. If they had the same effect, *arrahae* would have been prohibited by canon and civil law. But civil law established that *arrahae* could be lawfully retained when, by fault of the giving party, marriage was not contracted, whereas they must be restored, doubled or quadrupled, when the receiving party was at fault. In contrast to Roman law, however, Angelus held that the breaching recipient was responsible for returning double, not quadruple, the amount of *arrahae*<sup>147</sup>.

Adhering to mainstream doctrine, Angelus stressed that the reciprocal acknowledgment of *arrahae* made in the same instrument was invalid. Yet its invalidity could not be raised as an exception, for the statute on the *preceptum* forbade ipso iure the defendant from presenting any exception whatsoever. “There are many deeds”, he insisted, “that are utterly invalid by law; nonetheless, their nullity may not be produced, for the statute or municipal legislation shuts the mouth of one who wishes to allege their nullity”. Similarly, the statutes may prohibit the judge from hearing such defenses. Municipal legislation enacted against the magnates and the dispositions on contumacy was a case in point. If a statute establishing that one may not be heard in court is valid, “it becomes invalid when worded in the following way: that justice should be denied to one person, for in this case it would be in violation of the law of God”<sup>148</sup>.

Now, Angelus answered the objections. To the argument that a *preceptum* attached to an agreement may validate any deed, such as marrying an ascendant or descendant, permitting

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<sup>144</sup> For the actionability of a natural obligation under the *ius commune*, see J. GORDLEY, *The Philosophical Origins of Modern Contract Doctrine* (Oxford 1991), pp. 40-67.

<sup>145</sup> On illegality and immorality in Roman law contracts, see ZIMMERMANN, *The Law of Obligations*, pp. 697-715.

<sup>146</sup> For the argument based on absurdity as used by the jurists, see M. SBRICCOLI, *L'interpretazione dello statuto. Contributo allo studio della funzione dei giuristi nell'età comunale* (Milan 1969), pp. 356-366.

<sup>147</sup> Angelus's statement is true if one surmises that the double is the ordinary penalty for the breaching party. For the fourfold payment, a specific stipulation must be inserted in the contract of betrothal.

<sup>148</sup> For the legislation against the magnates, see the classic study of G. SALVEMINI, *Magnati e popolani in Firenze dal 1280 al 1295* (Florence 1899); for the legislation on contumacy prohibiting a person in contempt of the court to present defenses, see *Statuti della Repubblica fiorentina, II. Statuto del Podestà dell'anno 1325*, R. Caggese (ed) (Florence 1921), pp. 80-81, lib. 2, rub. 2, Qualiter procedatur contra contumacem, and p. 181, lib. 3, rub. 2, De officio trium iudicum maleficiorum; ASF, *Statuto del Podestà del 1355*, lib. 3, rub. 5, fol. 9r; *Statuta communis et populi Florentiae* (Freiburg 1778-1783), p. 234, lib. 3, rub.2, De officio iudicum maleficiorum et de modo procedendi in criminalibus.

marriage within prohibited degrees, or perpetrating a crime, he readily acknowledged that immoral deeds are forbidden by all the laws. In these instances the laws deny *tout court* the capacity of persons to enter into such immoral agreements. Yet there are deeds “in conflict with the commonly accepted standards of a community”, he went on, “only because of a civil law disposition”. Where conflict between deed and norm arises because of a civil law disposition, municipal statutes may be enacted contrary to civil law standards. In short, practices that are not in conformity with the *ius commune* may be permitted solely on the basis of the authority of municipal statutes. The logical conclusion was that the instrument on the reciprocal acknowledgment of *arrhae* must be enforced regarding the simple amount. Even the doubts the court had entertained on the proper form of the notarial instrument served as an additional argument supporting Angelus’s main thesis. If the wording of the instrument conformed to Florentine notarial practice, it was valid and must be enforced. Different communities have different customs and standards, and notarial practice, as one would expect, reflects local customs. Consequently, one has to follow local customs, for where the conflict is between two customs, there is no compelling reason to prefer one over the other.

