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John T. Noonan Jr.

SPEECH

CATHOLIC LAW SCHOOL - A.D. 1150

John T. Noonan, Jr. *

We are in a law school today, so let me start, as we do in law schools, with a case. The case reads as follows:

CASE TWENTY-NINE

Gratian: *A noblewoman learned that another noble's son sought her in marriage. She consented. But a non-noble of servile condition offered himself under first man's name and took her as wife. Her first choice at last arrived to seek her in marriage. She complained that she had been deceived and wanted to marry the first man. The questions here are:*

First, were they married?

Second, if she first believed a man was free, and later discovered he was servile, could she lawfully leave him forthwith?

QUESTION I

Gratian: *That they were married is proved this way. Marriage is the union of a man and woman keeping an undivided way of life* [Instit.1 9.1.]. *Mutual consent makes marriage. Those, therefore, who join in order to keep an undivided way of life, consenting to each other, are married.*

§1. *Reply to this: Consent occurs when two or more perceive the same thing* [Dig. 2.14.1]. *He who is in error, however, does not perceive the same thing. So he cannot consent - that is, agree to the same thing as another. So, one who errs does not consent. Thus she was not married, because both did not consent to the same thing, and that is necessary for marriage.*

Someone errs in the same way when he is ordained by someone he believes to be a bishop, but who is really a layman. He is not ordained and

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must still be ordained by a bishop. She erred in his way and thus was not united in marriage, but rather yet to be united.

§2. *On the contrary: Not every error eliminates consent. One who takes a wife, thinking her a virgin, or one who takes a prostitute, thinking her chaste, errs because he thinks a corrupted woman is a virgin, or because he accounts a prostitute as chaste. But did they not consent to these women? Does either man have the option of sending the woman away and taking another?*

In fact, not every error excludes consent. Error as to person is one thing, error as to fortune another, error as to condition another, and error as to quality yet another. Error as to person occurs when one thinks someone is Virgil when he is Plato. Error as to fortune occurs when one thinks someone is rich when he is poor, or conversely. Error as to status occurs when one thinks someone is free when he is of servile status. Error as to quality occurs when one thinks someone is good when he is bad. Error as to fortune or quality does not exclude consent to marriage.

If one agrees to sell a field to Marcellus, and Paul later arrives saying he is Marcellus and buys the field from him, did he agree on the price and sell the field to Paul? Also, if one promises to sell me gold, but gives me yellow ore in place of gold, and thus deceives me, did I consent to the yellow ore? I never wanted to buy yellow ore, and at no time did I consent to it, because consent cannot exist without the will.

Just as error as to the matter here excludes consent, so error as to person does in marriage. She did not consent to this man, but to the man she thought this man was.

§3. *Objection: Jacob did not consent to Leah but to Rachel* [Gen. 29:9-30]. *He served seven years for Rachel. So, when Leah was put in with him, but he did not know it, there would have been no marriage if error as to person excluded consent. For, as was said, he did not consent to her, but to Rachel.*

Response: Antecedent consent is one thing, subsequent consent another. Antecedent consent would be consent to both an undivided way of life and to fleshly intercourse. Subsequent consent occurs when, after sexual relations during concubinage or fornication, they both consent to the former as well. Antecedent consent did not make Jacob and Leah husband and wife, but subsequent consent did.

But they are not to be adjudged fornicators because of their intercourse, for he knew her with marital affection, and she rendered the debt to him with marital affection, thinking she was rightly joined to him, on account of the Law of the First Born and her father's command.

§4. *A later authority* [C. 34 qq. 1 & 2 c. 6] *proves that error as to person*

sometimes excuses. When a wife's sister goes to the bed of her sister's husband (both the sister and the husband being unaware), and the sister's husband knows her, she loses perpetually the right of marriage, but he who knew her in ignorance is excused.

This is also proved in another way. The devil sometimes transforms himself into an angel of light [*cf.* 2 Cor. 11:14], *but this error poses no danger to one who believes him to be good when he is posing as good. If, then he asked an unlettered person whether he wished to share his blessedness, and the latter replied that he wanted to associate with him, can one say he chose to associate himself in devilish damnation? Did he not, rather, choose to participate in eternal bliss?*

Also, if a heretic came to some Catholic and convinced him to accept his beliefs as those of Augustine, Ambrose, or Jerome, did he consent to accept the man's belief? Should one not say rather that he consented, not to the heretical sect, but to the integral Catholic Faith that the heretic falsely claimed to present?

