

OUTLINE — LAW SECTION 4

“Church and State” 800–1300; ‘Eclectic’ Sources of Law, Preliminary Look at Gratian

Regnum and Sacerdotium, 11th through mid-12th Centuries

The Reform Movement and the Investiture Controversy:

| <i>Popes</i> | <i>Emperors</i> | <i>Others</i> |
|---|---------------------|--|
| Leo IX, 1049–54 | Henry III, 1039–56 | Humbert of Silva-Candida d. before 1065 |
| (1st generation, simony and celibacy) | | |
| Alexander II, 1061–73 | | Peter Damian, d. 1072 |
| (2d generation, the problem of investiture comes to the fore) | | |
| Gregory VII, 1073–85 | Henry IV, 1056–1106 | 74T written before 1073 |
| (Canossa, pope and emperor depose each other) | | |
| | | Ivo of Chartres, 1040–1116 |
| Urban II, 1088–99 | | 1st Crusade, 1095–1099 |
| Paschal II, 1099–1118 | Henry V, 1106–1125 | Henry I (England), 1100–27 |
| | | Philip I (France), 1060–1108 |
| (Radical reform proposal and compromise: Concordat of Worms 1122) | | |

Empire and Papacy—Alexander III to Boniface VIII:

1159–1181—Pope Alexander III (controversy with Frederick I (Barbarosa) (emperor, 1152–1190; controversy with Henry II of England (1154–1189) leading to the martyrdom of Thomas Becket (archbishop of Canterbury, 1162–1170); Third Lateran Council (1179); development of the institution of papal judges delegate; large number of decretal letters)

1198–1216—Pope Innocent III (high point of temporal power of the papacy; England becomes a papal fief (1213); Fourth Lateran Council (1215))

1227–1241—Pope Gregory IX (relaxes pressure on Frederick II (emperor, 1211–1250); *Decretals* published (1234))

1243–1254—Pope Innocent IV (deposes Frederick II at Council of Lyons (1245); with Frederick’s death in 1250 northern Italian Guelfs and Angevins (followers of Charles of Anjou, brother of Louis IX of France (1226–1270), and king of Naples and Sicily, 1268–1282) drive imperial power from Italy)

1294–1303—Pope Boniface VIII (struggle with Philip the Fair of France (1285–1314) ends with the pope’s death; the papacy now becomes subject to the power of France)

Popes, Emperors and Kings:

| <i>Popes</i> | <i>Emperors</i> | <i>England</i> | <i>France</i> |
|----------------------|--------------------------|----------------|---------------|
| Alexander III, 1159– | Frederick I, Barbarossa, | Henry I, 1100– | |

| | | | |
|--------------------------|-----------------------------|----------------------|--------------------------------|
| 81 | 1152–90 | 1135 | |
| Innocent III, 1198–1216 | Henry VI, 1190–97 | Henry II, 1154–1189 | Louis VII, 1137–80 |
| Gregory IX, 1227–41 | Frederick II, 1215–50 | John, 1199–1216 | Philip II, Augustus, 1180–1223 |
| Innocent IV, 1243–1254 | Rudolf of Hapsburg, 1273–91 | Henry III, 1216–1272 | Louis IX, saint, 1226–70 |
| Boniface VIII, 1294–1303 | Adolf of Nassau, 1292–98 | Edward I, 1272–1307 | Philip IV, the Fair, 1285–1314 |

I. *Regnum and sacerdotium*, 800–1300

1. How not to look at the story

- a. In the time of Charlemagne, church and state worked together. The emperor and his bishops were partners in government, but the emperor had the upper hand.
- b. In the time of Henry II and Henry III this partnership continued, with the emperor leading the reform movement.
- c. During the minority of Henry IV, the papal party took over, leading to the investiture controversy.
- d. The settlement of the investiture controversy, by and large, favorably to the emperor and the kings, was followed by a period of relatively weak kings and emperors in the early to mid 12th century. During this period the popes put their legal system into operation.
- e. This leads to the conflict with Barbarosa in the late 12th century, settled favorably to the papacy because of the revolt of the Lombard cities.
- f. There follows the period of papal monarchy heightened by the weakness of the emperor.
- g. Things blew up again in the middle of the 13th century with Frederick II, deposed by Innocent IV at the council of Lyon in 1245.
- h. Angevins and northern Guelfs drove imperial power from Italy, but the triumph of the papacy did not last long because.
- i. The conflict between Boniface VIII and Philip IV (the Fair) of France (1298–1304), which leads to the “Babylonian Captivity” of the papacy at Avignon.