This case reveals that Florentine practices of betrothal among upper-level families were an exercise in risk management. Legal devices - such as the high amount of *arrhae*, their reciprocal acknowledgment without actual transfer of cash, and the attachment of a *preceptum guarentigiatum* to the betrothal contract - bound the two families with an ironclad contract, and, if no impediment occurred between betrothal and marriage, the alliance was secured. Though we do not now how the court ruled, Angelus’s *consilium* underscored the high risks involved in the Florentine strategic management of betrothal contracts. At the end of Trecento, a loss of a thousand florins was a substantial amount, as one can surmise from the amount of the dowries we have cited above. It comes as no surprise that jurists insisted on the actual transfer of money for a valid stipulation on *arrhae* to avoid an unhappy outcome in which the breaching party became a victim of his or her own fiction<sup>149</sup>.

### *Consilium II*

The facts of the second case centered on an agreement concluded between lady Massina, with the consent of her guardian (*mundualdus*)<sup>150</sup>, and Eusepio on the future betrothal and marriage of their minor children. Under the agreement, Massina’s daughter, Sera, immediately after the month of February, 1390, upon the completion of her twelfth birthday, would consent to take Pellegrino, Eusepio’s son, as her lawful spouse and husband (*sponsus et virum legitimum*). Next, Sera would contract lawful marriage with Pellegrino and accept from him wedding rings. Massina herself would pay Pellegrino Sera’s dowry, a certain amount consisting of cash and things. It was stipulated that Sera and Massina would fulfill all these promises at a future time and in a way that would be decided by the arbiters, a certain Antonio and Lorenzo, selected by both parties. More specifically, it was left to the arbiters to fix the dates of betrothal and marriage, the exact amount and composition of the dowry, and the method of payment. For his part, Eusepio promised that Pellegrino, immediately after the month of May, 1391, upon the completion of his fourteenth birthday, would reciprocate Sera’s consent to their betrothal and marriage<sup>151</sup>.

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<sup>149</sup> Angelus’s *consilium* did not go unnoticed, and his passing note on the invalidity of reciprocal acknowledgment of *arrhae* was cited, for instance, by JASON DEL MAINO to *l. Titia* (D. 45.1.134), fol. 189, n. 29.

<sup>150</sup> On the practice of guardianship of women in Florence, see T. KUEHN, “*Cum Consensu Mundualdi*: Legal Guardianship of Women in Quattrocento Florence”, in *Law, Family, & Women. Toward a legal Anthropology of Renaissance Italy* (Chicago 1991), pp. 212-237.

<sup>151</sup> For another Florentine betrothal contract closely resembling that between Massina and Eusepio, see MARIANUS SOCINUS, *Consilia*, vol. I, fol. 3r. In the case on which the Senese jurist was asked to give his opinion, both the *sponsus* and *sponsa* were younger than the required minimum of seven years; the dowry was set at eight hundred florins and the *arrhae* at five hundred; both parties reciprocally acknowledged the receipt of the *arrhae*; and the standard *preceptum guarentigiatum* was added to the contract. Sozzini advised that, despite the insertion of the *preceptum guarentigiatum*, the breaching party was not obligated to return double the amount of the *arrhae*, since the contract was utterly invalid owing to the ages of the *sponsus* and *sponsa*.



The abbreviated format of the *punctus*, however, leaves us in the dark regarding the social identity of the parties and the place where the agreement and dispute took place. Although Massina was not identified as a widow, it is almost certain that she was, for her husband was duty bound to marry off his *filia familias*, which he would have done had he been alive. The omission of surnames, which was usually done for the sake of brevity, prevents us from gauging the contracting parties' social standing. In the absence of toponymic surnames or any mention of place, we cannot be certain that the parties were Florentine or that the dispute occurred in Florence. Nor can we say with certainty whether *consilium* II was solicited by the court or one of the parties to bolster its case. It is apparent from Angelus's *consilium* that the dispute occurred in Tuscany, but not necessarily in Florence. Similarly, the presence of a *mundualdus*, a Florentine institution, with dates in Florentine style (*ab incarnatione*), were practices shared by nearby communities in the *contado*, *distretto*, and other parts of Tuscany. If not definitive, Angelus's linking of *consilium* II with *consilium* I, discussed above, is yet another piece of indirect evidence suggesting that the case was being litigated in a court under the jurisdiction of Florence and subject to its statutes.

