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Charles Donahue, Jr.

The Case of the Man Who Fell into the Tiber: The Roman Law of Marriage at the Time of the Glossators*

by CHARLES DONAHUE, JR.*

"A certain man espoused a woman by words of the future tense. At length he sent for her, and she was led to his house by his friends. Before they had lived together as husband and wife, he fell into the Tiber and was drowned. It is asked: 1) are those truly married who have not had intercourse? 2) must she, a virgin, mourn him as his widow? 3) can she recover her dowry as his widow?"

Although the subject matter of this passage, including a certain flair for the bizarre, suggests canon law writing of the classical period (12th and 13th centuries), the passage is, in fact, from a writer on Roman law of roughly the same period. It is a paraphrase of Vivianus Tuscus'[1] *casus* on D.23.2.5-7,[2] which in turn reports the

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† This paper was originally intended to appear in a *Festschrift* in honor of Stephan Kuttner. It is still dedicated to him, if he will accept it. Why it does not appear in the *Festschrift* involves a story of misfortune and misunderstanding unrelated either to the paper or the dedicatee.

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* Professor of Law, University of Michigan.

1. For Vivianus and his *casus*, see *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 1 *Mittelalter (1100-1500)*, ed. Helmut Coing (Munich, 1973), 219-20, 328, hereafter cited as Weimar (after Peter Weimar who did the section on the glossators), *Handbuch*. My rendition of the *casus* suppresses the fact that Vivianus calls the woman Berta and the man Cinna!

2. For citations to parts of the *Corpus Juris Civilis* I have employed the standard system of references. Thus:

I. = *Institutiones Justiniani*, followed by book, title, and section numbers;
D. = *Digesta seu Pandectae*, followed by book, title, fragment, and section numbers;
C. = *Codex Justinianus*, followed by book, title, law, and section numbers;
Nov. = *Novellae Constitutiones Justiniani*, followed by novel, chapter, and section numbers.

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responsum of Cinna, a jurist of the Roman Republic, to essentially the same set of questions. Cinna responded to the second and third questions, and, by implication, to the first as well, in the affirmative.

The response raises more questions than it resolves. If intercourse is not required for a valid marriage in Roman law, what is? Is some form of ceremony necessary? *Must* the woman come to the man's house? Who must consent to the marriage? May any man marry any woman, or are there limits on the capacity to marry? If so, what are they?

In the case of the section numbers, the first section is numbered ".pr," the second ".1," the third ".2," etc. Where no further indication is given, the reference is to the "Berlin stereotype edition": Paul Krüger, Teodor Mommsen, Rudolf Schöll, Wilhelm Kroll, eds., *Corpus Juris Civilis*, 3 vols., 1, 12th ed. (Berlin, 1911), 2, 9th ed. (Berlin, 1915), 3, 3rd ed. (Berlin, 1904), all many times reprinted. For the "vulgate" edition of the glossators, I have employed *Corpus iuris civilis iustinianei cum commentariis*, 6 vols. (Lyon, 1612), and have compared it for the Accursian gloss to the edition of Baptista de Tortis: *Digestum Vetus* (Venice, 1488) = Corpus Glossatorum Iuris Civilis (CGIC) 7 (Turin, 1969); *Digestum Infortiatum* (Venice, 1488) = CGIC 8 (Turin, 1968); *Digestum Novum* (Venice, 1488) = CGIC 9 (Turin, 1968), *Codex* (Venice, 1488) = CGIC 10 (Turin, 1968); *Volumen* (Venice, 1489), = CGIC 11 (Turin, 1969). Where the early printed editions are cited, I have employed the convention of following the citation to the Roman law text with an indication of the material cited, followed by the date of the edition and the folio or column number where the material is to be found. Thus, the *casus* referred to in the text is D.23.2.5, *casus* (1612), col. 2137, which is the *casus* on *Digest*, book 23, title 2 (*de ritu nuptiarum*), fragment 4 (*mulierem absenti*), to be found in *Corpus juris iustinianei*, 1 (Lyon, 1612), col. 2137.

In quotations from manuscripts and early printed editions, I have extended standard abbreviations, modernized spelling and punctuation, and corrected obvious errors without comment. Cross-references found in the commentary have also been modernized and placed in square brackets. For example, D.24.1.66. pr, v° *consensu* (= the gloss on the word *consensu* as it appears in the cited text) (1488), fol. 350r, reads: "Consensu. s. legitimo & de presenti. sed si hic sit dubium an sit facta ante matrimonium videtur. vel post. dic videtur. C. de dona. ante nup. l. cum in re," while D.24.1.66.pr, v° *consensu* (1612), col. 2246, reads: "*consensu.* s. legitimo, & de presenti. sed si hoc sit dubium an sit facta ante matrimonium, vel post, dic: *ut C. de dona. ante nup. l. cum in re. Accur.*" I have rendered this below (text at n.141) without comment but citing the 1612 edition, as "scilicet legitimo et de presenti, sed si hic sit dubium an sit facta ante matrimonium vel post, dic ut [C.5.3.6]."