Because this woman was deceived by error, she plainly did not consent to the latter man, but to the former man he falsely claimed to be. So she is not his wife.

§5. *Error as to fortune or quality does not exclude consent. When one accepts the prelacy of a church he believes to be very rich, and it is less so, although he is in error as to fortune, he still cannot renounce the prelacy he accepted. Likewise, one who marries a pauper thinking him wealthy cannot renounce this relationship, although she did err.*

Likewise, error as to quality does not exclude consent. When one buys a field or a vineyard, supposing it very fruitful, but errs as to the quality of the property and buys an infertile one, he still cannot rescind the sale. Likewise, one who takes as his wife a prostitute or seduced woman, thinking her chaste or a virgin, he cannot send her away and take another.

QUESTION II

Part 1

Gratian: *The second question concerns condition. Can a woman lawfully send away a man she thought to be free if afterwards she discovers he was servile? Many arguments prove that the woman cannot lawfully leave the slave. In Christ Jesus, there is neither Jew nor Greek, slave nor free* [*cf.* Col 3:11]. *Nor is there in Christian marriage, for the same law rules all in the Faith of Christ.*

The Apostle said to all without discrimination [*cf.* I Cor. 7:36], *"Whoever wishes to marry, let him marry in the Lord." And again* [I Cor. 7:39],

"Let a woman marry whom she pleases, only let it be in the Lord." He does not command a free woman to marry only a free man, or a slave girl only a slave, rather everyone may marry whomever he wishes, provided it is in the Lord.

Also, Pope Julius:

C. 1.

Slaves can lawfully contract marriage.

There is one Father in heaven for all of us. Each of us, rich or poor, free and slave, will equally render an account for himself and his soul. Therefore, we do not doubt that all, whatever their condition, are under one law before the Lord. If, however, all are under one law, then neither a free man nor a slave can be sent away, once he is joined in marriage.

Also, Pope Zacharias:

C. 2.

A man cannot lawfully send away a slave girl he has taken in matrimony.

If any free man takes a slave girl in matrimony, and they were joined by mutual consent, he does not have license to send her away, except on account of fornication [*cf.* Mt. 19:9]. There shall be one law in all things, for the man and for the woman [*cf.* C. 29 q. 2 c.5].

Also, Pope Julius:

C. 3.

Lawful marriage certainly exists between a master and a freed woman.

Some ask whether or not it is a lawful marriage if someone has given his slave girl her freedom and united with her in matrimony. We, therefore, resolve this ancient doubt and declare such marriages lawful. If marriage is entirely made by consent, there is nothing impious or contrary to the law in such a union. Why would we think that the said marriage should be prohibited?

Part 2

Gratian: *Reply to the foregoing: It is not denied that a free woman can*

marry a slave, but, if his servile condition was unknown, he can be freely put away when his servile status is discovered. What the Apostle [1 Cor. 7:39] and Pope Julius [C. 29 q. 2 c. 1] say should be understood to concern those whose condition was known to both.

The woman did not know this man's condition. Therefore, these authorities do not compel her to stay with him, so she is free to leave or stay with him.

Hence the Council of Verberie, at which King Pepin was present, legislated, at c. 6:

C. 4.

On one who takes a slave girl as a wife thinking her to be free.

If any free man takes another's slave girl as his wife, thinking that she is free, and this woman is later discovered to be enslaved, he may redeem her from slavery, if he can. If he cannot, he may take another wife, if he wishes. But if he knew she was a slave, and still thought highly of her, he must later keep her as his lawful wife. A free woman must do likewise with another's slave.

Also, from the same, c. 8:

C. 5.

A woman cannot lawfully send a man away if she married him knowing he was a slave.

If a free woman takes a slave, knowing him to be a slave, let her keep him, for we all have the same Father in Heaven. There shall be one law for the man and for the woman [*cf.* C. 29 q. 2 c. 2].

Also, Gregory, [in [Register], *V, I, to Bishop Fortunatus]*:

C. 6.

One who has proved himself free at law cannot be sent away because of servile status.

The bearer of this letter came here last year with her mother, compelled by litigation. Your Fraternity has prudently discovered that her husband, your priest, dismissed her from union with him because of her servile status. The woman and her mother assert that, in this case, you have promised, if she can with God's help prove that she is free, you will restore her marriage.

Let Your Fraternity know that, with God the Author of Freedom's guidance, she has proved that she is free, without any suspicion of slavery. Now that you know this, we order you to restore her to her husband without delay, and to prevent him from advancing other reasons to eject her. If you, contrary to our expectations, fail to do this, or he delays receiving her, know that we will correct it with severe punishment.

Gratian: *When it says [C. 29 q. 2 c. 5], "Knowing him to be a slave," it is understood that, if she did not know he was a slave, she would not be compelled to stay with him. So, when one is deceived as to person or condition, one need not adhere to the one through whose fraud one was deceived.*

But, if she received a free man, and he, as an excuse to withdraw, made himself someone else's slave, he cannot send his wife away, nor can she be enslaved on account of the marriage bond.

Hence in the Council of Trebur:

C. 7.

A man who received a woman while he was free may not abandon her by means of a deceitful status change.

It has been reported to the Holy Synod that a certain free man received a free woman as his wife and, after procreating children, he made himself another's slave to procure a divorce. It is asked if he must keep the woman, and, if he does keep her, must she also be enslaved, in accord with secular law.

It is decided that he may not send the woman away. Nor, in accord with Christ's law, should the woman be enslaved, because he made himself a slave without her consent, and she took him as husband when he was free.

Gratian: *There is also a question as to whether there is a marriage if one man's slave takes another's slave girl.*

Legislation of the [Second] Council of Châlons-sur-Saône, [c. 30], *treats this:*

C. 8.

The authority of their masters cannot annul the lawful marriages of slaves.

We have heard that certain men, with amazing presumption, annul the lawful marriages of their slaves, ignoring the words of the Gospel [Mt.

19:6], "What God has joined together, let no man put asunder." So we declare that the marriages of slaves cannot be annulled, even if they have different owners. Rather, preserving the unity of marriage, let them serve their different owners. This is to be observed when the marriage is a legal union with the owners' consent.[1]

The case comes from *the* casebook of the law school of the University of Bologna. The first version of the book was in use by 1139. In round numbers, 1150 may be taken as a time when it was current. It is not only an old casebook. It is a remarkably durable one. It was a major resource for canon law until 1917 when the Code of Canon Law was issued by Benedict XV. It had a run of not quite 800 years. As the author of a casebook myself, I'd be happy if my book would last one-tenth this time.

Why was it so durable, so significant? Not exactly because of the reputation of its reputed author, Gratian. No one knows who Gratian was. The Camaldolese monks, who in the seventeenth century wrote the history of the University of Bologna, claimed Gratian was a Camaldolese. He has also been identified as a bishop and as a layman. He remains a mystery, known only by his remarkable book. It is the book, and the teaching method that it embodies, that have made Master Gratian celebrated and best demonstrate the character of the first Catholic law school.

It is, then, not to the teacher but to his book and the case taken from it that I turn to show what a Catholic law school—the preeminent Catholic law school—was like in 1150, the point at which Bologna begins to produce men trained in canon law.

You will note right away that the case is a hypothetical. The term was not in vogue, but the putting of hypotheticals as a teaching device is standard in the thirty-six cases that form the heart of Gratian's book. Like many law professors' hypotheticals, this one is a bit strained in order to bring out the points the professor wants to make. It is strained but not fantastic. It does make one assumption that is contrary to life in our day but not to life then: that a woman would want to marry a man she hadn't seen. Clearly in 1150 we are in a society where the nobility does go in for arranged marriages, the arrangements can be made sight unseen, and consequently there is room for deception when the expected spouse is replaced by an imposter.

There is at work in the hypothetical a second social fact not present in

1. C. 29, *reprinted in* CORPUS IURIS CANONICI, 1091, 1091-96 (E. Friedberg ed., 1959) (translated by John T. Noonan, Jr. and Augustine Thompson, O.P.).

our world: society is divided into free and slave. Being a slave is not simply a social fact but a legal one. The status of a slave is, by law, a status where most of the legal attributes of personhood are absent. This state of affairs is the legacy of over one thousand years of Roman law and the universal acceptance of slavery is part of the social structure.