To avoid confusion, it should be remembered that in Florence the new year began on March 25<sup>th</sup>, the day of the feast of the Annunciation, making Pellegrino's fourteenth birthday fall in May 1391, rather than May 1390, in accordance with the solar calendar, in which the new year begins on the first of January. The salient point here is that, based on the facts provided in the *punctus*, Pellegrino would have reached the legal age for marriage only two months after Sera had completed her twelfth birthday, rather than fourteen months later. In his *consilium*, however, Angelus never used the expression *ab incarnatione*<sup>152</sup>; he used only *anno domini*, which referred to the solar calendar. Inexplicably, perhaps unconsciously, and we believe in error, Angelus seemed to have reverted to the solar calendar of his native city, Perugia. In Angelus's reckoning, or as he said, according to the facts furnished him, Pellegrino was fourteen months older than Sera. It may be objected that Angelus had not erred, because he also used the expression *recte calculo computato*, together with *anno domini*, thus calling attention to a subtler way of counting years. Yet, in context, the expression meant "counting more precisely", that is, counting down to the months.

*Consilium* II opened with a reaffirmation of *consilium* I: "Just as I advised in the above-mentioned case", Angelus declared, "so likewise here I approve once more all that is stated in the above *consilium* and affirm that it was consonant with the law and well advised". Angelus's reaffirmation suggests that the judge who commissioned *consilium* II may have been familiar with *consilium* I and the case which it addressed. If so, the reaffirmation released Angelus from repeating or summarizing the tenor of the earlier *consilium*. It is also conceivable that Angelus felt that the reaffirmation was necessary to forestall any inference that his opinion in the present case contradicted *consilium* I. The present case differed from the earlier one in that here one of the arbiters had died before declaring the date on which the marriage was to occur, therefore terminating the agreement. The arbiter's premature death, however, did not discourage Pellegrino's father from formally notifying Massina, immediately after Sera's twelfth birthday in February, that the time for marriage was at hand or had passed. Formal notification was necessary when the date for fulfilling an obligation was uncertain, thus placing the other party in default. The concrete issue Angelus was asked to resolve was whether Massina and Sera had broken the betrothal contract.

Angelus responded: "At that time, unless fraud had altered his age, Pellegrino was incapable of contracting marriage, although he could enter into a contract of betrothal (*sponsalium*)"<sup>153</sup>. While

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<sup>152</sup> The expression *ab incarnatione* was inserted in the edition printed in Lyon in 1551.

<sup>153</sup> A similar argument was made by Florentine jurists in another case of March 1412/13. This case involved a *sponsa* of ten years of age who exchanged *verba de presenti* with her *sponsus* and on whose behalf a dowry was promised. Was the marriage valid? If not, was the *sponsa*'s father released from his promise to pay the dowry? The jurist, Stefano Buonaccorsi, with endorsements from Filippo Corsini and Lorenzo Ridolfi, concluded that neither the marriage *de presenti* nor the promise of the dowry were valid: "Et primo quod matrimonium per verba de presenti contractum inter impuberes vel quorum unus pubes et alius impubes, qui non sunt proxima pubertati, vel in quibus malatia non supplet etatem, non est matrimonium sed iuris interpretatione sunt tamen sponsalia de futuro, licet verba haberent consensum experimentia de presenti". See BNF, Fondo Principale, II, II, 370, fol. 7r. MEEK, "Un'unione incerta", p. 111,

this was technically true, the two-step sequence, betrothal followed by marriage, was not stipulated in the contract. The convoluted wording of the contract, as Angelus construed it, stipulated that the betrothal, the ringing of the bride, and the marriage would all take place at the same time:

The agreement was conceived as follows - namely, that the said girl will consent to take Pellegrino as her lawful spouse and husband; and that she will accept from him wedding rings; and that she will contract lawful marriage with him. Therefore, the words, "spouse" [*sponsus*] and "husband" [*vir*] are interchangeable, as is customary among the Tuscans, for whom women are espoused by having rings placed on their fingers [*subharatio*]. For then, reciprocally and in mutual agreement, one to the other and vice versa, the bridegroom [*desponsans*] gives his consent to the bride [*desponsatam*] to take her as his lawful spouse [*sponsa*] and wife [*uxor*]. And she gives her consent to the bridegroom to take him as her spouse and husband. And then, as is customary, the notary will ask the bride if she consents to take him as her spouse and husband. Likewise, the husband is asked if he consents to take her as his lawful spouse and wife, and both answer that they will. Therefore, the parties to this agreement did not intend that betrothal should occur first and marriage afterwards, but that both should occur at the same time. However, since betrothal and marriage could not happen, as a matter of law, default was not incurred.