In quotations from modern critical editions, I have not departed from the editor's text (including printing conventions) without so noting, except that I have again changed all cross-references to modern form and put them in square brackets.

Citations to the text of *Corpus Juris Canonici*, ed. Emil Friedberg, 2 vols. (1879; repr., Graz, 1959) are in standard form. References to the gloss on Gratian's *Decreta* are in the same form as the Roman law glosses and refer to *Decretum D. Gratiani* (Venice, 1572).

For the canon law, and because of the Church's virtually exclusive jurisdiction over marriage cases, for Western medieval law generally, Alexander III answered these questions in a series of decretals dating from the 1170s. The rules derived from these decretals may be stated quite simply: (1) Present consent freely given between a man and a woman who are capable of matrimony makes a valid marriage, which marriage, except in the most unusual circumstances, bars all other marriages while the parties are living. (2) Future consent freely given between parties who are capable of matrimony makes an indissoluble marriage, if that consent is followed by intercourse between the parties. (3) With a few exceptions, any single Christian man may marry any single Christian woman without regard to the social position or status of either, provided that neither one is too closely related to the other.[3]

The striking thing about Alexander's rules is not what they require, but what they do not require. Although the Church strongly encouraged couples to solemnize their marriages,[4] between Alexander and the Council of Trent no solemnity or ceremony of any sort was necessary to contract a valid marriage.[5] There did not even have to be witnesses to the exchange of consent if both parties admitted that it took place. Further, in an age which was characterized by arranged marriages and elaborate provisions in the secular law for feudal consents to be given to marriages, it is striking to find that Alexander required the consent of no one other than the parties themselves for the validity of the marriage.[6] Finally, in an age characterized by class consciousness, it is surprising to discover that the only significant restrictions on the capacity of persons to choose marriage partners were the rules prohibiting the marriage of close relatives, and recent research would seem to indicate that these rules were of considerably less practical importance than was once thought.[7]

Alexander's synthesis resolved a debate among the schools. The Bolognese, on the basis of Gratian, distinguished between

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3. See Charles Donahue, "The Policy of Alexander the Third's Consent Theory of Marriage," in *Proceedings of the Fourth International Congress of Medieval Canon Law*, ed. Stephan Kuttner, Monumenta Iuris Canonici, Series C: Subsidia 5 (Vatican City, 1976), pp. 251-2, 280-1, and sources cited.

4. Donahue, "Policy," pp. 258-9 & n. 34; Michael M. Sheehan, "Marriage and Family in English Conciliar and Synodal Legislation," in *Essays in Honour of Anton Charles Pegis*, ed. J. Reginald O'Donnell (Toronto, 1974), 213-14.

5. Donahue, "Policy," pp. 259-60.

6. Donahue, "Policy," pp. 256-7, and sources cited.

7. See R. H. Helmholz, *Marriage Litigation in Medieval England*, Cambridge Studies in English Legal History (London, 1974), pp. 77-87.

matrimonium initiatum, and *matrimonium ratum* or *perfectum* and argued that marriage was not ratified or perfected until the parties had intercourse.[8] The Parisians, on the other hand, employed Peter Lombard's distinction between *de futuro* and *de presenti* consent and argued that present consent alone made an indissoluble marriage.[9]

I have argued elsewhere that the synthesis of the law given above is Alexander's, not Gratian's or Huguccio's or Innocent III's, despite the significant contributions that each of these figures made to the synthesis.[10] I have also argued on the basis principally of English ecclesiastical court records that Alexander's rules had the effect of breaking down the influence of family and feudal lord on the choice of marriage partners and that Alexander anticipated this effect and may even have designed his rules to achieve it.[11] I shall not repeat those arguments here; my concern here is to place Alexander's decisions in a broader setting by examining the Roman law of marriage in the period surrounding Alexander's time, the period of the Roman law glossators, roughly from the death of Irnerius († c.1130) to the death of Accursius († c.1260).[12]

There are several reasons why the Roman law of marriage in medieval Europe is a matter of concern: For example, it has been suggested that Alexander's rules are derived directly or indirectly, consciously or not, from Roman law.[13] I hope to show that while

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8. For Gratian's views on marriage generally, see Willibald M. Plöchl, *Das Eherecht des Magisters Gratianus,* Wiener Staats- und Rechtswissenschaftliche Studien 24 (Leipzig, 1935); John T. Noonan, "Power to Choose," *Viator* 4 (1973), 419-34.

9. See Jean Dauvillier, *Le Mariage en droit classique de l'Église* (Paris, 1933), pp. 12-13. For the debate between the schools, see Donahue, "Policy," pp. 255-6, and sources cited.