The hypothetical is posed with seven selected facts. The woman is of noble birth. She accepts a specific proposal of marriage. An imposter appears, who takes her as a wife. The real fiancé arrives. She wants to back out of her mistaken consent. She now also discovers that the imposter was a slave. On this basis two legal questions are posed with great clarity: (1) Was she married? and (2) Discovering that the man is a slave, is she free to disavow the marriage?

The discussion opens by reference to Roman law, always an important element in a Catholic European law school. The teaching of what was a new academic subject, canon law, had evolved at Bologna from the teaching of Roman law that had begun by 1100.[2] Theology is a background assumption. The canon law teacher was a theologian on his way to becoming a lawyer.[3] Theology says that a marriage is indissoluble. Theology does not say what a marriage is. To answer that question, the teacher and his students have to turn to human experience. The most accessible experience is incorporated in the familiar law of imperial Rome. Gratian draws on this law in two ways, to define marriage as a joining "in order to keep an undivided way of life" and to announce that marriage is made by mutual consent.[4] These foundational propositions plunge him into his first problem: consent, as Justinian's Digest declares, requires that those consenting "perceive the same thing."[5] If a party is in error as to the thing perceived, there cannot be consent. The woman, mistaken as to the man she was marrying, is not married. A somewhat different case is thrown in as a reinforcing analogy: a layman ordained by a man he thinks is a bishop remains a layman if in fact the ordainer is not a bishop.

Now Gratian complicates the argument, as law professors will. With-

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2. *See generally* 1 HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 98-99, 112-13 (F.M. Powicke & A.B. Emden eds., Oxford University Press 1936).

3. John Van Engen, *From Practical Theology to Divine Law: The Work and Mind of Medieval Canonists, in* PROCEEDINGS OF THE NINTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 873, 879 (Biblioteca Apostolica Vaticana ed., 1997).

4. *See* C. 29 q. 1, *reprinted in* CORPUS IURIS CANONICI 1091 (E. Friedberg ed., 1959).

5. *See generally id.* (citing 2 THE DIGEST OF JUSTINIAN, Book 14 (Theodor Mommsen et al. eds., 1985)).

out citation of authority, he suggests that if a man marries a woman in error as to her chastity, he may not get out of the marriage on the ground of mistake. Following up the suggestion, Gratian announces that there are four different kinds of error. Where he gets these categories from is not clear; he imposes them as obvious; and, of course, like many astute law professors, he has already inserted his solution in his categories.

The four kinds of error are as to person, fortune, status, and quality. As is apparent on very little inspection, these are overlapping and not very stable categories. They invite debate. They are the tools that Gratian appears ready to use. However, he moves to two commercial examples, one of which involves fraud. If you intend to buy gold and are given yellow ore instead, you did not consent to the purchase. The mistake is as to matter. It vitiates your consent. The sudden movement of Gratian's thought goes to an example which is treated as offering a decisive analogy with mistake as to person—this sudden movement is as though you were in the classroom hearing a professor brimming with ideas replace one idea with a better one that has just come into his mind.

The mind of the law professor, who is also well-read in Scripture, then wanders off to a biblical case set out in Genesis. Jacob has agreed to serve Laban seven years, at the end of which time Laban will give him his younger daughter Rachel in marriage. Jacob has looked both girls over and found Rachel distinctly better looking than her elder sister, Leah. As the story goes in Robert Alter's excellent modern translation:

> [a]nd Jacob served seven years for Rachel, and they seemed in his eyes but a few days in his love for her. And Jacob said to Laban, "Give me my wife, for my time is done, and let me come to bed with her." And Laban gathered all the men of the place and made a feast. And when evening came, he took Leah his daughter and brought her to Jacob, and he came to bed with her.[6]

The story assumes, but does not say, that after the feast Jacob was too drunk to know the difference between two sisters he'd seen for seven years and whose looks he had enthusiastically compared. In the morning he's naturally upset. Laban explains that "it's not done thus in our place, to give the younger girl before the firstborn," but he stipulates that if Jacob finishes out the bridal week with Leah he can have Rachel, too.[7] Jacob agrees. In this polygamous world, a second wife is no problem. In fact he has five sons from her.

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6. GENESIS: TRANSLATION & COMMENTARY 154 (Robert Alter trans., 1996).
7. *Id.* at 155.