2. What’s wrong with this account?

3. Targets of the reform movement

- a. Feudalization
- b. Simony
- c. Reform of religious life, secular clergy and laity

4. The investiture controversy revisited

5. Legal consequences

- a. The *dictatus papae* of Gregory VII in 1075 (*Mats.* p. V-8), constitutionalism too early?

b. A move toward the rule of law?

II. 'Eclectic' Sources of Law (derived from *Materials*, pp. VI–28 to VI–30.)

M. TITLE 62: ON LAWFUL MARRIAGES

271. CHAPTER I

Evaristus to all bishops.

A marriage cannot otherwise be legitimate unless the wife is sought from those who have lordship over the woman and by whom she is protected; and she is espoused by her nearest kin and lawfully dowered; and she is sacerdotally blessed at the proper time with prayers and offerings by a priest; and, accompanied by bridesmaids and escorted by those closest to her, she is solemnly given and received at a suitable time. Let them spend two or three days in prayer and preserve their chastity, so that good offspring might be produced, and they may please the Lord and beget not bastard sons, but lawful and legitimate heirs. Therefore, most beloved sons, know that marriages performed in this manner are lawful; but have no doubt that unions made otherwise are not marriages, but are adulteries, concubinages, lusts or fornications rather than lawful marriages, unless full consent is given and lawful vows are made.

271. Ps.-Evaristus, ep. 1.2 (H 87–88; JK †20). Ans. 10.2; Bon. 10.51. Cf. Grat. C.30 q.5 c.1.

[What do the position of these titles tell us about the importance that the author of 74T attached to issues regarding marriage? Where does this extract come from? Some of the particulars can be traced back to the *Collectio Hibernensis*, which dates to the early 8th century:]

Bk. 46 (45) Concerning the *ratio* of matrimony. . . . c. 2 Concerning a wife, who is to be had in marriage. Augustine says: Of what sort ought a wife to be? She is to be had according to law (*legem*), that is, if she is a chaste virgin, if she is espoused in virginity, if she is lawfully endowed and handed over by her relative, and is to be received by the spouse and the *paranymphe*. Thus according to the law and the Gospel she is to be taken lawfully into wedlock (*coniugium*) by public nuptials honestly, and for all the days of her life she is never to be separated from her husband, unless by consent and for the sake of giving time (*vacandi*) to God, except by reason of fornication. If she has committed fornication, she is to be abandoned, but while she is alive another is not to be taken to wife, because adulterers will not possess the kingdom of God.

[No one has ever done a systematic analysis of the sources of the *Collectio Hibernensis*. Can anyone spot any of them?]

[Can anyone think of a source that could have been used here that was not?]

N. TITLE 63: ON MARRIAGES FOR SOME REASON SEPARATED

272.

Bishop Leo to Bishop Nicetas of Aquileia.

The scourge of war and the terrible onslaughts of hostility have so disrupted some marriages that wives have been left all alone when their husbands were taken prisoners of war, and because they came to believe that their husbands were either dead or that they would never be released from their captivity, they entered another union because of their own need and anxiety. If ever any of those who were considered dead return, we should of necessity believe that the unions of their lawful marriages should be restored and, after the evils which the hostility brought have been removed, each should have what he lawfully had. However, no one should be judged culpable and considered an intruder into another's right if he married the wife of a husband who

was thought no longer to exist. If, however, wives are so enraptured with love for their second husbands, that they prefer to live with them rather than return to their lawful union, they are rightly to be censured so that I they are deprived of ecclesiastical fellowship until they return to their lawful union.

272. Leo I, ep. 159.1–4 (PL 54.1136A-1137B; JK 536) with omissions; from Ps.-Isid. ep. 59 (M 866D-867C; H 621 from Hisp.). Ans. 10.22. Cf. Grat. 34. q.1 c.1.