Angelo's foregrounding of the temporal unity of Tuscan betrothal and marriage rites was roughly consistent with practice, for, as we have observed, the betrothal and marriage of a couple on the same day did occur in late Trecento Florence.

Next, Angelus pronounced that on grammatical grounds the clauses in the agreement supported his argument that Massina and Sera would not have to fulfill their obligations until after the month of May, when Pellegrino would be legally capable of contracting a present-consent marriage. He concluded that it was impossible for default to have occurred, since the time for contracting marriage had not been declared by the arbiters: "If, therefore, the time for contracting the marriage, paying the dowry, and determining its amount, as well as the means by which all this should be carried out, were unconditionally placed at the discretion of the arbiters, there can be no default whatsoever before a declaration is made by the said arbiters concerning the time when and the means by which all this should be carried out, provided the facts are as they were disclosed to me". Finally, under a bilateral contract carrying reciprocal obligations, as in this case, the defendant cannot be placed in default unless the plaintiff first fulfills his obligations. Since it was legally impossible for Eusepio and Pellegrino to fulfill their own contractual obligations, there were no legal grounds for suing Massina and Sera for nonperformance.

We have no idea what motivated Massina to withdraw from the contract after the arbiter's death. Perhaps she had found a better match for her daughter. Whatever the motives, it seems that in contrast to the first case, the parties resorted neither to the fictitious acknowledgment of *arrhae* nor to the *preceptum guarentigiatum* to cement the contract. Again, in the first case, the *sponsalia* had been unilaterally broken, and the issue was whether the agreed-upon penalty could be lawfully imposed, whereas in the second the issue was whether Massina's decision itself constituted a breach of contract. In *consilium* II, Angelus rehearsed, but then moved beyond, time-honored doctrines regarding the differences between *sponsalia* and *matrimonium* and the invalidity of marriage vows owing to an impediment of nonage. As in *consilium* I, he accented the wishes of the parties as instantiated in their mutual agreements and the constitutive role of municipal law and local customs in the construction and the operation of betrothal contracts.

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translates the technical expression "in eam aetatem malitia non suppleret" as "difettava di quella malitia che in qualche modo avrebbe potuto compensare la sua minore età". In view of canons *c. De illis* (X. 4.2.9) and *c. Tue nobis* (X. 4.2.14), and the glosses *Nubilis* e *Prudentia*, the term *malitia* may be understood as *vigor naturalis* and *potentia coeundi* - in short, physical capacity to have sexual intercourse. For this meaning, see Iohannes Andreae ad *c. De illis* (X. 4.2.9), fol. 18v, n. 3. How the term *malitia* - which in post-classical Latin also means unfruitfulness or barrenness, as in the expression *terrae malitia* or *malitia arboris* - came to be used in this way requires further investigation.

### *Highlights and Contrasts*

Our study is the first to highlight the interplay of Roman and canon law jurisprudence, together with municipal law and local customs, in making and breaking betrothal contracts. Although notarial manuals regularly featured model contracts of *sponsalia*, our preliminary archival research suggests that betrothal contracts were few and far between. No doubt, upper-level families, as in Florence, relied on betrothal contracts for arranging the future marriage of minor children, when the interval between betrothal and marriage might be a year or longer. Florentine betrothal contracts attest to the strategic competence of Florentine families to contract alliances from which neither party could withdraw with impunity<sup>154</sup>. The cases we have discussed, along with the *novelle*, point to the instrumental role that widows played in arranging betrothals and marriages. *Arrhae* were one of the devices employed to construct an ironclad contract. Although *arrhae* were necessary, they proved insufficient, so that an oath and the *preceptum guarentigiatum* were required, as well, to ensure performance. The prohibitive risks attached to betrothal instruments surely discouraged commoners from employing them. Above all, the short intervals between betrothals and subsequent marriages inhibited the widespread use of notarized *sponsalia* contracts.