What is the relevance to Gratian of this tale which, in passing, conveys a recognition of both beauty and love as major motives for marriage, approves parental disposal of daughters in marriage, takes polygamy in stride, and is ambiguous about Laban's deception? In a later case, Gratian will defend the proposition that marriage must be made by the free will of the man and woman. Here he doesn't bother to look at the parental role, nor does he pause to examine the consent a blind-drunk Jacob could have given to Leah. He picks up the story as a kind of biblical ornament to his legal exposition and imagines a student asking how Jacob was married to Leah when he thought he was in bed with Rachel. The question is answered with ease by creation of two new categories, antecedent consent and subsequent consent. After Jacob acquiesced in Laban's request to stay the bridal week with Leah, he is assumed to have knowingly consented to her as a wife. One side problem remains: when they first had intercourse, weren't they fornicators? It's a question a mischievous or zealous student might well raise. Gratian's answer is no. Jacob thought she was his wife—he treated her "with marital affection," a key canonical concept describing the state of mind and feeling distinguishing conjugal relations from lust. As for Leah, she thought she was doing the right thing. The digression permits the teacher to touch on the immorality of sex without marriage.

A case of incest rounds out the digression. A sister creeps into the bed of her sister's husband. The assumptions have to be that the wife is away and that, again, we have a husband too soused to know the difference. The lascivious sister-in-law is punished by being denied the right to marry anyone; the husband is excused because of his ignorance. This case doesn't materially advance discussion of the hypothetical. It seems to enter the professor's mind by a kind of gossipy association of ideas, one story of ignorant mistake leading to another such story dealt with by law.

The teacher returns to the central question of mistake as to person, and the teacher now shows his interest in, and knowledge of, theology. He knows from St. Paul that the devil transforms himself into "an angel of light."[8] Suppose, so transformed, the devil asks an unlettered one if he wishes to share his happiness, does the answer Yes mean an acceptance of hell? Similarly, if a heretic convinces a Catholic that the heretic's beliefs are those of Augustine, Ambrose, or Jerome, does the Catholic consent to the heresy or to what the Catholic believes to be the Catholic faith? These questions are rhetorical. They emphasize that error can de-

8. *See* 2 *Corinthians* 11:14.

stroy true consent. They are not strikingly apropos to the case at hand, branching off as they do in the direction of good faith as a defense to heresy. As used by Gratian, the questions are meant to reinforce the argument that the woman is not married.

There is, however, a further wrinkle, illustrated by both ecclesiastical and secular law. If a priest accepts a prelacy thinking that it is well-endowed and it is not, he cannot back out. If you buy a field or vineyard thinking it is very fruitful and it turns out to be infertile, you are stuck. These errors are labelled errors of "fortune or quality."[9] By the same token, Gratian moves quickly to say, if a woman thinks a man is rich and he turns out to be poor, she can't get out of the marriage. It's just the same, he says again, as to a man who think he's married a virgin, and the bride turns out to have been seduced or to be a prostitute. No authority is cited for any of these propositions: ecclesiastical, commercial, or matrimonial. They are put forward as matters of common knowledge and acceptance.

After all these illustrations, analogies, distinctions, and categories, what is Gratian's answer to his first question: Was the woman married to the imposter? One way to read him is to go back where he says error as to person is different from error as to fortune. On that reading the woman is not married when she made a mistake as to person. But another reading is possible: Gratian has left the matter open. He has no decisive summing up. His final illustrations are of serious mistakes that do not vitiate consent. He offers no principled argument for his different categories, which could collapse into each other. He has started an argument. He has left his students to finish it.

Let's look at Question II. It takes us at once into a fundamental subquestion: can a slave ever marry? As to that question, Roman law had a simple answer: no. A slave did not have the rights and capacities of a person. If a slave had a sexual relation with someone, it was "a thing," nothing more. You will observe that Gratian, so careful to cite the Institutes and Digest of Justinian in answering Question I, makes not the slightest acknowledgment of Roman law here. "The Church lives by Roman law"–was a maxim current in Gratian's day.[10] But the maxim does not always hold. Without apology, without argument, with the sovereign freedom of one who is the expositor of the law of the Church, he

9. *See* C. 29 q. 1, *reprinted in* CORPUS IURIS CANONICI 1092 (E. Friedberg ed., 1959).

10. *See* R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 17 (1996) (stating that the aphorism "*Ecclesia vivit lege Romana*" developed because "the church had lived according [to] the Roman law during the early Middle Ages").

will decide the question of slave marriage uninhibited by secular law.

