BEHIND CLOSED DOORS: IMPOTENCE TRIALS AND THE TRANS-HISTORICAL RIGHT TO MARITAL PRIVACY

Stephanie B. Hoffman[*]

INTRODUCTION

On June 22, 1727, Edward Weld of Lulworth Castle, a wealthy landowner, married Catherine Elizabeth Aston, daughter of Walter Aston, Lord of Forfar.[1] For one year, Catherine and Edward lived together at Lulworth Castle.[2] In June 1728, Catherine returned to her father's estate in Standon.[3] Edward periodically visited Catherine at her father's estate.[4] They also attempted to live together in London for a period.[5] During this tumultuous period in the couple's marriage, Edward consulted with friends, relatives, and doctors

[*] J.D. Candidate, Boston University School of Law, 2010. B.A., Government, Cornell University, 2007. I would like to thank Professor Kristin A. Collins for her guidance in formulating and writing this Note.

[1] A SEQUEL TO THE CASE OF THE HONOURABLE MRS. WELD AND HER HUSBAND, WHOM SHE LIBELLED FOR IMPOTENCY, at v (London, Crawfurd 1734) [hereinafter A SEQUEL].

[2] *Id.*

[3] *Id.*

[4] *Id.* at vi.

[5] *Id.*

regarding his inability to consummate.[6] In the summer of 1729, Edward went to Mr. John Williams, an eminent surgeon, who diagnosed Edward; he found the "[f]renum too straight," which Williams corrected with a minor surgical procedure.[7] Edward told Catherine's father, Lord Aston, that he believed himself cured and merely needed time to heal in order to consummate his marriage.[8]

Before turning to the courts, Catherine attempted to encourage Edward's mother to move out of Lulworth Castle or to convince Edward to move elsewhere.[9] Catherine seemed concerned with the sanctity of her and Edward's marital home: "I am too much convinced, that when one is Married, they are to make That their Home, and I am very willing to do it, if I have no other Person to please than my Mr. Weld."[10] Perhaps Catherine blamed her and Edward's failure to consummate on the presence of her mother-in-law. Nonetheless, the publication does not indicate that Edward's mother ever left Lulworth Castle.

After more than three years of marriage without consummation, Catherine initiated a Citation for Insufficiency against her husband in the Arches-Court of Canterbury.[11] Despite Edward Weld's own confessions of impotence to Catherine's father and Edward's acquaintances,[12] and the testimony of numerous doctors to the prior existence of a defect,[13] the court dismissed the action for impotence on the grounds that Edward no longer had this defect.[14] The court decreed, "Catherine Elizabeth Weld, alias Aston, ought to be enjoined [in] perpetual silence in the premises."[15] After the resolution of the trial, "Mrs. Weld was admonished to go home to her husband, and cohabit with him at bed and board."[16] Catherine died in October 1739.[17] In 1740, Edward

[6] *Id.* at vii, 7-8.

[7] *Id.* at 6.

[8] *Id.* at 7-8.

[9] *Id.* at 37-38.

[10] *Id.* at 38.

[11] *See* THE PROCEEDINGS IN THE ARCHES-COURT OF CANTERBURY IN A CAUSE BETWEEN THE HON. MRS. CATHERINE WELD, DAUGHTER TO THE LORD ASTON; AND EDWARD WELD, ESQ; HER HUSBAND 14 (3d ed. London, Owen 1757) [hereinafter ARCHES-COURT].

[12] A SEQUEL, *supra* note 1, at 7-8.

[13] THE GENUINE PROCEEDINGS, IN THE ARCHES-COURT OF CANTERBURY, BETWEEN THE HONOURABLE CATHERINE ELIZABETH WELD, ALIAS ASTON, AND HER HUSBAND EDWARD WELD, ESQ; OF LULWORTH-CASTLE IN DORSETSHIRE, 33 (2d ed. London, Crawfurd 1732) [hereinafter GENUINE PROCEEDINGS].

[14] 7 TRIALS FOR ADULTERY: OR, THE HISTORY OF DIVORCES. BEING SELECT TRIALS AT DOCTORS COMMONS, FOR ADULTERY, FORNICATION, CRUELTY, IMPOTENCE, &C. 12 (London, Bladon 1780) [hereinafter 7 TRIALS].

[15] *Id.*

[16] *Id.*

[17] CHARLES HERBERT MAYO, BIBLIOTHECA DORSETIENSIS 162 (London, Chiswick Press 1885).

married Mary Theresa Vaughan and they had five children together before Edward died in 1761.[18]

* * * *

In seventeenth and eighteenth century England few people filed for a separation or nullification, particularly on the basis of an inability to consummate.[19] From 1660 to 1849, 860 nullification and separation cases were brought before the Court of Arches.[20] Out of 262 such cases that originated in the London Consistory Court from 1670 to 1857, seven involved allegations of impotence.[21] Remarkably, given their usual inability to initiate suits during this period, women represented a majority of the plaintiffs in separation and nullification actions during this period,[22] with the percentage of female plaintiffs being particularly high in the subcategory of impotence litigation. The requirements to initiate a suit for separation based on impotence in an ecclesiastic court changed over time, and litigants' battles took on new forms as medicine played a greater role and the parties were eventually permitted to act as their own witnesses. Despite the relatively small number of cases, impotency trials were of great interest, and published transcripts made them an important cultural phenomenon.

This Note examines the role that impotence trials played in England during the sixteenth, seventeenth, and eighteenth centuries, particularly how the trials and their popular publication challenge modern notions of marital privacy. The Weld case, introduced in the opening vignette, presents a concrete means of exploring the facets of impotence cases and their publication. Part I details the ecclesiastic courts' evidentiary standards and how wives built a case for impotence. Part I also explores the history of this cause of action, the types of litigants who brought an action in court, and the specific components of such a complaint. The types of evidence required, the means of producing such evidence at trial, and the parties instituting such actions produced an unusual legal record that begged for – and was subject to – publication for a wider

[18] 2 SIR BERNARD BURKE, GENEALOGICAL AND HERALDIC HISTORY OF THE COLONIAL GENTRY 652 (Ashworth P. Burke ed., Genealogical Publishing Co. 1970) (1891).

[19] *See* LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, at 425 (1990) (listing 735 separation cases and 125 nullity cases in the Court of Arches from 1660 to 1849, the majority of these brought on grounds such as adultery, cruelty, or restitution of conjugal rights). Only two of the five ways to break up a marriage in the early modern period in England involved litigation: (1) suing in a church court for separation from bed and board, without permission to remarry on the grounds of adultery or life-threatening cruelty; or (2) full divorce by act of Parliament, with permission to remarry based on a wife's adultery. *Id.* at 141. The other three methods were: (1) private separation; (2) desertion, elopement, or ejectment; and (3) wife-sale, whereby "a husband publicly sold to another man not only his wife but also all legal responsibility for her and her upkeep." *Id.*

[20] *Id.* at 425.

[21] *Id.* at 428.

[22] *See id.*

audience. The growth of the novel and the expansion of the reading public made reception of these pornographically themed trial publications even more popular. Part II discusses the contemporary popularity of these trials. It details the methods of publication, the readership, and potential explanations of people's interest, in order to explore the impotence trial as spectacle.

Finally, Part III analyzes the role that impotence trials play in challenging traditional conceptions of marital privacy. The impotence trial represents what today is an inherently suspect action by the court: an investigation of the marital bedroom. Trans-historical accounts consistently protect the marital bedroom from government or judicial oversight. However, the impotence trial did not just peek into the marital bedroom; it threw the curtain wide open. And the subsequent popular publications invited the public in for a full viewing.

I. SEPARATION BASED ON IMPOTENCE

In order to understand why these trials were ripe for popular publication, one must know a bit about the law surrounding the initiation of a cause for impotence. To bring an action to nullify one's marriage represented a departure from traditional notions of marital indissolubility. The requisites a wife had to satisfy to prove her prima facie case, especially the medical evidence required, made the content of the trials particularly salacious. The inquisitorial procedure used at trial required that much of the evidence be recorded, making it easier for the press and printers to publish trials for wide consumption. These factors taken together drew readers into the popular publication of impotence trials, and provided the opportunity to capitalize on a burgeoning audience.

A. *Impotence as a Cause for Nullification*

The English law of marriage, canon law, sanctioned impotence actions, which enticed wives because such actions allowed remarriage after successful nullification.[23] Charles Donahue's book outlines the four characteristics of thirteenth century Christian marriage law: (1) "marriage is between a man and a woman and is monogamous"; (2) "a Christian marriage once fully formed was indissoluble while both of the parties were living"; (3) "close relatives could not validly marry"; and (4) "marriage between Christians once fully formed was a sacrament of the church."[24] Donahue also categorizes the impediments to marriage that would allow for a divorce or annulment.[25] Impediments to marriage redefined the second characteristic of Christian marriages – indissolubility.