[Dated 458 A.D. The original text has been considerably shortened, but this summary seems to have gotten the gist of it quite well. In Leo's context it helps to know about the Roman law of *postliminium*. Why do you think that the author of 74T was interested in this text?]

O. TITLE 64: THAT MARRIAGES MUST NOT BE DISSOLVED FOR THE SAKE OF RELIGION

273. CHAPTER CCXXXVII

*Gregory to the Patrician Theotista.*¹

There are some who say that marriages ought to be dissolved for the sake of religion. Truly, it must be known that even if human law permitted this,² nevertheless divine law prohibited it. For the Truth himself says, "What God joined let no man separate."³ He also says, "A man is not allowed to put away his wife, except by reason of fornication."⁴ Who, therefore, would contradict this heavenly legislator? We know that it is written, "They shall be two in one flesh."⁵ If, therefore, husband and wife are one flesh and for the sake of religion the husband dismisses his wife or the wife her husband, leaving them to remain in this world or even to move to an illicit union, what is this religious conversion when one and the same flesh⁶ in part moves to continence and in part remains in pollution? If they both agree to lead a life of continence, who would dare fault them? But if the wife does not follow the continence which the husband seeks, or the husband refuses what the wife seeks, the union may not legally be broken, because it is written, "The wife does not have the power of her body but the husband; and similarly the husband does not have the power of his body but the wife."⁷

273. Greg. I. Reg. 11.27 (MGH *Epp.* 2.294.18–27, 295.11–14; JE 1817) with many omissions; cf. Ps.-Isid. ep. 4 (M 1117C/D, 1118a; H 744–745 from ed. Maur.). Ans. 10.18. Cf. Grat. C.27 q.2 c.19.

[Date: probably 600. Part of a long letter to the sister of Byzantine emperor Maurice. Once more, the letter has been considerably shortened, but what is here is largely unaltered and largely accurate. The reference to 'human law' may be a reference to Justinian's Novel 22.5 (535) or to the law referred to in it (which does not seem to have survived):]

Divorce takes place without blame whenever either the husband or the wife enters monastic life, and desires to live in chastity; for another law of Ours specially provides that either a man or his wife, who devotes himself or herself to a monastic life, is authorized to dissolve the marriage, and separate from his or her consort by serving a notice by way of consolation. And whatever the

¹ See the fuller version of the letter given in Gratian's *Decreta* C.27 q.2 c.19, below § 8A.

² The reference may be to Novel 128.40.

³ Matt. 19:6.

⁴ Matt. 5:32.

⁵ Matt. 19:5.

⁶ Gilchrist adds 'both' here, without warrant in the Latin text.

⁷ 1 Cor. 7:4.

parties may have agreed upon in case of the death of either, as set forth in their marriage contract, shall enure to the benefit of the abandoned wife or husband. The reason for this provision is, that wherever anyone embraces a different mode of life from that of his or her companion, he or she is considered to have died, so far as the marriage is concerned.

274. LIKEWISE ABOUT THE SAME MATTER, CHAPTER XLIII

Gregory to the Notary Adrian of Palermo.

The woman Agathosa has complained that her husband was converted to the monastery of the Abbot Urbino against her will. Therefore, we order your honour to conduct a diligent inquiry, lest perchance he was converted by her wish or she herself promised to change. And if he learns this was so, let him both arrange for the husband to remain in the monastery and compel the wife to change as she promised. If, indeed, it is none of these, and you find that the aforesaid woman did not commit any crime of fornication on account of which it is lawful to dismiss a wife, in order that his conversion should not be an occasion of damnation to the wife left in the world, we wish you to return her husband to her even if he has already been tonsured, dismissing all excuses, because although the secular law orders that a marriage can be dissolved for the sake of conversion, even if one party is unwilling, nevertheless the divine law does not permit this to happen. Except for fornication it in no way allows a husband to dismiss the wife⁸ because after the consummation of marriage husband and wife are made one body, which cannot be partly converted and partly remain in this world.