His first thought goes very far, so far that, if he sticks to it, the status of the slave disappears in canon law. In Christ Jesus, as St. Paul has instructed the Colossians, there is neither Jew nor Gentile, neither slave nor free.[11] If there are no slaves in Christ, how can slave status be a bar to matrimony? Gratian enlarges on the implications of his citation of St. Paul by two more quotations from the same authority speaking to the Corinthians specifically about marriage and setting no restriction as to the freedom of all Christians to marry. The scriptural foundation of Gratian seems solid.

Gratian proceeds with what is the common way of answering questions in his book—not by the free ranging discussion he engaged in answering Question I, but by citing a series of legal authorities arranged in short chapters with a summarizing headnote at the start of each chapter. He begins with three rulings by popes that slaves may marry validly. One of the rulings acknowledges an "ancient doubt" on this point.[12] None of them acknowledge that they go in the teeth of Roman law. They were, in their time, revolutionary without even mentioning the authority they repudiated. In Christ, the slave can receive the sacraments, the slave is eligible for salvation, the slave is a human being. On these capital points Christian law is firm. Gratian, taking the citations from earlier collections of papal pronouncements, does not attempt to date them or to provide any historical context. Without hesitation, he sees the rulings as the undisputed canon law. The law as papally proclaimed even encompasses the delicate case of a man marrying his own slave, although it is assumed in the case presented that the man will first emancipate and then marry her.

In the face of these sweeping authorities, Gratian creates a doubt by returning to the hypothetical where the free person did not know of the other's servile state. This ignorance, he maintains, changes the situation. The woman is free to stay or leave.

In support of this qualification is a chapter citing a French church council, marked by the irrelevant detail that King Pepin was present. The authority is local. It's enough for Gratian. The next chapter from the same council supports the general rule, implicitly applying it only where there was knowledge of the spouse's slavery. Chapter six, which follows, is a ruling by a major authority, Pope Gregory the Great. It as-

11. *See Colossians* 3:11.

12. C. 29 q. 2 c. 3, *reprinted in* CORPUS IURIS CANONICI 1093 (E. Friedberg ed., 1959).

sumes that priests may marry. It orders a bishop to make a priest of his diocese and to take back as a wife a woman he had dismissed because he thought she was a slave. The pope rules that he, the pope, has found her to be free, so the priest must have her back. The implication is that, if she had been found to be a slave, she would have lost her marriage. The placing of this decision in Gratian implicitly reads the decision as one where her husband married her believing her to be free. The decision thus lines up with the local French council. At this point Gratian himself concludes that error as to either person or status leaves the person who was deceived free to leave the deceiver. Slave status remains a status of importance in Christian law.

Chapter seven goes on to deal with a desperate attempt to escape marriage: a married man enslaves himself to another man and contends that his marriage is over. Not so, says the local Council of Trebur: he's still married and, moreover, his wife remains a free woman. Gratian's headnote stamps the whole maneuver as a fraud to annul the marriage.

Finally, chapter eight deals with the marriage of a slave to a slave. It is valid, according to the second council of Châlons-sur-Saône: God has joined them together; no man, even a master, may separate them. But there's a catch. The master, or masters if there are two different owners, must first have consented. Their consent makes the marriage legal. Only if legal, does it become inviolable. If inviolable, it survives even though each of the married pair must serve a separate owner.

Having examined in this detail a single case studied at Bologna in 1150, what can we say of the first Catholic law school? The study of law was, at least in part, the study of hypotheticals, with the power of hypotheticals to select and isolate significant legal issues and the weakness of hypotheticals that they lack the rich concreteness, the true mindbinding complexity, of real cases. The hypotheticals were the basis for questions that opened up substantial areas of law in a penetrating way. The questions also turned out to be convenient pegs on which to hang a variety of authorities.

The form paid off in the organization of authorities around a question. As the form also permitted digressions, the student was given a glancing look at problems and possibilities not immediately germane to the question asked. Priests can marry validly, so Gregory the Great indicates. Gratian doesn't pause to set a context. Believers in heresy may be in good faith. Gratian doesn't stop to ask when. Bridegrooms may get so smashed at bridal feasts that they don't recognize the bride in bed with them. Gratian abstains from comment. Multiple wives were apparently once acceptable to God. Gratian does not note the change in law and

morals. People who commit incest are subject to enormous punishments. Gratian doesn't ask why. An attentive student might be stimulated to think about the rules he knew and their alternatives and the great variations the institution of marriage had known. A great deal of tolerance of human frailties is apparent in Gratian, along with some tolerance of heavy punishments.