10. Donahue, "Policy," pp. 253-6, 271-3, 280-1, and sources cited.

11. Donahue, "Policy," pp. 260-79.

12. As is well known, the texts of the *Corpus Juris Civilis* were intensely studied in the twelfth and thirteenth centuries by a small group of scholars centered around Bologna who, because of their characteristic marginal notes, have come to be known as "the glossators." Their efforts, together with that of the scholars of canon law who began to work somewhat later, ultimately formed the basis of the *ius commune* of the later Middle Ages and Renaissance, the body of academic law common to most Western European countries to which the courts would refer, at least in the absence of contrary local custom. Whether the glossators saw this as the ultimate result of their efforts is hard to know, although the popularity of their teaching suggests that to their contemporaries it was of more than "academic" interest. See generally Francesco Calasso, *Medio evo del diritto,* 1 *Le fonti* (Milan, 1954); Walter Ullman, *Law and Politics in the Middle Ages,* The Sources of History (London, 1975).

13. Jean Gaudemet, "Originalité et destin du mariage romain," in *L'Europa e il diritto romano: Studi in memoria di Paolo Koschaker,* 2 (Milan, 1954),

there are some parallels between Alexander's rules and the Roman and while modern scholarship has done much to bring these parallels to light, the differences between Alexander's rules and the Roman are socially, if not doctrinally, more significant than the similarities, and that Alexander could not have known of many of the parallels unless he undertook an independent study of the Roman texts.

Further, the interplay of ideas between civilians and canonists has been the subject of a number of recent studies.[14] I hope to make some contribution to this broader area of concern by showing how the glossators were aware of canon law thinking on marriage from at least the mid-twelfth century. They made use both of Gratian's distinction between *matrimonium initiatum* and *matrimonium ratum* or *perfectum* and of Peter Lombard's distinction between *de futuro* and *de presenti* consent. At times they tried to argue that canon law should adapt itself to the rules of their texts, but after the promulgation of Alexander's decretals they sought to reconcile their texts with the canon law in all but the area that most concerned them—the power of families to dictate the marriage choice of their children.

Finally, by examining the differences and similarities between two of the major schools of medieval law competing for both academic and practical recognition, we may be able to cast some light on what the school which ultimately prevailed—in the case of marriage, the canonic—was trying to achieve. In particular, I hope to show that in the fundamental tension between the marriage partners and their families and lords which characterized medieval marriage law, canon law favored the marriage partners, Roman law their families.

Before we begin, however, let us briefly summarize what we find on the topic of the formation of marriage in the glossators' chief text, the *Corpus Juris Civilis,* looking at it as they did, not with the tools of modern historical scholarship, but as "the law," to be studied and formed into a coherent whole.

542-50. My concern here is only with the few paragraphs in the article which suggest (but then undercut) a direct influence of Roman ideas on Alexander, a suggestion which the author later seems to reject. Otherwise the article is a marvelously lucid *essai de synthèse.*

14. E.g., Bruno Paradisi, "Diritto canonico e tendenze di scuola nei glossatori da Irnerio ad Accursio," *Studi Medievali,* 3rd ser. 6.2 (1965), 155-287; Gabriel Le Bras, *Droit romain et droit canon au XIII^e siècle,* Accademia Nazionale dei Lincei, Problemi attuali di scienza e cultura 92 (Rome, 1967); Charles Lefebvre, "La Glose d'Accurse, le décret et les décrétales," in *Atti del convegno internazionali di studi accursiani,* ed. Guido Rossi, 1 (Milan, 1968), 249-84; Stephan Kuttner, "Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law," in *Scritti di socilogia e politica in onore di Luigi Sturzo,* 2 (Bologna, 1953), 349-63.

I. THE CONSENT THEORY OF MARRIAGE IN THE *CORPUS JURIS CIVILIS*

A casual glance at the texts of the *Corpus Juris Civilis* on marriage would seem to support the theory that Alexander relied heavily on Roman law. We find a distinction drawn between espousals, the promise to marry in the future, and nuptials, the marriage itself—a distinction roughly parallel to Alexander's distinction between future and present consent.[15] At least one text draws an analogy between marriages and other informal contracts.[16] Further, many texts tell us that consent is a necessary element in marriage,[17] and a few seem to imply that it is the only element necessary to make a marriage.[18]

This seeming simplicity and uniformity breaks down, however, when we come to examine the texts more carefully. The first significant group of texts are those like the case of the man who fell into the Tiber[19] which deny the essentiality of intercourse for making a marriage. In a case involving the application of the rule that gifts between husband and wife are void, it is irrelevant, a text ascribed to Ulpian tells us, that the parties have lived apart for a long time: "For coition does not make marriage but marital affection."[20] Another text ascribed to Ulpian tells us that where a legacy is granted on the condition that the legatee marry, the condition is fulfilled and the legacy owing immediately upon the wife's being led (*ducta*): "For the bedding together of husband and wife does not make nuptials, but consent makes them."[21]

While these texts make it quite clear that intercourse was not necessary to make a valid marriage in Roman law, they do not clearly establish that consent alone was sufficient. The first text does not use the word "consent" at all, but *affectio maritalis* and, a little earlier in the text, *honor matrimonii*—ill-defined concepts in Roman law which may refer to the way in which husband and wife are disposed

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15. D.23.1.1; D.23.2.1; Gaudemet, "Originalité" pp. 515-517, and sources cited.