274. Greg. I, *Reg.* 11.30 (MGH *Epp.* 2.300.20–301.5; JE 1820) from John the Deacon, *Life of Greg.* 4.41 (PL 75.203C–204A). Ans. 10.19. Cf. Grat. C.27 q.2 c.21.

[Probably the same year, i.e., 600. Palermo is in Sicily. What secular law applied in Sicily in the year 600?]

275. LIKEWISE ABOUT THE SAME MATTER, CHAPTER XLIII

Gregory to Felix, bishop of Siponto.

It has come to our attention that your nephew Felix seduced the daughter of Evangelus your deacon. If this is true, although he ought to be punished with the full force of the law, we want the rigour of the law to be somewhat relaxed, in this way, that is, that either he should take the woman he seduced as his wife or, if he considers that he must refuse this, he should be severely and corporally punished and excommunicated, and put away in a monastery where he should do penance and from which he shall have no right to depart without permission.

275. Greg. I, *Reg.* 3.42 (MGH *Epp.* 1.199.10–16; JE 1246) from John the Deacon, *Life of Greg.* 4.40 (PL.75.203C). Ans. 10.36; Ivo Decr. 8.29.

[Dated June, 593. Once more some truncation, but substantially accurate. The one thing that has been edited out is that that Gregory thinks that that Felix the bishop is partially responsible for his nephew's behavior, and he's not happy about that. C.Th. 9.24.1 seems to contemplate the death penalty for *raptus*, though it does not quite say so. CJ 9.13.1 (Justinian) definitely calls for the death penalty of *raptores*.]

JI 4.18.4: The lex Iulia, passed for the repression of adultery, punishes with death not only defilers of the marriage-bed, but also those who indulge in criminal intercourse with those of their own sex, and inflicts penalties on any who without using violence seduce virgins or widows

⁸ Matt. 5:32.

of respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.

[A search for *stuprum* in the Codex does not suggest that the penalty was changed in post-classical times. Why do you think that the author of 74T included this text? If someone wants to write a paper about this, it would be a great topic.]

[What's missing in 74T from the sources of law that we have been talking about?]

III. Gratian, Causa 27, quaestio 2. We'll talk about this in class next week, but I wanted to get a start on the basic argument here:

A certain man who has taken the vow of chastity espoused [*desponsavit*] a wife; she, renouncing the previous match, betook herself to another and married him; he seeks after her to whom he was previously espoused.

The first question is whether there can be marriage between those who have taken a vow of chastity?

Second, is it permitted for one who is espoused to leave the one to whom she is espoused and marry another?

Part 1. Gratian: The second question follows in which we seek to discover whether a girl espoused to another man can renounce the previous match and transfer her vows to another. First, we shall see whether they are married, second whether they can depart from each other. That they are married is easily shown by the definition of marriage and by the authority of many. For matrimony or nuptials are joining of man and woman holding firm to an undivided mode of life. Among them [the couple in the hypothetical case], moreover, was a joining which required an undivided mode of life, for there was between them consent which is the efficient cause of matrimony according to the statement of Isidore [of Seville; cf. *Etymologies* 9.7, a very free quotation; but the statement is a commonplace, ultimately deriving from D.50.17.30.], "consent makes matrimony." Again John Chrysostom on Matthew [an anonymous author of a collection of homilies on Matthew, Homily 32]:

[**Canon 1.**] Coitus does not make a marriage, but will does. And therefore the separation of body does not dissolve it but [separation] of will. Therefore, he who dismisses his wife and does not take another is still a husband. For even if he is separated in body, nonetheless he is still joined in will. When therefore he has taken another woman, than he has fully dismissed [the first]. Therefore he who dismisses [his wife] does not commit adultery, but he who marries another.

[**Canon 2.**] Again, Pope Nicholas [I, Response to the Bulgarians (866), c.3]:

According to the laws, consent alone between the parties suffices when the question is whether parties are married. If that alone is lacking, anything else, even if accompanied by coitus, is frustrated.

[**Canon 5.**] *The conjugal pact not the deflowering of virginity makes a marriage.*

When the marriage begins, the name marriage is taken. The deflowering of virginity does not make a marriage, but the conjugal pact. Therefore, there is marriage when a virgin is joined [*jungitur*] to a man, not when she is known by the man.