The good side of the way Gratian put in authorities that were sometimes not very pertinent to the question at hand was the breadth of experience referenced. The bad side was the invitation to look at his book, not in terms of questions asked, but in terms of the authorities collected—that is, not to use the authorities as aids to answering Gratian's particular questions, but to remove the authorities from this framework and to cite them on whatever topic they shed light. The possibility was accentuated by the ahistorical presentation. Context was not usually provided for the canons he cited only as so many relevant rulings. In short, the temptation was to use Gratian as a quarry, taking from the 4,000 authorities he used any building blocks you wanted.

The difference is captured by the difference in the two titles by which the work has been known. Gratian called it *Concordia discordantium canonum, A Harmony of Unharmonious Canons,*—a title wonderful in its analogy with music where harmony can come from dissonance, and a title forthrightly announcing that the legislative enactments of the Church were not in harmony and needed the work of scholars to be brought into working order. The other title was *Decretum, The Decree*—a wooden title suggesting that Gratian set out "the law" plain and simple. Over the centuries, treatment of the book as *The Decree* became common. With such usage there was lost the living spirit of the law school as it existed in Bologna in 1150.

In that school, as Question I of Case Twenty-Nine illustrates, authority was subject to analysis. "Question Authority" was a favorite bumper-sticker of the 1970's in America; it lingers on in a Berkeley nostalgic about the days of the free speech movement. Questioning authority is also Gratian's method—a method that discreetly and forcefully achieves this result by pitting one authority against another. A free-wheeling dialogue is created. Gratian's method of answering his questions is argumentative. He states reasons, makes distinctions, creates categories, draws lines, poses analogies. As to authority, theological principle is present, but in the background not the foreground of the discussion. Roman law is used when helpful, and absolutely ignored as if nonexistent when contrary to Christian law. Scripture is cited as commanding a result, but Scripture is qualified when it appears to lead to a result the teacher does

not approve. "You always can imply a condition in a contract," Holmes has written[13] and you can always imply conditions to the apparently apodictic announcements of the Bible. Gratian, a master teacher, was a master of such implied qualifications, tempering absolutes to custom.

Ecclesiastical authority is also invoked, again with freedom. A great pope like Gregory is put on a par with a couple of provincial councils from France. Gratian uses the authorities as chips to raise a doubt, bolster an argument, pose a paradox. He does not stand in awe of them.

As important as authority is practice–that is, what Gratian appears to see as so obvious, so taken for granted, that it needs no authority for support—for example, the proposition that you cannot get out of a marriage because you were mistaken as to the bride's chastity. The proposition is neither backed by a citation nor argued for, except by classifying the error as an error of quality. It is the way things are. Unarticulated, and perhaps only dimly apprehended, is the sense operating in the background of the teacher's mind that, if you let mistake become a major reason for dissolving a marriage, you will not have many indissoluble unions.

Hence, it is not really explained in the text why errors as to person or as to status prevent the bond from being indissoluble, while other errors, conceivably of greater moment to the parties, do not. If a slave may marry, why is a mistake as to a spouse's status as a slave different from a mistake as to his wealth, his integrity, his mental capacity, or his chastity? You may say that in a society where slavery exists, the mistake is of such a social magnitude that the mistaken spouse deserves a break; but it's not too difficult to think of other cases—say the spouse is a homosexual—where an analogous argument can be made and the category of a status mistake asserted.

Questions like these are not pursued in Gratian's text, but they are present in the material presented and are invited by contemplation of it. Mistake as to person as a reason for dissolution is the most interesting possibility of all. On its face, mistakes as to person will only occur when marriage is contracted at a distance. In my examination of decisions of the Roman Rota, I found only one application of the rule. It came from French Indo-China before World War I. An elderly widower, wanting to remarry, heard of a beautiful young maiden up river. The widower sent his son to propose on his father's behalf. The son dutifully went. The girl turned the father down. Mortified at his failure in his filial mission, the son negotiated with another village girl to return with him to be his

13. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

father's bride—only this one was old and ugly. Back in his home village, the son told his father that he'd won for his father the girl his father had heard about and wanted. Meanwhile the son carefully kept the proposed bride under wraps in a local convent. The day of the wedding she went to the church heavily veiled. The father became aware of her age and ugliness only after he had given his consent to marriage before the priest. Like Jacob, he was shocked and disbelieving that he'd married her. On these facts, the Sacred Roman Rota held that the father had made a mistake as to person. The marriage was annulled. You will note that the identity of the woman was at issue, but the important facts about her were her age, looks, and her qualities, not her name.[14]

Given modern psychological explorations of what makes a person, mistake as to person is a category that still has potential for development beyond the odd case from Indo-China. It is, I suggest, a characteristic of Gratian's method that his questions and his categories are open-ended and durable.