16. D.20.1.4.

17. E.g., D.23.2.2; D.23.1.11; D.23.1.7.

18. D.35.1.15 = D.50.17.30; D.24.1.66; D.24.1.32.13 ("maritalis affectio"); C.5.4.22; Nov.117.4 ("ex solo affectu," for those not "maximis dignitatibus decorati").

19. He didn't fall into the Tiber in the Roman text: "iuxta Tiberim perisset," for the possible significance of which see below, n.60, but as the glossators realized, it makes a much better story the other way. We will continue to refer to D.22.2.6-.7 as "the case of the man who fell into the Tiber."

20. Author's trans. here and throughout: "Non enim coitus matrimonium facit sed maritalis affectio." D.24.1.32.13.

21. "Nuptiae enim non concubitus, sed consensus facit." D.35.1.15 = D.50.17.30.

toward each other (*affectio*) and behave (*honor*) during the marriage rather than to how the marriage was begun.[22] Although the second text speaks of consent, the condition in the legacy is said to be fulfilled not upon consent, but when the wife is led (*ducta*). And the case of the man who fell into the Tiber speaks neither of consent nor of marital affection, but involves, if the rules described in the preceding fragment of the Digest[23] concerning marriages between absents[24] were followed, a leading of the bride into the house of the groom (*deductio in domum mariti*).[25]

From these texts and others like them,[26] we might conclude that in order for there to be a valid marriage in Roman law, there must be both consent and a *deductio in domum*. Now there can be no question, even if one relies only on the texts of the *Corpus Juris*, that such a *deductio* was a normal part of the Roman marriage ceremony; the standard phrase 'to marry,' *uxorem ducere*, implies as much.[27] Try as we may, however, we can find no text which comes right out and says that the *deductio* is a requirement for a valid marriage. Further, although many texts mention the *deductio*, many do not.[28] On the other hand, there is only one text (D.24.1.66) which states, again in the context of the prohibition on interspousal gifts, that marriage does not begin with the *deductio* (and even this does not imply that the *deductio* is not necessary, simply that the gift rule

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22. See Emilio Albertario, "Honor matrimonii e affectio maritalis," in E. Albertario, *Studi di diritto romano*, 1 (Milan, 1933), 195-210; but cf. Riccardo Orestano, *La struttura giuridica del matrimonio romano*, 1 (Milan, 1951), 200-4, 314-18, and sources cited. Another text using the same terms is D.39.5.31.pr. For a survey of the concept of marital affection in both the Roman law texts and in the medieval canonists, see John T. Noonan, "Marital Affection in the Canonists," *Studia Gratiana* 12 (= Collectanea Stephan Kuttner 2) (1967), 479-509.

23. D.23.2.5. See also D.23.3.69.3.

24. "Marriage between absents" is certainly an awkward phrase, but I know no other convenient way to render *matrimonium inter absentes, mariage entre absents, matrimonio fra persone lontane*, etc. "Proxy marriage" won't do because the Romans did not use proxies. See Jean Bancarel, *Le Mariage entre absents en droit canonique* (Toulouse, 1919), pp. 18-27.

25. For the suggestion that D.23.2.6 means that at least in Republican law the *deductio* was not necessary even for marriages between absents, see Alan Watson, *The Law of Persons in the Later Roman Republic* (Oxford, 1967), pp. 26-7. But see Pietro Pescani, "L'enigma del cosidetto responso di Cinna in D.23.2,6," *Studi Senesi*, 3rd ser. 13 (1964), 131-41. See also below, n.60.

26. E.g., D.23.1.9; D.24.1.32.27; C.5.3.6.

27. E.g., D.3.2.1; D.23.2.22; D.28.2.6.pr. In C.5.18.3, we find the woman leading the man, but in rather extraordinary circumstances. See below, text and n.86.

28. E.g., D.23.2.2; D.23.1.11; Nov.117.4.

becomes operative at the moment of consent), and the rule of this text is contradicted by an imperial constitution (C.5.3.6).

In fact, the many texts in the *Corpus Juris* on this topic will not sustain a consistent interpretation, particularly if we insist on reconciling as well Justinian's novels, in which the *deductio* is noticeably absent, but in which written instruments are required, at least for certain kinds of marriages, and in which marriages are said to be made not by consent, but by *affectus*.[29] On the other hand, with a few exceptions, the texts will sustain the notion that some act is required to indicate that the marriage has become something more than a promise and that something more than concubinage is involved. The question is controverted among Roman law specialists even today, but even if we follow the views of those who emphasize the consensual nature of Roman marriage, we find them admitting that the law required an objectification of matrimonial consent: some kind of factual evidence of the beginning of the state of matrimony beyond simply the exchange of consent before witnesses.[30] In this, then, the Roman rules, despite their ambiguity, stand in contrast to Alexander's.