The process of identifying the crucial differences between *arrhae* and a penalty was laborious, and the distinguishing traits, as elaborated by the jurists, were ultimately problematic. Similarly, the custom of giving a pledge (*pignus*) instead of cash posed a dilemma: should the value of the object pledged be treated symbolically or materially? While in the second case the pledge may be considered as an equivalent of *arrhae* given in cash, in the first it may not and thus it falls outside the dispositions of *l. Mulier* on *arrhae*. Additionally, the reciprocal exchange and acknowledgment of *arrhae* called into question the neatly devised system medieval jurists inherited from Roman law. Nonetheless, jurists succeeded in unmasking frauds, especially in the form of the fictitious and reciprocal acknowledgment of *arrhae*. Since the value of *arrhae* corresponded approximately to that of dowries, the jurists failed in their attempt to limit *arrhae* to a small amount of cash actually transferred from one party to another. Of long-lasting significance was the jurists' effective defense of an aggrieved party's ability to mount an action *ad interesse* against the breaching party in order to recover expenditures made in anticipation of marriage.

The multiple and varied sources of law of the late Middle Ages constituted a socio-legal reality far removed from contemporary regulations governing premarital procedures across Europe and the United States<sup>155</sup>. Today, civil law regulations are almost always based on the monopoly of codes and statutes uniformly applied within the jurisdiction of each country and within each of the fifty U. S. states. Depending on the domicile of the parties, compulsory premarital procedures in Europe and the United States usually consist of premarital counseling, attestation of residence, the production of a birth, divorce, or death certificates (of a former spouse), and the procurement of a marriage license. In Italy, notice of the future marriage must be posted for a minimum of eight days in the town hall of the locality where the couple resides in order to allow interested parties to raise impediments. In addition, all civil marriages must be recorded in a public registry<sup>156</sup>. These compulsory procedures were introduced by governments over the course of the nineteenth and twentieth centuries for the purpose of regularizing and controlling the formation of marriage. One important result of these procedures is that present-day suits resulting from both broken promises to marry and divorce largely concern claims over property, rather than challenges to the validity of the marriage itself. By contrast, the ease by which betrothals and marriages were contracted in the late Middle Ages inevitably resulted in myriad disputes over the very validity of betrothals and marriages.

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<sup>154</sup> For reasons prompting families to enter into a betrothal contract, see SALATIELE, *Ars notaria*, G. Orlandelli (ed) (Milan 1961), pp. 178-179. In gloss *servare* added to the model instrument of *sponsalia*, Salatiele wrote: "nota quod hec promissio fieri consuevit quando parentes viri et mulieris volunt inter se facere parentelam ob aliquam inimicitiam mitigandam".

<sup>155</sup> GROSSI, *L'ordine giuridico medievale*, pp. 223-235.

<sup>156</sup> M. TIMOTEO, "Family Law in Italy", in *Family Law in Europe*, C. Hamilton and Kate Standley (edd) (London, Dublin, Edinburgh 1995), p. 268.

A persistent theme in the broken-promise-to-marry scholarship and in fictional literature is that from the Middle Ages to the present unscrupulous men have tricked credulous women with sex-motivated promises to marry<sup>157</sup>. In the late Middle Ages, paternalistic church and secular courts consistently sought to compel male seducers to marry their victims. Such suits typically involved low-status families and individuals. At the same time, church courts favored plaintiffs, regardless of gender, seeking to enforce informal betrothal and marriage vows. In the absence of an action at civil law to initiate a suit over a broken promise to marry, high-status families, like the merchant families of Florence, tended to rely on notarized betrothal contracts to avoid the suits and troubles attending informal promises to marry. Our research indicates that betrothal contracts, with their detailed specification of performance contingencies - principally large amounts of compensation and automatic judgment against the breaching party - succeeded in minimizing the occurrence of broken promises to marry.

The experience of Florence differed from that of nineteenth-century England and the United States, countries in which a common law action for breach of promise to marry was well established and was used to launch thousands of suits. The large majority of plaintiffs were lower- and middle-class women seeking pecuniary compensation from ex-fiancés who, they asserted, had failed to keep their promises to marry. As Frost has shown, jilted women in Victorian England easily persuaded sympathetic judges and juries that they were deserving of compensation for unwanted pregnancies, lost jobs, careers forgone, humiliation, and emotional wounds. Compensation was especially needed for women who had already invested in costly wedding preparations. Frost appropriately admires these jilted women for asserting their rights<sup>158</sup>. Yet, there is also a paradox that in doing so they had to portray themselves as passive victims, and as Coombs observes, this portrayal was “contradicted by the very action of bringing suit”<sup>159</sup>. It is not surprising that these women became the objects of caustic criticism from legal and moral pundits and social critics like Charles Dickens (*Pickwick Papers*, 1836) and Gilbert and Sullivan (*Trial by Jury*, 1875). For them, female plaintiffs were heartless gold diggers and extortionists. Despite objections, the common law action of breach of promise to marry continued to be used by women to repair their lives well up until 1945. Only in 1970 did Parliament abolish the action.

U.S. state courts and legislatures in the twentieth century have significantly curtailed the ability of jilted women to win suits over broken promises to marry. According to Tushnett, “the idea of pure, romantic, non-materialistic love became so powerful over the course of the twentieth century that courts could no longer fully analyze the ways in which the economics of marriages and planned marriages were linked to the emotions surrounding them. This shift in understanding worked against many women’s material interests, as once-common and oft-successful female plaintiffs disappeared from the case reporters”<sup>160</sup>.

There is yet another contrast. In the late Middle Ages a sworn promise to marry was enforceable under canon law and the breaching party was held at fault and compelled to pay compensation.

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<sup>157</sup> CAZZETTA, *Praesumitur seducta*, cit.; and D. SUBOTNIK’s entertaining “*Sue Me, Sue Me, What Can You Do Me? I Love You.*” A Disquisition on Law, Sex, and Talk”, *Florida Law Review* 47 (July 1995): 311-409. The lyric is from Frank Loesser, *Guys and Dolls* (Frank Music Corp. 1949).

<sup>158</sup> G. S. FROST, *Courtship, Class and Gender in Victorian England* (Charlottesville 1995); and R. CRAIG, *Promising Language: Betrothal in Victorian Law and Fiction* (Albany 2000). For nineteenth-century Germany and Switzerland, see M. BORS, *Bescholtene Frauen vor Gericht: zur Rechtsprechung des Preussischen Obertribunals und des Zürcher Obergerichts auf dem Gebiet des Nichteheichenrechts* (Frankfurt am Main, 1998). Bors deals with the question of women who became pregnant during the time of the engagement and were then abandoned by their fiancés. He discusses the provision in the Prussian *Allgemeine Landrecht* of 1794 that pregnant women could not sue for breach of promise of future marriage, but could sue to acquire the legal status of divorced women in order to obtain the social rank and the name of the child’s father and, more importantly, support for the child. In the cases he analyses, the men invariably counterclaimed that the mothers had had slept with other men and therefore the children were not theirs. Our gratitude to Susanne Lepsius for signaling this book to us.

<sup>159</sup> M. COOMBS, “Agency and Partnership: A Study of Breach of Promise Plaintiffs”, *Yale Journal of Law and Feminism* 1 (1989): 1-23, quote, 3.

<sup>160</sup> R. TUSHNETT, “Rules of Engagement”, *Yale Law Journal* 107 (June 1998): 2583-2618, quote, p. 2584. For the nineteenth century, see M. GROSSBERG, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill and London 1985), pp. 33-63.

The promise importantly entailed a change in the promisor's legal status. It was unlawful for the party already betrothed to make a promise of future marriage to another party. Today, in Europe and the United States, an individual's legal status is not at all altered upon the exchange of promises to marry or upon the performance of premarital requirements prescribed by law<sup>161</sup>. Under Italy's *Codice Civile* (1865), a mutual exchange of a promise to marry in the future is not binding (art. 53). The breaching party, however, may be liable for compensation, where the promise was rendered by a party of legal age, or a minor with proper authorization, in an *atto pubblico* (a declaration made before a public official attested by a sealed document, or a document redacted by a public notary), or in a *scritta privata* (one drafted by the parties themselves). In that event, the party who declines, without a sound reason, to fulfill the promise must compensate the aggrieved party for expenditures made in preparation for marriage (art. 54). The amount of damages must be limited to actual prenuptial expenditures. These provisions on prenuptial procedures, with minor modifications, remain in force (*Codice Civile*, art. 79-81)<sup>162</sup>. Further, a standard textbook on contemporary Italian family law, echoing medieval doctrines, stresses that a penal stipulation attached to a "promessa di matrimonio" has no legal force or effect<sup>163</sup>. State legislatures and courts in the United States take a minimalist approach and are no longer willing to assign fault to the party breaking a promise to marry or to grant compensation to the aggrieved party, even for expenditures made in anticipation of future marriage. Under current U.S. legal doctrines and case law, the value of a promise to marry may not be assigned a price. American women think otherwise. According to recent surveys, women overwhelmingly consider the engagement ring, an object on which Americans of all classes lavish extravagant devotion, a down payment that they should be allowed to retain when a fiancé breaks his promise to marry<sup>164</sup>. Under U.S. law, however, an ex-fiancé may recover any tangible gift (or its equivalent monetary value) given to a woman in anticipation of marriage, particularly the engagement ring, which today frequently costs thousands of dollars<sup>165</sup>. In Italy, either party, having exchanged promises of future marriage, may demand the return of gifts (including love letters, photographs, and jewelry) given in anticipation of marriage, except where other arrangements for the disposition of the gifts had been made by contract (*Codice Civile*, art. 80)<sup>166</sup>. The contrasts we have pointed out must not mask the robustness, through the centuries and in radically dissimilar historical settings, of promises of future marriage. In fact, betrothal promises,