[**Gratian:**] Since therefore consent, which alone makes marriage, intervened between this couple, it appears that they were married. But it is asked, what sort of consent makes marriage? The consent of cohabitation? The consent of sexual intercourse? Both? If the consent of

cohabitation made a marriage, then a brother could contract marriage with his sister. If the consent of sexual intercourse [made a marriage, then] there was no marriage between Mary and Joseph. For Mary had sworn that she would keep herself a virgin. For this reason she said to the angel, “How can this be since I know not man? [Lk. 2:34].” That is to say, since I have determined that I will not be known [by a man]. For if she had not known a man up to that point, it would not have been necessary to ask how she could have a son, but [it was necessary] because she had determined that she would not be known. § 1. If therefore contrary to her determination she had consented to sexual intercourse, who would have been guilty of having violated her vow of virginity in her mind, if not yet in her body. It would be shameful [*nefas*] to think that of her, but, as Augustine says [a pastiche of quotations and paraphrases from Augustine, principally from his *De virginitate*]:

Part 2. Gratian: By all these authorities these people are shown to be married, but Augustine [not Augustine, probably a summary of the following canons] testifies to the contrary saying:

Canon 16: *There is no marriage among them whom mixing of the sexes does not couple.*

There is no doubt that a woman who has not had intercourse is not a married woman.

Canon 17: *That woman does not pertain to matrimony with whom the nuptial mystery is not celebrated.*

Again Pope Leo [to Rusticus of Nabonne, Ep. 167, 458–9].

Since the partnership of nuptials was so instituted from the beginning that it does not have in itself the sacrament of the nuptials of Christ and the Church unless there has been a mingling of the sexes, there is no doubt that that woman does not pertain to marriage in whom it is learned that there was not nuptial mystery.⁹

[There follows a canon added after Gratian’s time.] ...

Gratian. Again the Apostle teaches [1 Cor. 7:3] that a wife shall render the debt to her husband and the husband to her wife, unless perchance by consent they should devote themselves to prayer for a time. Whence it is given to understand that without the consent of the other it is not permissible for the one to take time off for prayer. § 1. Again, the man cannot take up the proposal of a better life [i.e., join a monastery] without the consent of his wife and vice versa. Whence Gregory writes to the patrician Theutista [Ep. 9.39, 601]:

Gratian. See, those who are married cannot profess continence without the consent of the other. Espoused, however, even without consulting those whom they have espoused are shown by examples and authority to be able to keep continence. As St. Jerome reports, Macharius, a most distinguished hermit of Christ, the marriage feast having been celebrated, was in the evening about to enter the bridal chamber, he fled the city and sought foreign shores and chose for himself the solitude of the hermit. § 1. Again St. Alexius, the son of the most distinguished Epiphanius, similarly called from the wedding by divine grace, deserted his espoused, and alone began to keep company with Christ. By these examples it is clear, that espoused can profess continence even without asking for the consent of their espoused. The same is proved by the authority of Pope Eusebius [actually from the Penitential of Theodore, c. 11], who says:

⁹ Gratian was using a corrupt text of Leo’s letter (although the corruption goes a long way back). The original letter (PL 54:1204A–1205A), as the *Correctores Romani* point out, does not have the first “not,” and probably should be translated “the partnership of nuptials was so instituted from the beginning that it has in itself the sacrament of the nuptials of Christ and the Church in addition to the mingling of the sexes.” The point of the letter is that concubines are not wives.

2. Supervenient impotence
3. Bigamous clerks
4. Incest penalty
5. Raptus

Part 3. Gratian: It appears therefore, that she is not a married since the privilege of marrying another is not denied to her who is espoused to a living man. How, therefore, according to Ambrose and the other fathers, are those espoused [*sponsae*] called married [*conjuges*] when by all these arguments they have just been shown not to be married? But it ought to be known that marriage is begun by espousal but is perfected by intercourse. For this reason there is marriage between those espoused, but it is begun [*conjugium initiatum*]; between those who have had intercourse there is complete marriage [*conjugium ratum*]. Whence Ambrose [see canon 5]: