

Death AND A Maiden

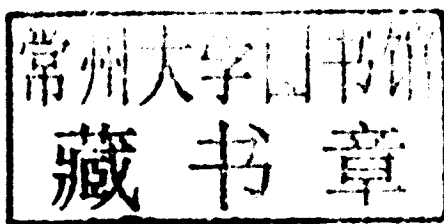
Infanticide and the Tragical History of Grethe Schmidt

William David Myers

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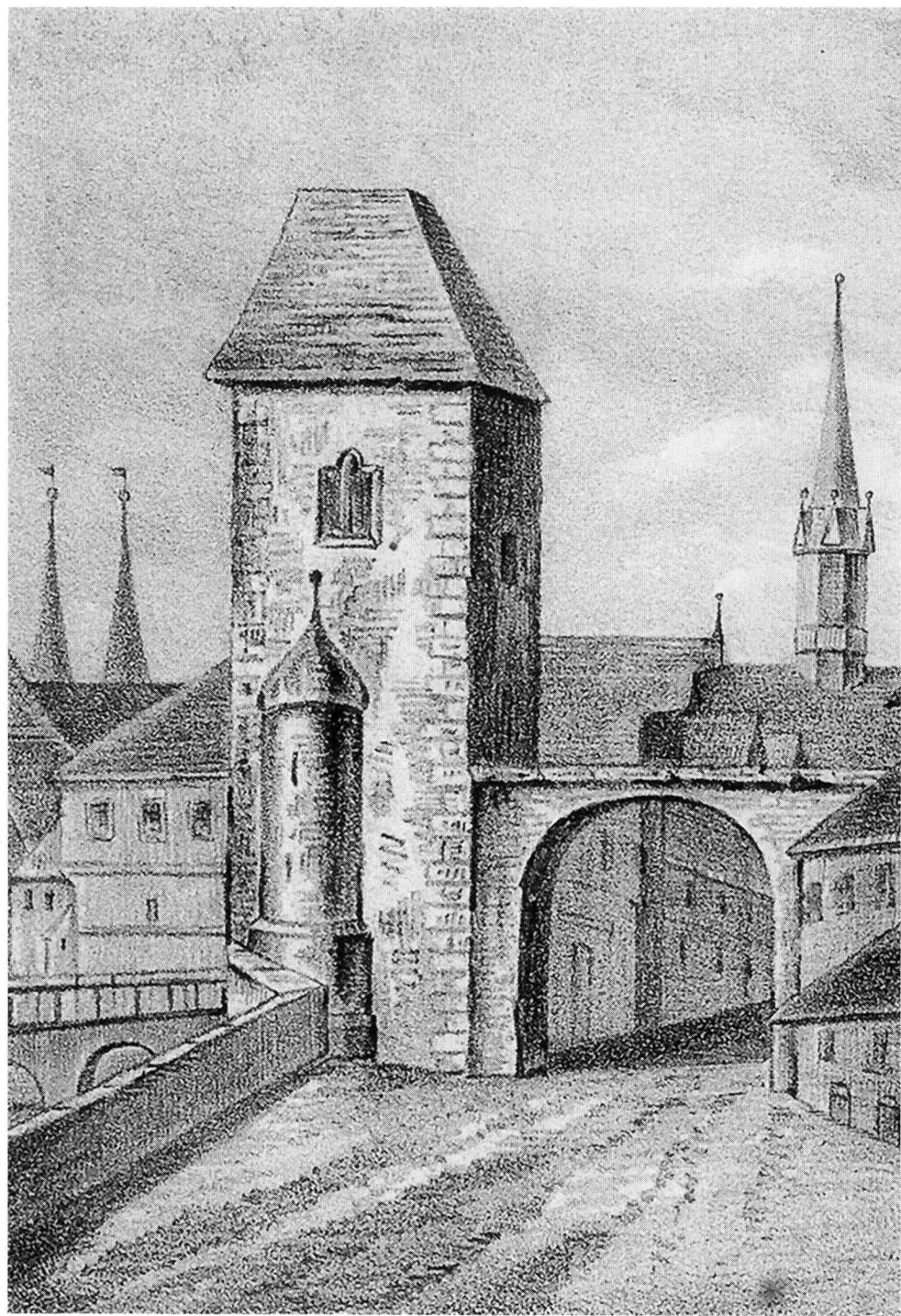
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To my Mother, Catherine Myers

And to the Memory of Robert and Sharon Fitzpatrick

Illustrations

Detail of the bridge at Hagen, 1650 *frontispiece*

Grethe's world: Detail of the Duchy of Brunswick-Lüneburg, 1650 16

Panoramic view of the city of Brunswick, circa 1650 26–27

Map of the city of Brunswick, circa 1400 45

The bridge at Hagen, 1650 48

Frontispiece for Justus Oldekop's *Contra Benedictum Carpzovium* 138

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modern Europe. In particular, Wolfgang Mueller was generous with time and with his astonishing knowledge of medieval and early modern law, and as a native Braunschweiger he gently corrected an outsider's inevitable mistakes about his *Heimat*. I could not ask for better colleagues. Among students, Michael Conforti gave an intelligent reading of the case and encouraged me to approach a criminal case from a lawyer's standpoint. Helena Guzik was a great help in editing the illustrations. A number of sophomore classes in the Honors Program at Fordham have had to wade through the material, and the book is stronger for their assistance.

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Contents

Illustrations ix

Acknowledgments xi

Introduction 3

PART ONE — GRETHE

- 1 In Brunswick, near Hannover City 17
- 2 Anatomy of a Crime 33
- 3 A Girl, purportedly a Maiden 44
- 4 Family Values 60
- 5 Common Repute—*Women and Neighbors* 74
- 6 Corpus Delicti 86
- 7 Knowledgeable Women—*The Midwives' Tale* 99
- 8 Legal Maneuvering and the Question of Torture 111
- 9 Terror, Torture, and Grethe Schmidt 123

PART TWO — JUSTUS

- 10 Case for a Defense 139
- 11 Not even a Sow—*The Case for Grethe* 149
- 12 The Thick Wilderness of Lies 161
- 13 The Way to a Confession 173
- 14 "Even to the Devil Himself" 190

Conclusion—Many Vigorous Enemies 204


Notes 213

Bibliography 251

Index 263



Death AND A Maiden



Introduction

This is an account of law, justice, and power politics told through a single alleged crime in 1661. The story of Grethe Schmidt—accused, investigated, and tortured for a vicious crime—is so confounding that even one of Germany’s clearest-eyed historians, Otto Ulbricht, has called it one of the “most spectacular” murder cases in northwest Germany during the seventeenth century.¹ From an apparently unremarkable arrest, the tale spiraled outward to set a defense lawyer and legal theorist against a powerful city’s magistrates and then upward to a legal contest between that city—Braunschweig (English Brunswick)—and its overlord, the Duchy of Brunswick, with the city’s independence and ancient liberties hanging in the balance. Lying behind the story itself were unsettled and dangerous political relations between lesser cities and the larger states seeking to engulf them. The weapons of choice were at first the criminal law of the Holy Roman Empire, fluid in practices and interpretations 130 years after its inception, and later the fragile treatises and decrees that bound the governmental entities of that empire together. The story this book tells began in the bedchamber of a house in Brunswick, but it ended at the court of Duke Augustus in the city of Wolfenbüttel. Along the way, criminal prosecution gave way to political intrigue. And yet, at the end of it all, after thousands of pages of testimony and rancorous legal exchange, it is still not clear that any murder happened.

THE STORY AND THE BOOK

In July of 1661, authorities in the city of Brunswick arrested a maid-servant on suspicion of murdering her bastard child. The case at first appeared almost routine: a young unmarried woman was punished for killing in secret a child born in secret. In this instance, though, the magistrates found no material trace of a crime: no infant was ever seen, no corpse ever discovered, and no physical evidence demonstrated that Margarethe Schmidt (hereafter known as Grethe)—fourteen or fifteen at the time of her arrest—had even been pregnant. In line with the law’s requirements, the testimony of witnesses justified the use of terror and torture, which resulted in a confession.

Aside from the girl's family, one person did take up her cause. Justus Oldekop, a prominent jurist and lawyer, aging and recently settled in Brunswick, became Schmidt's advocate (*Advokat*—a lawyer to represent her, roughly a precursor to the modern defense counsel). That a man of Oldekop's stature would condescend to help a poor peasant girl is itself a mystery, but help he did. Oldekop convincingly demonstrated the impossibility of Schmidt's original confession, after which the city magistrates extracted a second and entirely different confession. Oldekop so bedeviled the city's courts that, when they were done with Grethe Schmidt, the magistrates went after the lawyer himself, accusing him of sedition and libel. From the courtroom, the contest spilled into print as Oldekop publicly reviled the city's "unjust, untrue, and disgraceful" persecution of an innocent girl. The city responded in kind, vilifying the lawyer and justifying its process against an "immoral whore" who had polluted Brunswick's morals.² Oldekop suffered grievous wounds to his and his own family's honor. Like the impoverished family he defended, though, the lawyer remained defiant to the end.

During the 325 days Grethe Schmidt spent in jail, the prosecution labored to discover when, where, and how the girl had delivered and killed a baby. That she might in fact be innocent was a possibility that judicial officials never really considered, even though their goal theoretically was not a conviction but the truth itself. Convinced of her guilt, the magistrates interpreted the testimony of neighbors in light of the fact that Grethe fit the typical profile of an infanticide suspect as described by law and custom—a young, unmarried woman working in domestic service. Out of these basic elements the prosecution fashioned a criminal.

As intriguing as the story itself might be, the case also reveals the dynamism in the processes of early modern law and justice. The alleged murderer herself—Grethe Schmidt—was a work in progress, shaped and reshaped by the state's persistent prosecution and by her family's determination to exonerate her. The criminal processes were equally dynamic, as Schmidt's advocate sought to expand the role of the defense lawyer. The final conflict between city and duchy demonstrates the precarious, shifting balances of power in early modern Germany and the ways in which laws and courts could serve as instruments to carve out greater autonomy or to grind subjects into submission.

To unwind the complicated story of Grethe Schmidt and her ordeal, this book follows the events in chronological fashion and divides roughly into three parts, as different themes and issues come to the fore. The opening chapters concentrate on the woman and the alleged crime, while the second half of the book shifts first to the legal maneuvering over Grethe

Schmidt's fate and then to the battle of wills and words between the city of Brunswick's criminal courts and her lawyer. The book concludes with the political conflict over authority and jurisdiction between the city of Brunswick and its titular sovereign, the Duchy of Brunswick.

In looking at the materials of the Schmidt case, social historians will see much that is already familiar from the extensive studies of infanticide in German-speaking lands. Legal scholars will also recognize many of the developments traced in the book's second half. Why, then, should scholars concern themselves with this single case, no matter how gripping? Answering this question fully requires that one consider the current research on both infanticide and law in Germany. The basic argument, though, is that the deep concerns and imaginations of magistrates and rulers were at least as strong an influence in shaping infanticide prosecutions as any statistical evidence about the pervasiveness and frequency of the crime itself. The Grethe Schmidt investigation offers an intimate look at both the crime and the ways in which expectations and received wisdom combined to lay the burden of suspicion on a young woman. In short, the Schmidt case allows us to observe at close range the construction of a criminal and to ponder the significance of that fashioning for understanding the history of crime and of women. As noted below in chapter 6, the *corpus delicti* in this case was Grethe Schmidt herself, her appearance, and her admitted sexual activity (consensual or not). The prosecution's ability to shape the narrative without hindrance was a powerful, even decisive, tool that drove the process inexorably forward.

Another advantage to examining a single, extraordinary case is the depth of focus it permits the historian. The Schmidt process involved much more than interrogations and tortures carried out in the city dungeons. Prolonged isolation under the exclusive control of court officers was the circumstance in which Grethe Schmidt lived from the moment of her arrest. The possible cumulative effects of this experience is a factor that the historian must weigh as well. Perhaps the most intimate and crucial details afforded by the criminal record concern the process of torture and its role in shaping the identity of Grethe Schmidt as a murderer. The decision to apply torture was integral to the process of discovering the truth—physical coercion was to occur only when prosecutors had already established a high degree of probable cause.³ Historians have also noted a substantial but uneven decline in the use of torture after 1650.⁴ In this light, the routine recourse to torture in a case as problematic as the Schmidt affair seems even more remarkable. Did torture confirm almost certain conclusions resulting from testimony and other evidence? Or did the prosecutors labor to meet minimum standards permitting them to undertake terror and torture as a way of “making” a case that the evidence did not quite

establish? Was the determination of probable cause left to the discretion of legal faculties who acted as judicial advisors, or to the courts themselves? One must consider that magistrates investigating serious but “mundane” crimes such as infanticide were also involved in investigating and prosecuting crimes like witchcraft. How this affected their perception of the evidence and procedures—especially in establishing a *corpus delicti*—is among the many difficult questions in need of an answer.

Schmidt herself was tortured twice over several months, but following the standard early modern practice this meant that she underwent a number of experiences leading up to the actual application of pain: introduction to the torturer, examination of the torture instruments, and demonstration of their use. The carefully scaled choreography of terror and actual physical pain contributed at each step to shaping the identity of Grethe Schmidt as a criminal. She went into jail a suspect, spent 325 days in the exclusive company of her jailers (save for one visit from her father), was tortured twice, and emerged a confessed murderer. While the investigation swirling outside her cell fashioned her public persona, the records also document the tremendous pressures placed upon her during the incarceration. In all of this, the question of gender—of the criminal, of the crime—played a major role.

Similarly, the extensive records covering Grethe Schmidt’s defense provide an unmatched opportunity to examine the potential for a criminal defense in the hands of a skilled lawyer, as well as the ambivalent attitude toward a defense on the part of magistrates and prosecutors who saw the discovery of truth as their particular, even exclusive, domain. A close look at the work of Justus Oldekop in this case reveals an experienced advocate pushing to expand the boundaries of the process in a legal system that offered the opportunity of criminal defense only with reluctance.

Some of the issues noted above have been treated, especially for the eighteenth century. The earlier history is less well known, because although infanticide was a major crime in the minds of jurists, clergy, and rulers, its study has always been overshadowed by the attention paid to witchcraft, another crime that “flourished” in the sixteenth and seventeenth centuries and diminished in the eighteenth. Yet, save for witchcraft, more women were executed for newborn child murder than for any other crime.⁵ And in contrast to witchcraft prosecutions, infanticide was much less an “exceptional crime” and more a matter of routine criminal justice. As such, an infanticide prosecution permits us to focus more on the routine workings and processes of the criminal courts. Finally, in contrast to cases of witchcraft, the very existence of which is problematic, infanticide was a deed that women may actually have committed.