<sup>161</sup> In Germany, however, there is an exception: engaged persons may not be forced to testify in court against each other.

<sup>162</sup> G. OBERTO, *La promessa di matrimonio tra passato e presente* (Padua 1996).

<sup>163</sup> M. AQUINO-R TALLARITA, "La promessa di matrimonio", in *Manuale del nuovo diritto di famiglia*, G. Cassano (ed) (Piacenza 2000), pp. 70-102. A subsidiary issue, one that also arose in the Middle Ages (see above, note 134), is whether marriage brokers are entitled to their fees if, after an engagement has been brokered, the marriage itself is not celebrated.

<sup>164</sup> TUSHNETT, "Rules of Engagement", p. 2591. For the reasons behind the invention and adoption of the groom's wedding band and the double ring ceremony, which became popular in the 1940's and 1950's in the United States, see VICKI HOWARD, "A 'Real Man's Ring': Gender and the Invention of Tradition", *Journal of Social History* 36 (2003): 837-856.

<sup>165</sup> While we were revising this paragraph, a story appeared in the New York Times regarding a Pennsylvania Supreme Court ruling on whether a lie about the value of an engagement ring voided a prenuptial agreement. Mr. Porreco told his teen-age fiancée, who was thirty years younger than the groom, "that the ring was worth \$21,000, about half of her net worth at the time of marriage". After they married and separated, "she discovered that the stone in her engagement ring was a fake". The majority of the court ruled *caveat sponsa*: that the groom's "misstatement did not amount to fraud because she (the bride) should not have trusted her fiancé". The witty dissenting opinion was written in verse by Justice J. Michael Eakin, whose penchant for judicial poetry has been criticized. For this Sacchetti-like tale, see Adam Liptak, "Justices Call on Bench's Bard to Limit His Lyricism", *New York Times*, 15 December 2002, National Section. As Susanne Lepsius reminds us (private communication), in contrast to the United States, expensive engagement rings are not customarily given in Germany, Scandinavia and Eastern Europe. Rather, the engagement ring is usually a gold band that is worn on the left hand before marriage and then transferred to the right hand after marriage. A valuable ring, often consisting of diamonds, is customarily given by the husband to his wife to celebrate the birth of their first child.

<sup>166</sup> Advice on the recovery of gifts given in anticipation of marriage, plus a model letter requesting the return of the gifts that the donor can send to the donee, can be found on the Web: <<http://members.xoom.virgilio.it/abelcuo/seduzione/codice.htm>>

which have been the exclusive preserve of heterosexual couples, are now made by same-sex couples in Europe, the United States, and Canada. In Italy, the cities of Florence and Pisa have led the way in permitting same-sex couples to register as domestic partners. With regard to medieval Italy, further exploration of archival and legal sources is necessary to better understand the function of *sponsalia* among diverse social groups and regions. The basic questions of who contracted betrothals and where, when, and how they were contracted remain to be answered. The different and conflicting material and emotional meanings attributed to betrothal promises by communities, legal authorities, yesterday's patriarchal families, and today's autonomous and self-fashioning individuals constitute a fascinating, ongoing chapter in comparative socio-legal history.