

1. The easiest case in which to see his ultimate resolution is *Veniens ad nos* (VIII–19).

   Alexander III to the bishop of Norwich [1176 X 1181]. A certain William appealed to us, showed in his account that he received in his house a certain woman by whom he had children and to whom he swore before many people that he would take her as wife. In the meantime, however, spending the night at the house of a neighbor, he slept with the neighbor’s daughter that night. The girl’s father finding them in the same bed at the same time compelled him to espouse her with present words. Recently, William standing in our presence, asks us to which woman he ought to adhere. Since he could not inform us whether he had intercourse with the first woman after he had given his oath, we therefore order you to examine into the matter carefully, and if you find that he had intercourse with the first woman after he had promised he would marry her, then you should compel him to remain with her. Otherwise, you ought to compel him to marry the second one unless he was compelled by a fear which could turn a steadfast man.

   What is the scheme of rules that might be derived from this decretal?

   a. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.

   b. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, even if that consent is given in the most informal of circumstances. (This is less easy to see just from this decretal because all Alexander may be doing is enforcing the contract.)

2. The first stage is illustrated by *Veniens . . . B* (VIII–17).

   Alexander, bishop, servant of the servants of God to his beloved sons G the chief canon and the canons of Lucca greetings and apostolic blessing. Coming to the clemency of the apostolic see, B. the bearer of these presents not without blushing and shame proposed that when Guilla the woman had been lawfully espoused to L. and both were of full age, the aforesaid B. driven on by sin knew her. When the deed was published the *treugani* and consuls of Pisa seized him and compelled him by their force and threats to take the aforesaid woman as wife. Wherefore, since it is unworthy and contrary to the sanction of the canons that the same woman be handed over to two men, we commend to your discretion by apostolic writing that you very carefully inquire into the truth of this matter, and if it is notorious or otherwise lawfully apparent to you, that the aforesaid L. previously received the aforesaid woman as his by espousal, as, for example, it is usually done with the pledge of a ring, you should totally absolve the same B. from her petition and impose on him a moderate and suitable penance for perjury. Otherwise, you should very strictly compel him, though it appears that he is in holy orders, to take the same woman as wife and treat her with marital affection.

   What is the scheme of rules that can be derived from this decretal?

   In it Alexander seems to be holding that any espousal, whether or not accompanied by
intercourse, is binding and prevails over a second espousal. If this is the holding of this case, it conforms neither to Gratian’s nor to Lombard’s theory, and may represent the ancient discipline of the Roman church (cf. Nicholas I).

3. The second stage is illustrated by *Sicut Romana* (VIII–18).

Alexander III to William, archbishop of Sens [1173 or 1174]: Further, if any man and woman contract marriage with equal consent and the man, the woman unknown, takes another as wife and knows her, he is to be compelled to dismiss the second and return to the first. For although some think differently and the church does not have the same custom, it nonetheless seems safer (*tutius*) that he ought to have the first rather than the second, since he ought not to be separated from the first without that judgment of the church after he contracted marriage with her by equal vow and consent. Indeed, although it is permitted for an espoused woman unknown by a man to become a nun, he cannot take another woman as wife.

What is the scheme of rules that can be derived from this decretal?

In the late 1160’s Alexander spent some time in France, and he may well have been exposed to the ideas of Peter Lombard while he was there. He also became aware that there was considerable controversy about this matter, and that controversy is reflected in the hesitancy that characterizes the letters in this period. This decretal does not say that the marriage was one of the present tense, nor is it completely consistent with the Lombard’s thinking because it makes the issue of entry into religion dependent on whether the woman has had intercourse. I am inclined to think, however, that it reflects the influence of Lombard’s thinking with its focus on the type of consent, and there is one other decretal (*Sollicitudini*, VIII–21) which probably belongs to this period that shows the same.

4. The “Solemnity Period”

Alexander III to the archbishop of Salerno [1176 or 1177]: [I]f a proper present agreement is made between man and woman (observing the customary solemnities, that is, before a priest or before an official in the presence of suitable witnesses, as is still done in some places,) that the one receives the other unto himself by expressing the customary words of mutual consent, saying to the other “I receive you as mine” and the other saying “I receive you as mine,” whether accompanied by an oath or not, that man is not permitted to marry another woman. And if he does marry another woman, even if intercourse follows, she ought to be separated form him, and he ought to be compelled by constraint of the church to return to the first. Although some have felt one way and some another on this matter, this is the way the matter was at one time resolved by some of our predecessors.

What is the scheme of rules that can be derived from this decretal?

If that was the direction in which Alexander was going in the early 1170’s he changed his course very briefly in the mid 1170’s. Both *Ex litteris* (VIII–18) and *Licet preter solitum* (VIII–19) hold that an unconsummated present consent marriage will prevail over a subsequent one accompanied by intercourse, but both require (*Ex litteris* so holds in the common-law sense) that the present consent be accompanied by the solemnities customary in the area.

5. At the end of his pontificate Alexander abandoned the solemnity requirement (something that he held only briefly, see *Quod nobis* (VIII–21)). Two decretals from after 1176 (one certainly so, one probably so; see *Significasti*, VIII–20, and *Veniens ad nos*, VIII–21) come up with the following rule scheme:
a. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, unless one of the parties choses the religious life.

b. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.

c. With few exceptions any Christian man was capable of marrying any Christian woman, so long as they were of marriageable age, not in orders or solemn vows, and not too closely related to each other.

I would suggest that the extraordinary thing about these rules, which prevailed throughout the West until the council of Trent in 1563 is not what they require but what they don’t require. No solemnity or ceremony of any sort was necessary to make an indissoluble marriage; no parental consent was required. There were no class barriers to marriage. We will have occasion to ask later how these rules were received by a society in which arranged marriages were the norm, and cross-class marriages were uncommon. For the time being, I think we have shown how they came about. I offered some speculations in the lecture on why he came out the way he did.

Why did Bologna happen?

Review the outlines for Lectures 7 and 8. There’s a lot of detail there, but the question that I want to pose in this class is not what happened or even how did it happen but why did it happen. How would you evaluate the following propositions as “explanations” of the extraordinary revival of legal studies in the twelfth century (you may take the “facts,” some of which are controversial, as true)?

1. The conflict between regnum and sacerdotium. As we have seen, just because the investiture controversy was settled at the beginning of the 12th century that doesn’t mean that the tensions that underlay it disappeared nor does it mean that reformist zeal ceased. The 12th century, after all, was the century of the conflict between Becket and Henry II of England, Alexander III and Frederick Barbarossa. It was also the century that saw by its end the development of a new discipline for which they still did not have a name but which we call moral theology.

2. Economics. The twelfth century saw an extraordinary revival of economic activity. Numbers are hard to come by, but some economic historians estimate that the percentage growth of gross domestic product in western Europe in the twelfth century was greater than in the sixteenth century, perhaps even than in the nineteenth century (the other two leading candidates for the centuries of greatest economic growth before the twentieth).

3. The revival of culture. In France, there is an extraordinary flowering of sculpture and architecture in the great Romanesque churches of central France and the very beginnings of Gothic in the north. There is a notable revival of secular literature. In the south of France the Troubadour poets develop a love lyric the likes of which had not been seen in the West certainly since the Romans and perhaps never before. It is the century of Abelard and Heloise, of Henry II of England and Eleanor of Acquitaine, of a transnational Latin culture. It is perhaps the last century in which a man named John could be born in Salisbury in England, write the first original treatise of political thought since the Romans in a Latin as good as Cicero’s, and end his life as bishop of Chartres.
4. The revival of other kinds of disciplines. The twelfth is a century of the study of the Bible and of what today we would call theology and philosophy in the monastic and cathedral schools, particularly in France. Abelard (d. 1148) is a major figure in this tradition, but his work probably comes too late to have influenced the beginnings of university study of Roman and canon law. The glossators of the Bible, however, certainly are early enough.

5. Increase in judicial activity, particularly in Italy. We know that in the eleventh century and probably before there was a law school at Pavia where Lombard law (a Romanic-Germanic mix) was studied. A recent book (by Charles Radding) has pointed out that the Pavese jurists served as judges, and Radding tries to argue that they were beginning what we might call legal method. There probably isn’t enough material that certainly antedates the revival at Bologna to make that statement with any confidence, though practical concerns at a lower level than the high politics of the reform movement are almost certainly important in the development of the method and of Bologna. All of the first Bolognese civilians are known to have acted as judges. An even more recent book (by Anders Winroth) argues that Irnerius was largely mythical and that the real study of Roman law doesn’t get going at Bologna until the 1230’s, by which time Gratian had already composed the first draft of his Concordance of Discordant Canons.