The largest social question raised by Case Twenty-Nine was the compatibility of slavery with the Gospel of Jesus Christ. It is characteristic of Gratian that he does not press the question to the point of saying slavery is a sin. He will only go so far as to say slaves can marry, and even there he, or perhaps an editor, unexpectedly added, only if their owners consent. From our perspective it's a timorous exposition of the demands of Christianity, especially so today when John Paul II can issue an encyclical, *Evangelium vitae*, describing slavery as intrinsically evil. Christians of Gratian's day did not regard slavery as intrinsically evil but as a customary division of society, sanctioned by law, practiced by churchmen and religious orders, and mitigated at least by the availability of Christian marriage. You can see in Gratian's teaching at Bologna how the fundamental question of human freedom for all was in front of him and how, bound by convention and custom, he failed to address it.

Pondering this stupendous failure, we can, I think, draw a question for our Catholic law school today. Is there any realm or areas that we avoid, any line of thought that we do not pursue, because to do so would put us into too much conflict with the customs of the day? I ask, not meaning now to propose an answer.

The overall impression of the first Catholic law school is of opportunities missed, yes; of perfection not achieved, yes; but also of argument,

14. *See* JOHN T. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA 332-33 (1972) (citing *Southwestern Ce-Li*, 5 Decisiones Sen Sententiae 242 (April 17, 1913)).

reasoning, and reflection filled with vitality. Authority is used to challenge authority. The teacher puts questions and gives illustrations that challenge convention. The canons clash. The resolution is with the school.

From documents after 1150, we learn that students organized the school; masters were adventurers who offered their teaching to those who would pay them.[15] The Registry of Bologna has a record of oaths given by masters not to teach in another city.[16] There were no admission requirements, no examinations, and no dean. The school did not consist in any set of buildings we know of. The only information on how teachers and students lodged is a decree of Pope Clement IV in 1189 excommunicating students or masters who bid up the rent of a building already occupied by students.[17] The students and the masters were typically treated as a unit; so a decree of the Emperor Frederick Barbarossa in 1158 had recognized them.[18]

The school made canon law the equal, if not the superior, of the greatest legal system extant, the Roman, borrowing from its forerunner judiciously. The school trained men who could be lawyers, judges, and administrators in the Church from Dublin to Cracow. The school educated teachers for other universities; the men who taught canon law at Oxford in the 1190's relied on Gratian.[19] The school staffed the Roman curia and on a number of occasions provided a pope with his education. The school made possible a system of law binding Europe together. When, about a century after Gratian had first composed his work, Pope Gregory IX made a new, up-to-date collection of papal decrees, edited as he said to avoid prolixity, duplication, and outright contradictions, he appropriately sent the collection to his "beloved sons, the doctors and students" of the law school at Bologna.[20]

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15. *See* RASHDALL, *supra* note 2, at 149.

16. *See* COMMISSIONE PER LA STORIA DELL'UNIVERSITA, 1 CHARTULARIUM STUDII BONONIENSIS: REGISTRO GROSSO 3 (Presso La Commissione Per La Storia Dell'Universita Di Bologna 1909).

17. *See* X 3.18.1, *reprinted in Decretales Gregorii P. IX*, *in* CORPUS IURIS CANONICI 519-22 (E. Friedberg ed., 1959).

18. *See* RASHDALL, *supra* note 2, at 144 & n.1.

19. *See* James A. Brundage, *The Rise of Professional Canonists and Development of the Ius Commune*, ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTELUNG LXXXI 34-36 (1995).

20. Gregory IX, *Rex Pacificus* (Sept. 5, 1234), *reprinted in Decretales Gregorii P. IX*, *in* 1 CORPUS IURIS CANONICI 4 (E. Friedberg ed., 1991).