[23] *See* CHARLES DONAHUE JR., LAW, MARRIAGE, AND SOCIETY IN THE LATER MIDDLE AGES: ARGUMENTS ABOUT MARRIAGE IN FIVE COURTS 18-20, 33 (2007).

[24] *Id.* at 16.

[25] *See id.* at 18-33.

By the end of the thirteenth century, indissolubility made it almost impossible to divorce.[26] There were two types of divorce allowed under canon law. The first approximates modern day annulment, after which the parties could remarry.[27] The second type approximates modern day separation, after which neither party could remarry as long as the other was still alive.[28] Divorce without permission to remarry was used in adultery cases.[29] In order to obtain a divorce decree, the parties had to turn to the church, whose pronouncements regarding the status of a given marriage came through the ecclesiastic courts.[30]

Impediments were divided into two separate categories: diriment and impedient.[31] Divorce after which the parties could remarry was only allowed in cases of diriment impediments, the category under which impotence fits.[32] Diriment impediments "invalidated any attempted marriage" so long as the impediments were present "at the time that the marriage was contracted."[33] Impedient impediments did not invalidate the marriage but rendered it unlawful: "Those who married in the face of an impedient impediment could be penalized . . . but their marriage was valid and could not be dissolved."[34] The list of impediments deemed to invalidate a marriage or make it unlawful was trimmed down during the twelfth and early thirteenth centuries,[35] but still included impotence or frigidity.[36] Impotence was considered a diriment impediment so long as it existed at the time of marriage and the other partner did not know of its existence when he or she married.[37]

---

[26] *Id.* at 33.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See id.* For a history of the function and operation of the ecclesiastic court system, see STONE, *supra* note 19, at 33-44.

[31] DONAHUE, *supra* note 23, at 18.

[32] *Id.* at 33.

[33] *Id.*

[34] *Id.*

[35] *Id.* The remaining impediments besides impotence were: insanity, nonage, force or fear, error, condition, disparity of cult, orders, vows, crime, consanguinity, affinity, spiritual affinity, public honesty, clandestinity, and solemnity. *Id.* at 19-33.

[36] *Id.* at 19-20 (explaining that impotence is an impediment to marriage because "it removes both primary causes of marriages, the procreation of offspring and the avoidance of fornication"). The ancient rule in impotence trials was that if a man denied his impotence, he was taken at his word. *Id.* at 20. This was later amended to allow the woman to produce witnesses to her own virginity to prove her husband's impotence. *Id.*

[37] *Id.*

B. *Procedure in Consistory Courts*

Medieval canon law prescribed the procedure to be followed in consistory courts – a type of ecclesiastic court – which was radically different from that followed in common law courts.[38] The four major ways canon law differed from common law were: (1) the form of evidence – canon law used private written documents; (2) the form of testimony – canon law used private interrogation by professional examiners through interrogatories; (3) the decision-maker – canon law depended on a judge, not a jury; and (4) the rules of evidence.[39] A court proceeding usually took place in six parts.[40] First, a litigant would hire a proctor, or professional lawyer, who specialized in civil law and had a license to practice in ecclesiastic courts.[41] Second, the defendant was summoned through the registration of a citation with the court.[42] Third, the litigant drew up a Libel,[43] which often included written exhibits and exaggerated well beyond what could be proved.[44] Fourth, the defendant appeared in order to make an Answer, which a court clerk would record.[45] There were sometimes difficulties associated with getting a defendant to appear before the court, and there were a host of processes in order to deal with this.[46] Fifth, the court interrogated witnesses using a deposition and interrogator process that avoided any oral cross-examination.[47] The court could issue Compulsories, the ecclesiastic form of a modern subpoena, in order to bring in witnesses.[48] The use of Interrogatories permitted lines of questioning that today might be deemed irrelevant.[49] Finally, the court would hold a hearing in open court in order to issue a sentence based on the written

[38] STONE, *supra* note 19, at 195.

[39] *Id.*

[40] *Id.* at 195-97.

[41] *Id.* at 195.

[42] *Id.*

[43] In this usage, Libel is defined as "[t]he complaint or initial pleading in an admiralty or ecclesiastical case." BLACK'S LAW DICTIONARY 999 (9th ed. 2009).

[44] STONE, *supra* note 19, at 196.

[45] *Id.*

[46] *Id.* at 195-96. The most interesting means of enforcement, and really the only means to effectuate a citation, was excommunication. *Id.* at 196 (describing excommunication as one of the only means of enforcement, but a "rather empty threat"). Also, the court could issue writs to be carried out by the sheriff, but this was "slow, clumsy, and expensive." *Id.* Imprisonment for contumacy, or contempt of court, therefore rarely occurred. *Id.*

[47] *Id.*

[48] *Id.* There was no oral argument or oral questioning of witnesses before the court. *Id.* All documents were submitted in writing, and a judgment was issued after the court reviewed these documents. *Id.* at 196-97. The court's decision was announced orally to the parties, but was not recorded officially by the court. *Id.* at 197.

[49] *Id.* at 196-97 (explaining that interrogatories could turn into fishing expeditions, often inquiring about witnesses' religion, politics, and finances).

documentation.[50] Because the judgment was not recorded in the court files, it is sometimes difficult to discern from the record which party prevailed.[51] This is one of the inherent problems with analyzing the Consistory Court's decisions in nullity suits.[52]

C. *Building a Case for Impotence*

The ecclesiastic courts utilized an inquisitorial method[53] and required documentation of all party allegations, making impotence cases ripe for post-decision publication. Because the opinions themselves were not published, lay editors compiled the litany of written interrogatories, depositions, and other trial documents for publication. The content of the evidence – primarily focused on the spouse's ability to copulate – incentivized publication and presented a unique opportunity for printers and publishers to turn a profit.

1. The Inquisitorial System and Evidence in Consistory Courts

"The canonical method of prosecuting the case is not an adversary method," but rather "it is akin to the inquisitorial method found in civil law countries."[54] There are two main differences between the inquisitorial form and the adversarial (American) form. First, in the inquisitorial system the court, rather than the lawyers, is responsible for gathering and evaluating evidence.[55] Second, there is no clear line between the pretrial period and the trial itself.[56] The court will assemble a dossier of documents submitted by both parties – complaint, answer, potential witnesses' identifying information, etc. – to use in

[50] *Id.* at 197.

[51] *See id.*

[52] The ecclesiastic courts recorded much, if not all, of the evidence used in marriage trials, including accusations, answers, depositions, and interrogatories. *Id.* at 27-28 ("Perhaps the richest discovery by historians in recent years is the enormous wealth of archival material hidden away in the largely uncatalogued records of the ecclesiastical courts."). But much of the lawyers' arguments and the judges' reasoning was not recorded, at least until the eighteenth century. *Id.* at 28. In *Norton v. Seton*, 3 Phill. Ecc. 147, (1819) 161 Eng. Rep. 1283, 1285 (Arches Court), the court points to "the difficulties that had attended the search from the want of reported cases, and the inaccurate manner in which the Arches books had been kept." The court then provides a history of 18th and early 19th century impotence cases for which it could find records. *Id.* at 1285-87. For the period 1730-1812, the court identified eight cases. Through a search on HeinOnline's English Reports database, I was able to locate another fifteen impotence cases from 1819-1865.

[53] John A. Alesandro, *A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct*, 36 CATH. LAW. 257, 288 & n.135 (1996) (describing differences between canonical inquisitorial method and common law adversarial method).

[54] *Id.* at 288.

[55] John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985).

[56] *Id.*

its investigation.[57] These documents are available to both parties, and in the ecclesiastic courts, these documents are archived as court records, rather than formal court opinions.[58] Additionally, testimony is not recorded verbatim, if taken orally;[59] instead, the court periodically summarizes the testimony.[60] This manner of record-keeping made future editorializing by publishers much easier, because the information was already in a concise, integrated form.

Ecclesiastic courts also had their own evidence law independent of the common law courts.[61] Unlike the common law rules, canon law required two witnesses to every act, excluded the testimony of principal parties (husband, wife, etc.) as biased, and allowed handwriting comparisons to determine authorship of a document by someone with personal knowledge of the writer's handwriting.[62] The rule barring testimony of principal parties in impotence cases evolved (and occasionally broke down) over time to allow only the testimony of the parties themselves.[63] However, the admitted parties' testimony was rarely helpful because medical evidence was often required to prove multiple aspects of the prima facie case for impotence.[64]

2. The Wife's Allegations

Impotence suits, within the context of nullity suits more generally, remained one of the only ways a wife could bring her husband to court in order to annul her marriage and thereafter remarry, because the church limited remarriage based on the grounds on which divorce was granted.[65] Unlike adultery or criminal conversion cases, the wife's faithfulness was usually not on trial in impotence suits.[66] Yet, wives did not avoid privacy invasion because they had

[57] *Id.* at 827.

[58] STONE, *supra* note 19, at 27-28.

[59] Langbein, *supra* note 55, at 828.

[60] *Id.*

[61] *See* STONE, *supra* note 19, at 197-98.

[62] *Id.* Reference to these canon law principles can be found in the cases themselves. *See, e.g.*, Harrison v. Harrison, IV Moore 96, (1842) 13 Eng. Rep. 238, 240 (Ecclesiastical) (appeal taken from the Arches Court of Canterbury) ("[T]he sole confession of the parties cannot be considered sufficient . . . .").

[63] *See, e.g.*, F v. D, 4 Sw. & Tr. 86 (1865) 164 Eng. Rep. 1448, 1451 (Ecclesiastical) ("[N]ow both parties can speak on oath, explain what they cannot deny, dispel and rebut inferences, while they admit facts; and the Court judges in a broader and fuller light."); Greenstreet v. Cumyns, 3 Phill. & Ecc. 10, (1812) 161 Eng. Rep. 1062, 1062 (Consistory Court of London) (allowing husband to admit impotence in his answer despite doctor's report to the contrary). *But see Harrison,* IV Moore at 101-02, 13 Eng. Rep. at 240 (preserving canon law rule holding testimony of parties insufficient grounds on which to decide a matrimonial claim).

[64] *See infra* note 81 and accompanying text.

[65] *See supra* notes 27-30 and accompanying text.

[66] Sometimes, however, dissatisfaction within the marriage and adulterous affairs (both heterosexual and homosexual) led wives to bring their husbands to court for impotence.

to demonstrate their own virginity as an element of the impotence case.[67] While potentially liberating in that women could try to escape loveless marriages, the impotence trial exposed women to courtroom investigation that could later be exploited in the press.

The customary case for impotence, which seeks nullification of the marriage due to a failure to consummate, involves a suit by a wife against her husband.[68] Not all cases fell into this pattern; occasionally men brought their wives to court claiming impotence, which often meant frigidity or a physical obstruction or malformation preventing intercourse.[69] And on one occasion, a husband initiated a suit to dissolve his marriage based on his own impotency.[70] Lady Catherine Elizabeth Weld's case, introduced at the outset, provides a model Libel, alleging all nine elements required in order to institute a suit against her husband for impotence.[71] Mrs. Weld's Libel alleged: (1) the date of her legal marriage to her husband,[72] (2) the age of the parties at marriage,[73] (3) her husband's healthy appearance at marriage,[74] (4) cohabitation for a minimum of three years,[75] (5) her husband's failure to consummate,[76] (6) her own fitness

See, e.g., LAWRENCE STONE, BROKEN LIVES: SEPARATION AND DIVORCE IN ENGLAND 1660-1857, at 119 (1993) (detailing Duchess Frances Scudamore's affair, which precipitated her impotence suit against her husband).

[67] *See, e.g.*, 7 TRIALS, *supra* note 14, at 9 (summarizing testimony of three midwives who "carefully and diligently inspected the private parts of the body of the Honourable Catherine Elizabeth Weld" and alleged her virginity).

[68] *But see, e.g.*, D v. A, 1 Rob. Ecc. 279, (1845) 163 Eng. Rep. 1039, 1039 (Consistory Court of London) ("Sentence of nullity of marriage pronounced, by reason of a natural, incurable malformation of the sexual organs of the female . . . .").

[69] *See, e.g.*, *id.*; Briggs v. Morgan, 2 Hag. Con. 324, (1820) 161 Eng. Rep. 758, 758 (Ecclesiastical) ("This was a suit of nullity of marriage brought by the man, 'by reason of incurable natural mal-conformation and bodily defects in the person of the woman.'"); Guest v. Shipley, 2 Hag. Con. 321, (1820) 161 Eng. Rep. 757, 758 (Ecclesiastical) (dismissing suit brought by husband because of his prior validation of lawful marriage).

[70] Norton v. Seton, 3 Phill. Ecc. 147, (1819) 161 Eng. Rep. 1283, 1284 (Arches Court) (dismissing nullification suit brought by husband claiming his own impotence).

[71] *See* ARCHES-COURT, *supra* note 11, at 14-15.

[72] *Id.* at 14. The date of marriage was important to demonstrate both that the parties were legally married and that they had been together for the requisite amount of time to allow for consummation.

[73] *Id.*

[74] *Id.* The wife could not have knowledge of the husband's defect before marriage because this would mean that she "entered into the bargain of marriage" with warning, so she would be aware of the defect and she could not later void the marriage on that basis.

[75] *Id.* The three year cohabitation requirement, known as triennial cohabitation, mandated that the husband and wife had lived together for at least three years with the opportunity for consummation during a majority of that time. *See* A v. B, 1 Sp. Ecc. & Ad. 12, (1853) 164 Eng. Rep. 7, 9 (Consistory Court) (stating that "[a]fter a triennial cohabitation without consummation, the law presumes impotence, though no defect be apparent," but holding that because "this rule is founded [upon the principle] [t]hat there

and willingness to participate in sexual intercourse,[77] (7) her virginity,[78] (8) her unawareness of her husband's defect at the time of marriage,[79] and (9) her husband's defect.[80] This final element required, at the very least, the husband's constructive impotence (and sometimes the husband's foreknowledge of a defect, depending on when the case was filed).[81] The focus of each case before the court could be one or more of these elements. Frequently the debate was over the female's virginity or a physical impediment in the husband. These cases often relied heavily on medical examination testimony and evidence.[82] In the Weld case, three midwives certified Mrs.

should be cohabitation of so long a period that, if the man were potent and in good health, no temporary impediment could have prevented consummation, according to all the reasoning and experience which the subject admits of," the triennial cohabitation rule does not bar nullification). England may have been unique in its adoption of this "requirement found in some of the canonic sources that the couple attempt to have intercourse for three years before a marriage could be dissolved on [impotence] grounds." DONAHUE, *supra* note 23, at 371.

[76] ARCHES-COURT, *supra* note 11, at 14-15.

[77] *Id.* at 15.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See, e.g.*, *id.* ("Edward Weld hath declared to several Persons, long before the Commencement of this Suit, that he was incapable and unable to perform the Conjugal Rites, by Reason of some some natural Imperfection which he well knew in himself." (emphasis omitted)). Ideally, a woman bringing a claim of impotence against her husband would have physical evidence – usually through a medical inspection – of an impediment. Impediments included malformation or a defect in the genitalia. Sometimes the medical examinations relied on comparison to "average" penis size as a rubric for evaluating deficiencies. *See* JOHN MARTEN, GONOSOLOGIUM NOVUM: OR, A NEW SYSTEM OF ALL THE SECRET INFIRMITIES AND DISEASES, NATURAL, ACCIDENTAL, AND VENEREAL IN MEN AND WOMEN 14-16, 19-20 (London, Crouch et al. 1709) (discussing above-average and below-average size of genitalia as causes for impotence).

[82] Impotence trials did not always rely solely on medical testimony. PIERRE DARMON, TRIAL BY IMPOTENCE 186-209 (Paul Keegan trans., Chatto & Windus 1985) (1979) (detailing the "trial by congress" non-medical testimony method). Occasionally the parties, particularly husbands, performed certain sexual acts for a committee in order to prove virulence. *Id.* at 186 (explaining how husbands accused of impotence "loudly demanded their right to undergo [the 'trial by congress']"). Pierre Darmon documents the French "trials by congress," a practice in effect from 1550 until 1667, whereby "the carnal act [is] consummated in the presence of witnesses." *Id.* at 186. The "trial by congress" was utilized in Venice as early as the 1470s where "a man accused of impotence successfully demonstrated his virility before a clerical audience . . . by successful intercourse with two prostitutes." STONE, *supra* note 66, at 134. Stone also discusses the involvement of women in arousing men accused of impotence; men could elect self-arousal or the participation of others, as early as 1433 in English trials. *Id.* at 134-35 ("[A] husband accused of impotence had two choices to prove his virility . . . . The first test was visual evidence of erection and ejaculation by masturbation . . . . The second . . . was by public copulation with a prostitute

Weld's virginity: "That her Parts of Generation are in such a State as render her capable of Conjugal Embraces, no Defect in their Formation, or otherwise, appearing . . . . And . . . [t]hat it is impossible she can have had any Carnal Conversation with a Man."[83] Five surgeons certified that Mr. Weld was capable of consummation: "[T]hey had carefully inspected the parts of E. Weld, that are designed for propagation, and did find them fully and justly proportioned, and fitly and sufficiently formed for the act of carnal copulation."[84] Much of the impotence case rested on medical certifications because such documentation was regarded as definitive as to the primary factual disputes.

Because medical knowledge at the time was underdeveloped, parties took it upon themselves to challenge the procedure used to make medical determinations. For example, Mr. Weld argued:

> [T]he Verdict of three Midwives may be loose and uncertain, as to a Woman's Virginity, yet the Inspection of able Surgeons is sufficient to determine credibility on a Man's Capacity, because there is not the same Doubtfulness in both Cases; the Parts in the one Sex being obvious, and in the other not.[85]

At times, the husband refused to submit to inspection,[86] or the wife had yet to undergo inspection when the case was brought before the court. In these circumstances, the court made differing determinations, and occasionally declined to make a final determination of the case until an inspection had taken place.

D. *Litigants*

Who went to court to initiate a suit tells us not only about the nature of the suits themselves, but also about what might have motivated these individuals to bring suit and what the ramifications would have been. By and large, upper middle and upper class women conducted this type of litigation.[87] Based on the recorded evidence and some contemporary efforts to compile stories surrounding the litigation, we also get a clearer picture of what happened before, and sometimes after, a case came into the courts.

---

before an assembly of doctors and ecclesiastical lawyers . . . ."). Trials by congress were rare in England. *Id.* at 135.

[83] GENUINE PROCEEDINGS, *supra* note 13, at 31 (emphasis omitted).

[84] 7 TRIALS, *supra* note 14, at 8-9.

[85] ARCHES-COURT, *supra* note 11, at 38. The husband supported his argument by presenting depositions of surgeons. *Id.* at 39 (recounting depositions of Mr. Williams, Mr. Dickens, and "several other Surgeons").

[86] *See, e.g.*, Harrison v. Harrison, IV Moore 96, (1842) 13 Eng. Rep. 238, 238 (Ecclesiastical) (appeal taken from the Arches Court of Canterbury) ("[Husband] was pronounced in contempt, for non-compliance with a monition to undergo inspection . . . .").

[87] *See infra* notes 94-95 and accompanying text.

During the late 1600s, women predominantly brought matrimonial cases in the Consistory Court of London.[88] By the late 1700s, the sex-ratio flipped, and a majority of plaintiffs were men.[89] In the 1800s, the sex-ratio of plaintiffs switched again, back to a majority of females initiating suits.[90] Historian Lawrence Stone identifies a potential bias against wives who brought suits: husbands were more often given favorable verdicts.[91] But this does not necessarily hold true in impotence litigation, because wives succeeded at a higher rate than husbands in obtaining nullification based on impotence.[92] Therefore, impotence litigation might be an area where norms in matrimonial litigation – such as a bias against women litigants – did not play out.

[88] STONE, *supra* note 19, at 186-87 ("Between 1660 and 1857, the sex ratio of plaintiffs in matrimonial cases in the London Consistory Court changed erratically. In the late seventeenth century, the court was predominantly used by women, over 60 per cent of all plaintiffs being female.").

[89] *Id.* at 187. This correlates with a shift in the content of the majority of matrimonial suits. *Id.* ("[T]his change was largely due to the decline in suits by women – usually pregnant – desperately trying to prove a contract or clandestine marriage; and by the growth of separation suits, most of them brought by husbands because of their wives' adultery . . . ." (citation omitted)).

[90] *Id.* ("The shift in the early nineteenth century back to a majority of female plaintiffs is consequently hard to explain.").

[91] *Id.*

[92] Of the fifteen cases I studied from 1812-1865 with final determinations on the merits, eleven were of the traditional variety, where a wife sued her husband. F v. D, (1865) 164 Eng. Rep. 1448 (Ecclesiastical); H v. C, (1865) 164 Eng. Rep. 880 (Ecclesiastical); M v. B, 3 Sw. & Tr. 550, (1864) 164 Eng. Rep. 1389 (Ecclesiastical); M v. H, 3 Sw. & Tr. 517, (1864) 164 Eng. Rep. 1376 (Ecclesiastical); S v. E, 3 Sw. & Tr. 240, (1863) 164 Eng. Rep. 1266 (Ecclesiastical); Castleden v. Castleden, IX H.L.C. 187, (1861) 11 Eng. Rep. 701 (Ecclesiastical); G v. T, 1 Sp. Ecc. & Ad. 389, (1854) 164 Eng. Rep. 224 (Consistory Court of London); A v. B, 1 Sp. Ecc. & Ad. 12, (1853) 164 Eng. Rep. 7 (Ecclesiastical); N v. M, 2 Rob. Ecc. 625, (1853) 163 Eng. Rep. 1435 (Consistory Court of Rochester); Harrison v. Harrison, IV Moore 96, (1842) 13 Eng. Rep. 238 (appeal taken from the Arches Court of Canterbury); Greenstreet v. Cumyns, 3 Phill. Ecc. 10, (1812) 161 Eng. Rep. 1062 (Ecclesiastical). Four involved suit of the wife by her husband. D v. A, 1 Rob. Ecc. 279, (1845) 163 Eng. Rep. 1039 (Consistory Court of London); Briggs v. Morgan, 2 Hag. Con. 324, (1820) 161 Eng. Rep. 758 (Ecclesiastical); Guest v. Shipley, 2 Hag. Con. 321, (1820) 161 Eng. Rep. 757 (Ecclesiastical); Norton v. Seton, 3 Phill. Ecc. 147, (1819) 161 Eng. Rep. 1283 (Arches Court). Of the eleven cases where the wife was the plaintiff, six wives received a nullification verdict from the court. *F v. D*, 164 Eng. Rep. 1448; *G v. T*, 1 Sp. Ecc. & Ad. 389, 164 Eng. Rep. 224; *A v. B*, 1 Sp. Ecc. & Ad. 12, 164 Eng. Rep. 7; *N v. M*, 163 Eng. Rep. 1435; *Harrison*, IV Moore 96, 13 Eng. Rep. 238; *Greenstreet*, 3 Phill. Ecc. 10, 161 Eng. Rep. 1062. And in one case, the court refused to nullify the marriage, but did not order continued cohabitation. *S v. E*, 3 Sw. & Tr. 240, 164 Eng. Rep. 1266. Of the four cases where the husband was the plaintiff, only once did the husband receive a favorable verdict. *D v. A*, 1 Rob. Ecc. 279, 163 Eng. Rep. 1039.

At the outset of the reinstitution of Consistory Courts in 1660, wealthy landed squires and nobility represented a large portion of petitioners; between 1780 and 1820, they represented over half of all petitioners despite making up only a third of the overall population.[93] Over time, the poor and the "middling sort"[94] of litigants were priced out of litigating, particularly at the appeals level, as the price of litigation in the Consistory Courts grew.[95] Additionally, the publicity generated by litigation for separation served as an additional deterrent for those who wanted to avoid the spotlight.[96] Generally, then, litigants initiating impotence suits were wealthy and female. In addition to the fact that wealth allowed individuals to actually initiate suits and participate in the rather expensive litigation process, wealth also played a particularly important role because it meant that money was at stake in dissolving the marriage. The fact that litigants were wealthy also increased the popular interest in the trials because wealth translated into a sort of celebrity.[97]

Impotence trials involved a set of unusual circumstances ripe for publication. Litigants, primarily wives, had to prove an impediment for nullification; and impotence provided an avenue by which both parties could remarry. As a result of the inquisitorial system and evidentiary standards – such as the requirement of medical testimony – impotence trials lent themselves to prying by publishers.[98] This litigation involved primarily upper-class couples because money was at stake and they could afford to sue.[99] Their celebrity made the publications of such trials even more popular among both middle and upper class readers.

---

[93] *See* STONE, *supra* note 19, at 38-39.

[94] *See id.* at 45 ("The 'middling sort' embraced a wide variety of persons, from rich merchants and bankers to prosperous shop-keepers and yeomen down to farmers and small tradesmen and clerks. It was a group defined by culture, morals, leisure activities, and occupations as much as by wealth or status.").

[95] *Id.* at 38.

[96] *See id.* at 186 (discussing newspaper coverage of such litigation); *infra* Part II.B. (discussing publicity surrounding impotence trials). It should be mentioned that some of the case decisions only retain the first initial of each party's last name and redact other identifying information from the report. Some of these court decisions were conducted in camera. The court would often call the female party something like "A, falsely calling herself D" to indicate a situation where nullification would eradicate her married name, as if it was in place under entirely false pretenses. This represents the function of nullification – it completely wiped out the existence of the marriage between the parties. *See, e.g.*, *D v. A*, 1 Rob. Ecc. at 280, 163 Eng. Rep. at 1039.

[97] *See infra* note 105 and accompanying text.

[98] *See* discussion *infra* Part II (discussing factors leading to the publication of impotence trials).

[99] *See supra* notes 93-95 and accompanying text (discussing the financial status of litigants in impotence trials).

II. POPULARIZING IMPOTENCE TRIALS

The ecclesiastic courts' evidentiary standards, and the particularly salacious evidence required to set out a case for impotence, lent itself to pornographic publication. During the eighteenth century, a culture of sensational publishing, which recounted the sexual exploits of noble couples, grew out of the marriage cases. Editorialized court reporting became one way for publishers to make a name for themselves. The pricing of these pamphlet and book publications – ranging from two pence to one shilling – made access possible at least to middle and upper class society.[100] The literary class read these stories and shared them with others, leading to a proliferation in publication. The Weld case, for example, was published at least four times over an almost fifty-year period – in 1732, 1734, 1757, and 1780.[101] After the initial insult of going through an impotence court proceeding with its intimate inquiries and physical examinations, the parties were subject to a second affront to their dignity by the popular publication of their trial, which preserved the story indefinitely. In this sense, not only did the court investigate the goings-on of the marital bedroom, but the evidence was then broadcast to the ultimate judge: the public.

Peter Wagner has characterized the publication of impotence trials, and separation trials more generally, as "the way in which partly obscene and pornographic material could be sold under the veil of legal and/or scientific documents."[102] Visitors to England remarked that these publications based on court reports were "the most scandalous literature in London."[103] The tabloid press that arose around matrimonial trials during the seventeenth, eighteenth, and nineteenth centuries mirrors the similarly popular "celebrity" press of modern times. The motivations for reading this literature and the impact it had on society may also have some similarities with current popular press; they both shape societal notions of sexuality and morality and create a readership that devotes time and money to indulge in these sordid tales.

As more people read or heard the details of individual impotence trials, the popularity of the couple's intimate affairs grew. The act of initiating a suit ended up inducing both the court and the public to investigate the marital bedroom. Through intimate questioning, physical examination, and sometimes

---

[100] *See infra* text accompanying note 104 (describing the price and appearance of these publications).

[101] *See* sources cited *supra* notes 1, 11, 13, 14.

[102] Peter Wagner, *The Pornographer in the Courtroom: Trial Reports About Cases of Sexual Crimes and Delinquencies as a Genre of Eighteenth-Century Erotica*, *in* SEXUALITY IN EIGHTEENTH-CENTURY BRITAIN 120, 124 (Paul-Gabriel Boucé ed., 1982) [hereinafter Wagner, *Pornographer*] (describing two specific impotence trial publications as examples of typical pornography of type mentioned); *see also* Peter Wagner, *Trial Reports as a Genre of Eighteenth-Century Erotica*, 5 BRIT. J. FOR EIGHTEENTH-CENTURY STUD. 117, 117-20 (1982) [hereinafter Wagner, *Trial Reports*] (describing increase in readership of impotence trials and popular response).

[103] Wagner, *Pornographer*, *supra* note 102, at 131.

literal sexual investigation, the court inquired into the activities of a couple's bedroom. The salacious facts brought out and recorded during the court proceedings were then transcribed and editorialized for heightened entertainment value. This double violation disturbs traditional trans-historical notions of indissoluble marital privacy.

A. *Publication*

Who read these legal publications and how did they become so popular? Literacy, some expendable income, and enough leisure time to enjoy the publications are necessary prerequisites, but these constraints might not lower the number of readers tremendously. Interestingly, there does not seem to be a consistent answer to the question of who the target audience of these publications was. Stone asserts, "The pamphlets were clearly designed for a wealthy and sophisticated market, being 'elegantly printed on superfine paper' and priced at two shillings and sixpence each."[104] Conversely, Wagner argues:

> It is quite possible that this literature served as a kind of "ersatz" for the less fortunate people, who were trying to imagine what it would have been like to live a life of free-wheeling sexual promiscuity. The evidence of the trial reports, in particular the prefaces and the moral justification for their publication, would suggest that this sort of literature was read above all by the male literates lower down in the social hierarchy. They were admiring and possibly also hankering after the extra-marital liaisons of the rich and mighty, which they could not afford to have.[105]

Perhaps the trials were read throughout the literate classes of society in the eighteenth century. There is sufficient reason to believe that both middle and upper echelons of society would desire to participate in this fast-growing trend. Since some of the motivations – like class animosity or jealousy – were not shared, it is also likely that the trials meant different things for each socio-economic group. There was not a shared experience in partaking in this pseudo-pornography; nonetheless, its impact could be felt across class lines.

Regardless of the exact readership, the publication of legal trials for popular consumption evolved over time. Publication began "in about 1670 with summary accounts of London criminal trials in the *Old Bailey Proceedings*," and evolved into full transcripts of the trials.[106] In the 1750s, these publications, drawn from real life stories, became "a substitute for the novel."[107] The public was fascinated by more than just the sexual content:

> But there was more to these reports of cases than mere sexual titillation. There was intense interest in the human drama of the narrative, the discrepancies in the evidence, the moral and factual differences between

[104] STONE, *supra* note 19, at 251-52 (citation omitted).

[105] Wagner, *Pornographer*, *supra* note 102, at 136.

[106] STONE, *supra* note 19, at 249.

[107] *Id.*

> the testimony of the witnesses on the two sides, the rhetorical feats of the rival counsels, and, at the climax, the always unpredictable assessment of the damages by the jury. . . . [R]eportage thus served all the purposes of a modern TV sitcom.[108]

In 1690, publishers began to distribute individual adultery trials.[109] As entirely private publishers, rather than quasi-official sources, began to publish the trials, the focus "shifted to the sexual aspects in the trials."[110] Publishers turned to "collections of the more sensational items in about 1750," and the genre had exploded in popularity by the 1770s.[111] A few of the publications were biased materials commissioned by the parties themselves and hawked to the public in order to sway opinion in one party's favor.[112]

By the early 1700s, publishers such as John Dunton and Edmund Curll began to make a living from the exclusive publication of scandalous court reports.[113] Curll published several compilations: two volumes on the French trial of the Marquis de Gesvres and his wife; the English case of the Earl of Essex and the Lady Howard in a set of volumes entitled *The Case of Impotency*; and *Cases of Divorce for Several Causes*.[114] Through these publications, Curll laid the foundation for a century of sordid tales about legal trials taking place in the Consistory Courts of England and abroad.

1. Edmund Curll and the Rise of Published Courtroom Drama

Ralph Straus, the early twentieth-century author of Curll's biography, describes Curll in honest and unflattering terms:

> To most people, I suppose, the very name of Edmund Curll will be unknown, and even those . . . [who] know something of his tempestuous career, may express surprise that any detailed attention should be paid to so contemptible a scoundrel. Almost certainly that is how they will describe him. Why trouble yourself, they may ask, about a miserable wretch for whom no right-minded man has ever been able to find a good word? Did he not earn a living by publishing obscene books for which he was rightly punished? Was he not the most rascally of "pirates"? Surely

[108] *Id.* at 252.

[109] *Id.* at 249.

[110] Wagner, *Pornographer*, *supra* note 102, at 122.

[111] *Id.*; *see also id.* at 128 ("The genre of pornographic trial reports was fully developed in the late 1770s, a fact which is borne out by the publication in seven volumes of a special collection of interesting cases, *Trials for Adultery: or, the History of Divorces. Being Select Trials at Doctors Commons, For Adultery, Fornication, Cruelty, Impotence, &c* (London, 1779-81)."). As the subtitle indicates, *Trials* included more than just adultery cases; almost all types of matrimonial separation cases were included in this massive compilation, including a 1780 reprint of the Weld case. *See* 7 TRIALS, *supra* note 14, at 1.

[112] *See* STONE, *supra* note 19, at 250.

[113] *See* Wagner, *Pornographer*, *supra* note 102, at 123.

[114] *Id.* at 123-24.

> a vulgarer, more dishonourable money-grubbing bully of a fellow never disgraced the Republic of Letters with his presence? The man, they will tell you, was an impudent pest, and if amongst the hundreds of books that he published one or two were not without merit, there never lived a rogue who better deserved the appalling reputation that has always been his. And there are scores of authorities whom they may quote. Hardly a great man of his own time, hardly a critic of later days, but has consigned Edmund Curll to the gutter.
>
> There never was a man who was called by so many names. There never was a man who succeeded in irritating almost beyond endurance so many of his betters.
>
> . . . .
>
> He was called impudent liar, and accused of forgery, theft, immorality, and even something like murder.[115]

Most importantly, though, Edmund Curll gave "the public what it wanted" and served as a "comical rogue."[116] Over half of the books that Curll published did not bear his name on the title page, yet his name signaled "a certain alluring naughtiness in the book."[117] When Curll opened a second shop in 1712, *The Cases of Impotency and Divorce* hit the shelves, and remained one of Curll's "best-sellers" for years.[118] However, critics of Curll's lurid publications voiced their criticism in public forums. Daniel Defoe published an attack on Curll in the *Weekly Journal* demanding that Curll be punished for the lewd content of his publications.[119]

In his own defense against obscenity allegations, Curll argued that his impotency cases had been published in seemingly legitimate forums:

> The Trial of the Marquis de Gesvres was publicly printed at Paris; the Trial of the Duke of Norfolk, authorised by the House of honourable Peers; the Trial of the Earl of Essex was drawn up by the Archbishop Abbot, and printed from his manuscript; the Trial of Fielding, Mrs. Dormer, &c, all authorised by our Judicial Courts.[120]

While the sources of these trials may have carried a definite legitimacy, it was the method by which Curll published them that caused controversy. As Straus indicates, Curll used the title page and prefatory material to entice the reader

---

[115] RALPH STRAUS, THE UNSPEAKABLE CURLL: BEING SOME ACCOUNT OF EDMUND CURLL 3-5 (1928).

[116] *Id.* at 5.

[117] *Id.* at 21.

[118] *Id.* at 39-40.

[119] *See id.* at 79. Although the criticism was anonymous, it was later shown to be the work of Defoe. *Id.* at 79 n.1.

[120] *Id.* at 91.

into purchasing his renditions of the cases.[121] In the impotency case of the Marquis de Gesvres, Curll draws the reader in by claiming in his advertisement:

> [B]ecause the English Readers may be desirous to know somewhat concerning the Parties, I can assure them that the Marquis de Gesvres is not only descended from one of the best Families in France, but is likewise a very handsome, jolly, and seemingly compleat Gentleman: But there's no trusting to Looks; as may be too well testify'd by his unhappy Spouse . . . .[122]

Curll played on the readers' tabloid interest in reading about nobility in compromising situations involving their personal sexual relations. He did this by presenting a host of documents – briefs, doctors' reports, interrogatories, etc. – related to each case that would detail the intricacies of each side's position.

Often these documents painted a picture of the ultimate in he-said, she-said. While traditional ecclesiastic law precluded a case entirely based on the testimony of interested parties,[123] Curll's publications stressed the differences between the husband's and the wife's accounts in hyperbolic terms in order to heighten the drama of the wife's accusations.[124] Depending on the reader's sympathies, these exaggerated discrepancies between the parties made it likely that readers would find extreme fault with one position in the case. As with a novel, the reader can relate to one of the real-life characters, making the story more interesting.[125]

Later eighteenth century publications emulated Curll's introduction of the trial report as erotica, and specifically his use of the title page as a foray into eroticism. The infamous *Trials for Adultery* entices potential readers with the following title page summary:

> The whole forming a complete History of the PRIVATE LIFE, INTRIGUES, and AMOURS of many Characters in the most elevated Sphere: every Scene and Transaction, however ridiculous, whimsical, or extraordinary,

---

[121] *Id.* at 21 (asserting that Curll likely meant his name to imply "a certain alluring naughtiness" when placed on a book's title page).

[122] THE CASE OF IMPOTENCY DEBATED, IN THE LATE FAMOUS TRYAL AT PARIS; BETWEEN THE MARQUIS DE GESVRES, (SON TO THE DUKE DE TRESMES, PRESENT GOVERNOR OF PARIS) AND MADEMOISELLE DE MASCRANNY HIS LADY, WHO, AFTER THREE YEARS MARRIAGE, COMMENC'D A SUIT AGAINST HIM FOR IMPOTENCY [advertisement] (London, Curll 1714) [hereinafter IMPOTENCY DEBATED].

[123] *See supra* text accompanying note 62.

[124] *See, e.g.*, IMPOTENCY DEBATED, *supra* note 122, at 5 ("So then the Marquis de Gesvres says, That he has consummated his Marriage seven or eight hundred times; and, I say, he is incapable of consummating at all: This is all the Question that is between us.").

[125] If Curll could hook the reader, he guaranteed greater royalties for his own publications.

> being fairly represented, as becomes a faithful Historian, who is fully determined not to sacrifice *Truth* at the Shrine of *Guilt* and *Folly*.[126]

This title page quote illustrates three larger points about the genre. First, the author appeals to the reader's desire to learn about the private sexual relations and affairs of the trial participants. Second, the author focuses on the social class of the "[c]haracters," which was an important pull both for other members of "the most elevated Sphere" and for those lower on the social ladder.[127] Third, this author points out the ultimate juxtaposition in impotence trial literature between tabloid, novel-like appeal – absurdity, whimsy, and amazement – and non-fiction. These were, after all, court reports based, to some degree, in fact. Here, the author acknowledges his duty to report as a historian would, with accuracy and care. Yet at root, the success of impotency trial publications depended on exaggeration, if not outright story telling. If not for these added details, the genre would have been unnecessary and redundant because other publications and newspaper accounts would have fulfilled the reporting function.[128]

2. Lady Elizabeth Weld: An Impotence Trial Case Study

One means of exploring the embellished art of publishing impotence trials is to look at independent publications of the same trial. The action brought by the Honorable Catherine Elizabeth Weld (maiden name Aston) provides one such opportunity. Elizabeth Weld's case against her husband Edward Weld was first published in 1732, less than a year after the court decided the case.[129] Straus notes in the Handlist of Curll's publications that John Crawfurd (pseudonym for Edmund Curll) published an eight volume set entitled *The Cases of Impotency and Virginity Fully Discuss'd* in March 1732.[130] Curll, or someone attempting to impersonate him, also published the sequel to the case detailing the final appeal.[131] Almost fifty years later, the case was published again in 1780 as part of the *Trials for Adultery*.[132]

In a 1757 publication of this case, the editor introduces the reader to the seduction of the tale: "Cases like that which is examined in the following *Pages*, have met with so good a Reception from the *Publick*, that I do not think

---

[126] 7 TRIALS, *supra* note 14, at title page.

[127] *See* Wagner, *Pornographer*, *supra* note 102, at 123 (observing that authors "highlighted the sometimes bizarre sex life of the aristocracy while at the same time exposing them to ridicule").

[128] *See supra* note 106 and accompanying text (mentioning publications that provided "summary accounts" and "verbatim transcripts").

[129] *See* GENUINE PROCEEDINGS, *supra* note 13, at title page.

[130] *See* STRAUS, *supra* note 115, at 292-93; *see also* GENUINE PROCEEDINGS, *supra* note 13, at title page.

[131] *See* STRAUS, *supra* note 115, at 299-300.

[132] *See* 7 TRIALS, *supra* note 14, at title page.

it necessary to bespeak their Favour here."[133] Instead, the editor attempts to overcome moral objections to this type of publication: "Pieces of this Cast may be written without offending the most exact Decorum; and consequently be read, without sullying the chastest Mind."[134] In a sense, the author must defend the publication and encourage readership against a moral pull to avert one's eyes from the content. Likely, this type of introduction results from the infancy of such publications. In the 1780 publication on the other hand, the author instead invites the reader to serve as judge: "However, we shall now leave every reader, male and female, to judge as they think proper of this un-congugal [sic] conjunction."[135] This type of introduction, in contrast, eagerly invites the reader into the story to take on the role of an actual player in the courtroom drama. Also, the reader is conceived of as male *or* female, which defies a deep-seated notion of feminine purity and chasteness. Even in modern analyses, pornography's audience is typically male.[136] Perhaps modern understandings of the reading population do not actually reflect the reality of the times: women read pornography. Or maybe the preface to *Trials* fails to accurately reflect the true readership, which may have been predominantly, if not entirely, male.

The publications produce various documents of the parties to tell the litigants' story. The editor of each publication summarizes these documents, and conveys a slightly different meaning to the reader.[137] The 1757 publication includes: the Libel, the Answer, depositions on behalf of the complainant, depositions on the part of Edward Weld, the reply, and the judge's determination.[138] The 1780 publication, which is significantly shorter, includes: the case stated (a summary), an introduction, the depositions made on behalf of the defendant, the substance of the five surgeons' certificate, the substance of the three midwives' certificate, the sentence, and two allegations given to the Court of Arches on behalf of Edward Weld.[139] The details of these documents present different pictures of the case advanced by Mrs. Weld. In the earlier publication, the reader is given a greater level of detail of each side of the case, which makes the judge's determination at the end more surprising. In the later publication, the documents are presented in a way that urges the reader to assume that the court's dismissal was correct. The editor of

[133] ARCHES-COURT, *supra* note 11, at iii.

[134] *Id.* at iv.

[135] 7 TRIALS, *supra* note 14, at 3.

[136] *See* Wagner, *Pornographer*, *supra* note 102, at 136.

[137] For example, different publications of the same case may present the same deposition with entirely different wording. *Compare* A SEQUEL, *supra* note 83, at 6 (stating that Edward's surgeon, Mr. Williams "found nothing amiss in the organs of generation"), *with* ARCHES-COURT, *supra* note 11, at 39 (writing that Mr. Williams is "positively of Opinion, that the said *Edward Weld* is [sexually] capable and sufficient").

[138] *See* ARCHES-COURT, *supra* note 11.

[139] *See* 7 TRIALS, *supra* note 14.

the later publication gives the reader little indication of the case mounted by Mrs. Weld. Viewing the two publications of the same case side-by-side, the importance of editorial technique surfaces, and the reader is shown two versions of the same story.

The coverage of the earlier publication is also different in character. The Libel sets out all the requisite elements of a "Citation for Insufficiency" – legality of marriage, age of parties, knowledge of husband's health, cohabitation for three years, opportunity for consummation, failure to consummate, wife's virginity, lack of knowledge of defect, husband's knowledge of defect, and prayer to void the marriage.[140] The Answer begins with a lengthy section on the definition of marriage and the importance of consummation and procreation to the fundamental purpose of such a union.[141] The focus on the particular pleadings and deeply rooted understanding of the cause seem to be a by-product of the purpose of publication. With the genre still in its early stages at the time of the earlier publication, the reader needs a more established sense of the overall scheme.

On the other hand, the level of detail provided in the earlier publication could merely be the result of a lengthier publication devoted solely to Mrs. Weld's case. The case, as published in *Trials*, is part of a collection of cases. The editor of *Trials* may have decided only to publish those details necessary to understand the court's outcome while summarizing the other relevant issues. The differences in the methods used and the details provided demonstrate that publication of courtroom dramas was as much an art as a science.

3. Non-Book Publications

Around 1775, a number of magazines cropped up to report these cases as well.[142] Remarkably, newspapers and magazines were also able to provide full accounts of contemporary cases.[143] "Elite scandal periodicals" such as *Town and Country Magazine*, highlighted extra-marital affairs of London's high society.[144] "[C]oarse and sensationalist" titles such as *Bon Ton Magazine*, could not be trusted as honest portrayals of actual situations, but flourished nonetheless.[145] And "openly pornographic publications" such as *Rangers Magazine*, occupied the bottom of the market.[146] At all levels of the market,

[140] *See* ARCHES-COURT, *supra* note 11, at 13-16; *supra* notes 71-81 and accompanying text.

[141] *See* ARCHES-COURT, *supra* note 11, at 17-18.

[142] *See* STONE, *supra* note 19, at 252 ("During the last quarter of the eighteenth century, there sprang up a number of [such] magazines."). One such periodical, the *Crim. Con. Gazette*, began publishing in the 1830s. *Id.*

[143] Wagner, *Pornographer*, *supra* note 102, at 134.

[144] STONE, *supra* note 19, at 252.

[145] *Id.*

[146] *Id.*; *see also* Wagner, *Trial Reports*, *supra* note 102, at 119-20 (classifying such magazines as "predecessors of *Playboy*").

literate members of society bought and read these magazines to hear about the gossip within their own social class or as a commentary on the social classes above them.[147]

In addition to these direct publications about scandalous trials of the time, novels covered the same subject matter and themes, demonstrating a demand for these topics, whether fiction, non-fiction, or some sensationalized middle ground.[148] Particularly thrilling trials would also captivate live audiences for hours.[149]

B. *Factors in Society*

In order for this genre of literature to become popular, certain factors in society aligned to produce a dedicated readership. Wagner concludes that "[s]everal factors in the eighteenth century produced a climate of deep sexual interest which called for the production and distribution of sex literature."[150] He highlights five factors: (1) an upper class permissive lifestyle, potentially, although not necessarily, as a reaction against "a Puritan ascetic morality";[151] (2) arranged marriages based on money and influence; (3) the prevalence of keeping several mistresses and the status indication that practice gave; (4) a growing recognition of human sexual desires and needs; and (5) a greater amount of leisure time.[152] These social characteristics divided the nobility or aristocracy from other social classes and also city-dwellers from those living in the countryside.[153] In this respect, those belonging to the upper class were looking in on their own experience; this could enhance the fantasy and potentially the reality of the situation. For the middle class looking in on something unfamiliar, there was a level of fantasy as well, but coupled with that fantasy was jealousy or desire that would not exist for someone of the same social class.[154]

---

[147] *See* Wagner, *Pornographer*, *supra* note 102, at 123.

[148] *See* STONE, *supra* note 19, at 252 (observing a "rise in the circulation of novels, which dealt . . . with much the same themes of love, marriage, sex, and money").

[149] *See id.* (observing that one "sensational trial lasted from 9 a.m. till 2 p.m.").

[150] Wagner, *Pornographer*, *supra* note 102, at 134.

[151] Thomas Foster's work on male sexuality indicates that the eighteenth century did not necessarily produce a "special moment" of sexual awakening and that Puritans embraced matters of sexual pleasure in the context of "[p]rocreative aims" as early as the seventeenth century. Thomas A. Foster, *Deficient Husbands: Manhood, Sexual Incapacity, and Male Marital Sexuality in Seventeenth-Century New England*, 56 WM. & MARY Q. 723, 723-24 (1999).

[152] *See* Wagner, *Pornographer*, *supra* note 102, at 134-35.

[153] *See id.* at 136 ("London's exceptional position . . . meant attitudinal and behavioral patterns were rather different in the country.").

[154] *See id.* (describing the middle class as "admiring and possibly also hankering after the extra-marital liaisons of the rich and mighty, which they could not afford to have").

Stone also details the explosion of publications of law reports as popular media from the 1740s on, specifically in the context of criminal conversation trials.[155] He attributes the explosion of law report tabloids to three developments: (1) the improvement of stenography techniques, (2) the expansion of book and pamphlet publication and satirical caricature print-trade, and (3) the shift "away from regarding illicit sex as basically sinful and shameful to treating it as an interesting and amusing aspect of life."[156]

The publication of legal trials had several immediate implications. First, if nothing else, they popularized the process and potentially made the trials more accessible to the public by demonstrating other couples' resort to the ecclesiastic courts to resolve their marital woes.[157] On the other hand, fear of excessive publicity might have driven some away from litigation in order to preserve their reputations.[158] The editor of *Trials* deems Mrs. Weld "blameless" for instituting a Citation for Insufficiency against her husband because

> it was very well known, that, by their [Roman Catholic] religion, matrimony is a sacrament; and it is understood amongst those people, that this sacrament is violated by such as continue together in that state, while they are conscious to themselves, that they cannot answer the holy ends of matrimony.[159]

In this passage, the editor seems to encourage women to resort to such trials if they are unable to consummate their marriages. By both declaring Mrs. Weld "blameless" and arguing she had a religious obligation to pursue such an inquiry, this editor makes it even more difficult to avoid the court process. Whether this was internalized by readers facing a similar dilemma will never be known, but given the popularity of these publications, such a statement at

---

[155] STONE, *supra* note 19, at 248. An action for criminal conversation was not a criminal prosecution, but rather a civil suit for the recovery of damages by a husband against his wife's paramour. *See id.* at 231. The suit took place before or coupled with a divorce proceeding. *See id.* Stone argues that this explosion was part of a larger movement to publish legal cases in the eighteenth century. *Id.* at 249.

[156] *Id.* at 248-49 ("The collapse of the moral controls of the church courts, the decline of Puritanism, the expiration of the licensing laws, and the general secularization of thought in the eighteenth century all facilitated the publication not only of pure pornography such as *Fanny Hill*, but also of full transcripts of detailed evidence produced in trials for [criminal conversion].").

[157] *See id.* at 253 (stating that increased publication made "such actions better known and more commonplace").

[158] *Id.* at 254 (explaining that because of the publicity given to criminal conversion actions, "[t]he husband was exposed to the world as a cuckold; the wife was branded as a whore, without a chance to defend herself; and the lover was often revealed as a treacherous friend of the husband").

[159] 7 TRIALS, *supra* note 14, at 6.

least likely complicated the wife's decision whether to bring her husband to court.

The editor of a later version of *Trials* articulates even deeper implications for the publication of such trials: "This publication may perhaps effect what the law cannot: the transactions of the adulterer and the adulteress will, by being thus *publickly circulated*, preserve others from the like crimes, from the fear of shame, when the fear of punishment may have but little force."[160] There was a perception at the time that the publications of these trials could affect individual actions by providing an alternative, non-legal deterrent against certain sexual behaviors: exposure. The trials also brought "fame and fortune" to "some of the greatest lawyers of the century."[161] Publicity brought home the use of a process for obtaining legal separation in a society that very rarely resorted to such measures.

Thus, popular publication of these trials, and the trials themselves, intruded into the marital bedroom in a way that today seems inconsistent with trans-historical notions of marital privacy. Despite a contemporaneous recognition of marital privacy in the trial publications,[162] conceptions of dignity and privacy took a different form than the modern narrative of privacy indicates. Violations of the explicit codes that regulated marriage acted as an invitation for the court, and in some ways the public, to rectify these failures.[163] During this period:

> The marriage relation was the most intense focus of constraints; it was spoken of more than anything else; more than any other relation, it was required to give a detailed accounting of itself. It was under constant surveillance: if it was found to be lacking, it had to come forward and plead its case before a witness.[164]

This regulatory preoccupation was concerned with succession and vigor of the ruling class in order to ensure longevity of those in power. While impotence trials and their subsequent publications served as an affront to couples' dignity, such intrusions functioned as part of a regime regulating marriage in ways that included potential invasions by external bodies. Only in

---

[160] 1 TRIALS FOR ADULTERY: OR, THE HISTORY OF DIVORCES. BEING SELECT TRIALS AT DOCTORS COMMONS, FOR ADULTERY, FORNICATION, CRUELTY, IMPOTENCE, &C. iii (London, Bladon 1779).

[161] STONE, *supra* note 19, at 253.

[162] *See infra* note 174 and accompanying text.

[163] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 37 (Vintage Books 1990) (1978) ("Up to the end of the eighteenth century, three major explicit codes – apart from the customary regularities and constraints of opinion – governed sexual practices: canonical law, the Christian pastoral, and civil law. They determined . . . the division between licit and illicit. They were all centered on matrimonial relations . . . .").

[164] *Id.*

the nineteenth century would sexuality be located in a "single locus" – the marital bedroom.[165]

III. IMPOTENCE TRIALS: THE MARITAL PRIVACY COUNTEREXAMPLE

In a series of cases beginning in the 1920s, the United States Supreme Court relied on the Due Process Clause of the Fourteenth Amendment to protect the rights to marriage, conception, and childrearing.[166] Similarly, the Court construed the Equal Protection Clause to protect marriage and procreation on one's own terms.[167] In cataloguing the "[v]arious guarantees," which "create zones of privacy," the Court identified the protections provided by the Fourth and Fifth Amendments "against all government invasions 'of the sanctity of a man's home and the privacies of life.'"[168] By the time the Court reached *Griswold*, it had decided on the foundations for building an immutable right to privacy in the marital context. Impotence trials, however, shake that foundation by challenging the trans-historical notion of a firmly rooted and sacred right to marital privacy.

In privacy law, the marital bedroom is sacrosanct.[169] According to the Court in *Griswold*:

---

[165] *See id.* at 3.

[166] *See* Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (striking down a Wisconsin statute that required court approval to marry if one had an obligation to support a minor child not in his custody); Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (invalidating a city ordinance limiting which categories of relatives may live together as a single "family"); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that unmarried fathers are entitled to hearings on their fitness as parents before their children are taken from them); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (ruling that the State cannot interfere with parents' liberty to direct their children's upbringing by forcing them to send their children to public schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (abrogating a state law that forbade teaching any non-English modern language to children who have not completed the eighth grade).

[167] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (nullifying Virginia's anti-miscegenation law on equal protection grounds); Skinner v. Oklahoma, 316 U.S. 535, 542 (1942) (holding unconstitutional on equal protection grounds Oklahoma's statute which provided for the sterilization of criminals while exempting white collar criminals).

[168] Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). The concept of man's house as his castle has inherently created a boundary between public and private domains. This concept has deep historical roots. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *288 ("[E]very man's house is looked upon by the law to be his castle . . . ."); HENRI ESTIENNE, THE STAGE OF POPISH TOYES 88 (Binneman, 1581) ("[Y]oure house is youre Castell, your Beds your Bulwarks, your goods your glorye, your wives your worship and comfort, your daughters not ravished, and your selves not slaved at the tyrannous pleasure of strangers . . . .").

[169] *See Griswold*, 381 U.S. at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); *Meyer*, 262 U.S. at 399 (holding liberty guarantees the right "to marry, establish a home and bring up

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[170]

Thus, the home, and particularly the marital home, is impenetrable to outside viewers. In the Fourth Amendment context, police cannot intrude into the home, either physically or technologically without cause. To do so would be a breach of the castle.[171] In this sense, a husband exercises ultimate control over his domain: the home. Reva Siegel characterizes this as "private governance exercised by the master of a household over its dependent members."[172] Marital privacy law encompasses the inherent notion of male control of a particularly privatized domain and his dominion over a fixed space. Therefore, marital privacy emanates its own penumbra of associated rights and protections that make this facet of the privacy doctrine so foundational.

While history is littered with examples of preserving the sanctity of the home and intimate relations, investigating counterexamples to a fixed trans-historic narrative provides a more dynamic understanding of the roots of privacy law. Impotence trials – the types of evidence, the inquiries, and the physical bodily exploration – defy traditional notions of privacy. Adultery and criminal conversation cases did not breach the boundary of the marital bedroom; instead the court would look only at the non-marital bedroom (an area historically unprotected from court intervention and public scrutiny).[173] A

children"); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 489 (2009) ("We hear the ironic echoes of Justice Douglas in *Griswold v. Connecticut*, on allowing 'the police to search the sacred precincts of marital bedrooms for telltale signs of' . . . well, marital sex. And of course the 'very idea' is 'repulsive to notions of privacy surrounding the marriage relationship.' We are conscripted as witnesses of repulsive conduct." (footnotes omitted)).

[170] *Griswold*, 381 U.S. at 486.

[171] *See* Suk, *supra* note 169, at 492-93 (discussing use of infrared technology to see through walls).

[172] Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1000 (2002).

[173] Until recently, the line of jurisprudence regarding homosexuals' right to privacy demonstrates the opposite approach to private acts between non-married, consenting adults. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."). Rather than preserving the general sanctity of the home and the private acts committed therein, the police were allowed to intrude on the bedroom and witness the acts performed there. *Id.* at 187-88. There is something different, and therefore, not private about this bedroom. *Lawrence* undid this unequal application of the marital privacy doctrine and affirmed the notion that individuals performing such acts in the privacy of their homes should be entitled to protection from state intervention and voyeurism.

blatant breach of the marital bedroom, however, is what made the impotence trial different.[174] When we invade the privacy of the home and look in on the marital relationship – usually constructed through imagery of the woman – "[w]e become invited voyeurs."[175]

The publications of impotence trials explicitly performed the function of inviting the public into the marital bedroom, inviting them to become voyeurs of the intimate relations that may or may not be taking place.[176] At the same time, contemporaneous impotence cases acknowledged the inviolable privacy that the courts were examining:

> Transactions of the Marriage-Bed are in their nature secret, and the natural Modesty of the Fair Sex so great, as to lay all possible Restraints on them in this respect, there's no Wonder that so few Cases are to be found to direct the Judgment with respect to the Proofs . . . .[177]

In such a passage, the court identifies the historical roots of marital privacy within the context of a case that seeks to pull back the curtain on the marital bedroom. This is not to suggest that judges performing the task of carving out and redefining privacy rights should look to impotence trials as a source of authority for the claim that marital privacy does not exist or can be eroded. Rather, the impotence trial – as a phenomenon – demonstrates that taking a look back through the common law does not provide a clear, consistent picture of the protection of the marital bedroom. Such an invasive legal event as the impotence trial provides a context in which courts were particularly willing to engage the marital bedroom. The court did not carefully refrain from examining particular questions, but rather invited itself to partake in the theatrics (or lack thereof) of the marital bedroom. In the courtroom, and by implication in the popular press and literary community, this intrusion played out for all to witness.

Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, *touching upon the most private human conduct, sexual behavior, and in the most private of places, the home*." (emphasis added)).

[174] *See* ARCHES-COURT, *supra* note 11, at iv-v ("The Secrets of the Marriage-Bed very often are the Source of those Inquietudes, which render both Sides unhappy. If therefore, in any such Cases, the Law of God and the Land may void the Bonds, certainly it is an Ease to both and an Injury to none: but if Things be so that they admit no Remedy, it seems proper that the Parties should know it; and by making the best of a bad Bargain, drag on the Chain of Wedlock as well as they can.").

[175] Suk, *supra* note 169, at 489.

[176] *See, e.g.*, 7 TRIALS, *supra* note 14, at 3 (inviting "every reader, male and female, to judge as they think proper").

[177] THE WHOLE OF THE PROCEEDINGS IN THE ARCHES-COURT OF CANTERBURY, IN A CAUSE BETWEEN THE HON. MRS. CATHERINE WELD, DAUGHTER TO THE LORD ASTON, AND EDWARD WELD ESQUIRE, HER HUSBAND 35 (London, Rayner 1732).

CONCLUSION

Today, courts conceive of the marital bedroom in terms of inviolability. *Griswold* asks, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[178] Yet, the impotence trial asked a congruous question: Have this husband and wife consummated their marriage? And in some ways, the court went further to inquire into the quality of attempted sexual relations and possible physical and emotional impediments to consummation. The court discussed the most intimate aspects of the couple's physical being.[179] The court inquired into the intimate details of matters relegated to the marital bedroom, and then publishers across London portrayed these courtroom tales for all to read. This double violation of the sanctity of the marital bedroom defies traditional narratives tracing privacy as it relates to marriage and sex back through history. In an area of the law marred by historical debate, England's impotence trials are more than ancient relics; these trials allow us to peek at the common law roots from which the privacy doctrine grows.

[178] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[179] Questioning women's virginity was nothing new. *See, e.g.*, KATHLEEN COYNE KELLY, PERFORMING VIRGINITY AND TESTING CHASTITY IN THE MIDDLE AGES 2 (2000) (observing that "chastity tests" extend at least as far back as to the Virgin Mary's time).