That the Roman lawyers were able to tolerate this ambiguity is surprising only if we fail to consider that in Roman law relatively few juridical consequences flow from a determination of the precise point at which marriage begins. The prohibition on interspousal gifts seems to be the most important,[31] followed far behind by a series of lesser consequences, the mourning period for widows, the interpretation of private instruments and the availability of the action for dowry being among the ones mentioned.[32] So far as the legitimacy of children is concerned, the precise point of the formation of marriage is of relatively little consequence in a legal system that recognizes adoption, legitimation by subsequent matrimony (at least in the later law),[33] and testamentary disposition. The precise point of the formation of marriage is of relatively little importance for the criminal law if concubinage is also recognized (or at least not punished criminally), and the bond of marriage is of relatively little importance in a legal

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29. Nov.117.4; Nov.74.4; cf. C.5.4.26.1; C.5.17.11.pr; Noonan, "Marital Affection," pp. 482-9.

30. Orestano, *La Struttura*, pp. 162-87, 240-58; cf. Olis Robleda, *El matrimonio in derecho romano* (Rome, 1970), pp. 82-110; Edoardo Volterra, *La Conception du mariage d'après les juristes romains* (Padua, 1940); but see Emilio Albertario, "L'autonomia dell'ellemento spirituale nel matrimonio e nel possesso romano-giustineano," in Albertario, *Studi*, 1:211-28; Ernst Levy, *Der Hergang der römischen Ehescheidung* (Weimar, 1925), p. 70 nn.4-5.

31. D.24.1.32.13; D.24.1.66; C.5.3.6.

32. D.23.2.6; D.35.1.15; D.23.2.7.

33. See Max Kaser, *Das römische Privatrecht*, Handbuch der Altertumswissenschaft X.3.3.2, 2 (Munich, 1975), 200-1.

system in which until quite late, divorce, like marriage, was a matter of consent. Thus, while the Roman jurists were making rules about the formation of dissoluble marriages, Alexander was making rules about indissoluble ones.

When we come to the question of whose consent is required for a marriage, the contrast with Alexander's rules is considerably clearer. "Nuptials," Paul says, "cannot exist unless everyone consents, that is those who come together and those in whose power they are."[34] Now if we take an historical approach to the *Corpus Juris* (something which the glossators emphatically did not do), we can see hints that the power of the *paterfamilias* to withhold his consent to his children's marriages declined as time went on.[35] Already the *lex Julia de maritandis ordinibus* (18 B.C.) forbade fathers from wrongfully preventing their children's (or perhaps it was only daughters')[36] marriages, and an imperial constitution under Septimius Severus (193-211 A.D.) authorized an action *extra ordinem* to compel such fathers to consent to the marriage and grant a dowry (D.23.2.19). We have a text which states that as early as the mid-second century, A.D., a father of a daughter was presumed to consent to her espousal, unless he expressly dissented (D.23.1.7.1).[37] Further, a number of texts emphasize that marriages of sons, even sons in the power of their fathers, cannot be made without the son's consent,[38] and at least one (D.23.1.11) states the same about daughters in power.[39]

On the other hand, there is substantial evidence that the power of choice of daughters was substantially restricted, at least in some periods. A daughter is presumed to consent to her father's choice at espousals, unless she strongly opposes it (*repugnat*); indeed, she may dissent only if the father chooses someone unworthy (D.23.1.12).[40] Further, if a father made a marriage contract on

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34. "Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt." D.23.2.2.

35. See generally Biondo Biondi, *Il diritto romano cristiano*, 3 (Milan, 1954), 1-57; Kaser, *Römisches Privatrecht*, pp. 202-19.

36. Fritz Schulz, *Classical Roman Law* (Oxford, 1951), p. 112.

37. For possible interpolation, see Orestano, *La Struttura*, pp. 208-11, especially nn.549, 556-7.

38. E.g., D.23.1.13; D.23.2.22; C.5.4.12.

39. For possible interpolation, see Ernst Levy, Ernst Rabel, eds., *Index Interpolationum*, 2 (Weimar, 1931), 43.

40. D.23.1.11: "Sponsalia sicut nuptiae consensu contrahentium fiunt: et ideo sicut nuptiis, ita sponsalibus filiam familias consentire opportet: [D.23.1.12:] Sed quae patris voluntati non repugnat, consentire intelligitur. Tunc autem solum dissentiendi a patre licentia filiae conceditur, si indignum moribus vel turpem sponsum ei pater eligat."

behalf of his daughter and then died, this contract is to remain inviolate, even if the girl's tutor or curator agrees to break the contract (C.5.1.4). Even a son, although he cannot be compelled to take a wife (D.23.2.21),[41] will be deemed to have preferred marriage (to offending his father), if he contracts marriage with a woman whom he would not have chosen but for his father's insistent urging (D.23.2.22).[42] Not only was the father's consent to the choice of marriage partner of his children in power necessary, to the point where it seems at times to be his choice and not his child's, but the father of a daughter in power could also dissolve her espousals (D.23.1.10). Even in the later law, he could compel her divorce from her husband *magna et justa causa* (C.5.17.5.pr),[43] and a novel of Justinian's requires that sons and daughters, in power or *sui juris,* obtain the consent of their fathers before divorcing their spouses (Nov.22.19).

An emancipated son may validly marry without his father's consent (D.23.2.25). The texts concerning emancipated women are considerably more complicated and not completely consistent. The two chief late imperial constitutions (C.5.4.18; C.5.4.20), however, imply the following rules: In the marriages of all women under the age of 25, whether they be in power or *sui juris,* virgins or widows, the choice of the father in binding, at least to the extent that the woman cannot make a choice of marriage partner contrary to his judgment. If the father is dead, the woman still must consult with her mother and her relatives, but she may, with the consent of a judge, ignore their advice.

The necessity for parental consent for the marriage of children in power is the only rule about how marriages are formed (as opposed to with whom they may be formed) which is stated in Justinian's *Institutes:* "For both civil and natural reason persuade that this ought to be so: that the command of the parent should take precedence."[44] The contrast with Alexander's rules is obvious.

Not only were more consents required for a valid marriage

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41. "Non cogitur filius familias uxorem ducere." See also C.5.4.14.

42. "Si patre cogente ducit [sc. *filius familias* from the preceding fragment], quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur: maluisse hoc videtur." My rendering in the text reconciles the two passages by taking *cogere* in D.23.1.21 in a different sense from *cogere* in D.23.1.22. For others' views and a somewhat different reconciliation, see Orestano, *La Struttura,* pp. 218-27.

43. The prior law probably allowed fathers to compel, for any cause, the divorce of either sons or daughters in power; see Percy E. Corbett, *The Roman Law of Marriage* (Oxford, 1930), pp. 2-3, 122-5, 239-41.

44. "Nam hoc fieri debere et civilis et naturalis ratio suadet in tantum ut iussum parentis praecedere debeat." I.1.10.pr.

under Roman law than under Alexander's rules, but also fewer people could validly marry. Slaves could not contract a valid Roman marriage. Their relationships were not marriage (*justae nuptiae*), but simply 'shacking up' (*contubernium*). Their children were not legitimate; they could not inherit; they were not in power; and they could not claim dowry. Not only could slaves not marry each other, they could not contract a valid Roman marriage with a free person.[45]

In addition to these rules, there were a number of Roman rules prohibiting marriages across classes and prohibiting marriage because of the performance of some official or quasi-official function. The rules are complicated and not completely discernible from the surviving texts; suffice it to say here that senators and their descendants for two generations were forbidden to marry freedmen or freedwomen; all freeborn persons were forbidden to marry pimps, prostitutes, the freedpersons of the latter, women adjudged guilty of adultery, and actresses;[46] soldiers and officials in the provinces could not marry women of their provinces;[47] and tutors could not marry their wards.[48] Some of these rules were changed by Justin and Justinian,[49] but they show a bias against cross-class marriages and a power in civil authority to incapacitate people from marrying totally alien to Alexander's rules.

II. THE GLOSSATORS OF THE ROMAN LAW AND MARRIAGE

As Fritz Schulz notes[50] a history of the Roman law of marriage in the Middle Ages does not yet exist. I confine myself in this section

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45. I.1.10.pr; D.40.4.59.pr; C.5.18.3.
46. D.23.2.23, .42, .43, .44, .49.
47. D.23.2.63, .65; D.24.1.3.1; D.34.9.2.1.
48. D.23.2.59, .60, .63, .64, .67.
49. C.5.4.23; Nov.117.6.
50. *Classical Roman Law*, p. 108. Orestano, *La Struttura*, pp. 22-39, 52-8, collects a number of important texts, but Orestano is interested in them more for what they tell us of the historiography of the Roman law of antiquity than for what they tell us of medieval law. Piero Rasi, "Il diritto matrimoniale nei glossatori," in *Studi di storia e diritto in onore di Carlo Calisse*, 1 (Milan, 1939), 129-58, was unknown to me at the time I prepared the text. Rasi covers a wider number of issues using fewer texts: the *Summa Trecensis*, Azo, the Accursian gloss, and Tancred, the last of whom, as Rasi recognizes (at 134 n.4), was a canonist not a civilian. I have found it unnecessary to modify anything in the text in the light of Rasi's work (although I certainly would have used his references had I known of the work at the time!). My principal disagreement with him concerns the interpretation of the *Summa Trecensis*, below text at nn.70-74.

The glossators' work on marital property is nicely treated in Manlio Bellomo, *Ricerche sui rapporti patrimoniale tra coniugi*, Ius nostrum 7 (Rome, 1961).

to two of the surprising characteristics of Alexander's rules—absence of ceremony and absence of parental consent—and to the major medieval Roman law texts, most of which are in print. It is possible that further research, particularly in the pre-Accursian glosses, will show the pattern to be different from the one which appears below. Pending further research in unpublished sources, however, what appears below represents, I hope, a valid working hypothesis.

The diversity of views of the glossators of the Roman law on almost every topic is well known. It is surprising, therefore, to find in the published *dissensiones dominorum*[51] but one *dissensio* which concerns the formation of marriage, and that one, whether an action will lie for breach of a contract to marry,[52] does not directly concern us and the Alexandrine rules. The *quaestiones* and *distinctiones* literature[53] also yields little. The relative absence of material on the formation of marriage in these bodies of literature might lead one to the conclusion that the glossators were not interested in the formation of marriage, perhaps because they recognized that it was a topic for canon lawyers not civilians.[54] There is, however, a sufficient amount of material in other types of literature, as outlined below, to suggest that the relative absence of writing on the formation of marriage in the *dissensiones, quaestiones* and *distinctiones* literature must be explained on other grounds. One possible, if somewhat mechanical, explanation is that the glossators confined their discussions of the formation of marriage to certain types of literature (chiefly, as we shall see, to commentaries on D.50.17.30 and D.23.1 and .2 and to *summae* of C.5.4) so that it would be easier for the student to find material on the topic. A further possible explanation, at least for

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51. Gustav Hänel ed., *Dissensiones dominorum* (1834; repr., Aalen, 1964); Vittorio Sciajola, "Di una nuova collezione delle *Dissensiones dominorum* con l'edizione della collezione stessa," *Studi e Documenti di Storia e Diritto* 9 (1888), 247-97; 11 (1890), 417-28, repr. in V. Sciajola, *Studi Giuridici,* Ius 6, 2 (1934), 329-413.

52. Hugolinus, *Dissensiones dominorum* 261, in Hänel, *Dissensiones,* pp. 430-1. See also idem, 264, in idem, pp. 433-4: "an poena mulieris, intra annum luctus nubentis, hodie cesset?"

53. For the printed collections, see Weimar, *Handbuch,* pp. 222-6, 229-31. Emil Seckel, "Distinctiones glossatorum," in *Festschrift für Fedinand von Martitz* (Berlin, 1911), p. 340, prints a distinction from a ms. of the *Institutes* at I.1.10 (Bamberg Jur. 3, fol. 5v), "nupcie alie permisse, alie prohibite," which appears to be a very early form of a *distinctio* which was to appear in a number of works with which we shall deal. See below, text at n.69, and text at nn.205-8.

54. Hints at such an attitude may be found in some of the simplified types of literature. For example, an Anglo-Norman practice book of the early thirteenth century (Weimar, *Handbuch,* pp. 208-9) says: "legitimum matrimonium hodie dicimus de iure poli, non de iure fori." Max Conrat (Cohn) ed., *Das Florentiner Rechtsbuch* (1882; repr., Aalen, 1969), p. 4.

the absence of treatment of this topic from the *dissensiones* and *quaestiones* literature, is that at no given time was there anything sufficiently controversial about the formation of marriage to warrant its inclusion in these types of literature.

As we shall see, prior to Alexander's decision the glossators quite consistently held that marriages were formed by consent followed by some outward manifestation of the change of status, normally a *deductio* (or *traditio* or *traductio,* as they sometimes called it)[55] and that the required consent was the consent of both the marriage partners and their fathers, if the marriage partners were in power. After Alexander's time this consensus broke down, and a new consensus emerged, which we find in Azo and the Accursian gloss. Let me try to demonstrate this thesis issue-by-issue by examining the relevant texts.

A. Consent Alone or Consent Plus?

1. *The Roman Law of Marriage before Alexander's Decretals*

Perhaps the earliest[56] expression of the Bolognese glossators on the topic of the formation of marriage is in Bulgarus' commentary (mid-twelfth century) on the *regula, nuptias non concubitus sed consensus facit* (D.35.1.15 = D.50.17.30):[57]

> *Marriage is not made by the bedding together,* etc. Rather marriage is made by affection following a leading (*ductio*). For a woman who is led by an absent but willing man becomes a wife and must mourn him when he has fallen into the Tiber and died (while he happens to be returning from a feast), before she had intercourse with him.

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55. See below, n.106.

56. Although perhaps not earlier than the *Summa Trecensis,* below n.68. Bulgarus probably was born before 1100, lived into the 1160s, and some of his writings definitely date from before 1141. See Hermann Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge, 1938), pp. 68-9. The modern trend of scholarship is to date Bulgarus' commentary, *De diversis regulis iuris,* fairly late in his career. See Herman Kantorowicz, "Kritische Studien," *Zeitschrift für Rechtsgeschichte* (Röm. Abt.), 49 (1929), 87-8; Severino Caprioli, "The capitoli intorno alla nozione di 'regula iuris' nel pensiero dei glossatori," *Annali di Storia del Diritto* 5-6 (1961-62), 268 n. 197; Weimar, *Handbuch,* p. 216.

57. Nuptias non concubitus et ct. Affectione tamen sequente ductione fit matrimonium. ducta enim et absente et uolente tamen uiro uxor fit et debet ipsum in Tiberim deuolutum et mortuum lugere, dum forte a coena rediret, antequam se illi commisceret.

Wilhelm C. Beckhaus ed., *Bulgari de diversis regulis iuris commentarius* (1856; repr., Frankfurt, 1967), pp. 29-30. One ms. reads "traductione" for "ductione." Idem, p. 30 n.1.

The reference is obviously to the case of the man who fell into the Tiber (D.23.2.6), and Bulgarus' use of it shows that the early Bolognese glossators read the case together with the preceding fragment (D.23.2.5), which states that at least in the case of a marriage between absents the wife must be led into the house of the groom. This reading gave them considerable trouble with the text of D.23.2.6, since it expressly states that the wife was absent, i.e., presumably from the man's house. Bulgarus' restatement of the case shows that the glossators had taken the word *absentem* to refer to the man and not to the woman. They must either have assumed that the case of the word could be accounted for by attraction to the *eum* which precedes it[58] or have emended the word to *absens* as Cujas and Faber were to do in the sixteenth century.[59] Thus, a text which might be read to support the proposition that consent alone is sufficient to form a valid marriage[60] becomes a text by which the *regula* is clarified: true, intercourse is not necessary for a valid marriage, but neither is consent alone, there must be a *ductio* as D.23.2.5 shows. Further, "consent" may not be quite the right word; it is not consent, in the sense of contractural consent, that makes a marriage, but *affectio.* Bulgarus does not explain why he substitutes *affectio* for *consensus,* but the substitution, coupled with the *ductio* requirement, indicates that he is thinking of marriage more as a legal act than as a contract.[61]

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58. See Valentino Capocci, "Il testo del responso di Cinna riferito da Ulpiano: D.23,2,6," *Studia et Documenta Historiae et Iuris,* 24 (1958), 297-307, who, however, argues that the assimilation (attraction) is a scribal error and that *absens* is the correct reading. See below, n.60.

59. See Pescani, "L'enigma" (see above, n.25), pp. 131-2 and sources cited there at n.l. A twelfth century gloss in London, British Library, Ms. Royal 11.C.III, fol. 229ra, v° *absentem,* notes "alias absens."

60. The text reads:

> Denique Cinna scribit: eum qui absentem accepit uxorem, deinde rediens a cena iuxta Tiberim perisset, ab uxore lugendum responsum est.

Watson (*Persons,* pp. 26-7) leaves the text unamended and concludes that in Republican law the *deductio* was not necessary even in a marriage between absents and that the rule changed in classical law (D.23.2.5). Pescani ("L'enigma") on the basis of a Greek *scholion* emends to "eum qui absen<s volen>tem accepit uxorem, deinde a Cena <a town in Sicily> rediens," etc. Alvaro D'Ors ("Ulp. 35 Sab. D.23.2.6," *Labeo* 11 [1965], 241-2) reads *absentem* as referring to the absence of the wife from Rome; the bridegroom went to get her at her father's house where the wedding feast (*cena*) was held, but the bridegroom perished next to the Tiber during the *deductio.* The case of the man who fell into the Tiber continues to have its fascination.

61. See below, n.209.

Johannes Bassianus' (†c.1190) commentary on the same *regula* reveals a different analysis:[62]

> Immediately when the espoused woman is led the nuptials are perfected and remain perfected although no bedding together intervenes, but despite the fact that nuptials are perfected by the leading, nonetheless they are said to be made by consent, because it is from consent alone that the leading makes a marriage.

The commentary has not been dated other than by Johannes' death,[63] but it shows obvious evidence of Gratian's influence and none at all of Alexander's. Suppose we look at the Roman law texts in the light of Gratian's distinction between *matrimonium initiatum* and *matrimonium ratum* or *perfectum,* Johannes seems to say. We find support for Gratian's view that marriage is initiated by consent, but we find nothing to support Gratian's view that it is perfected by intercourse. Rather, in the Roman texts marriage is perfected by the *ductio.* This, of course, is not to say that a *ductio* without marital consent makes a marriage, any more than intercourse without marital consent makes a marriage in Gratian's scheme.

So far we have dealt only with "pure" Romanists. Bulgarus was the founder of the school of adherents to the *ius strictum,* and Johannes Bassianius was one of his foremost followers.[64] We would expect to find in the work of the school of Martinus Gosia, the so-called *gosiani,* and in the early writers of the *Summa Codicis* tradition more openness to canon law and more willingness to adapt Roman law to the needs of contemporary society, a society, which, after all, could not be expected to follow pagan Roman marriage customs.[65] We find, however, in the work of these writers no relaxation of the requirement that in order for there to be a valid marriage, there must

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62. Statim enim ex quo sponsa ducta est, et nuptie perfecte sunt et manent perfecte, licet nullus interveniat concubitus; set cum ductione perficiantur nuptie, tamen consensu fieri dicuntur, quia ex consensu solo ductio matrimonium facit.

Ed. in Severino Caprioli, "Quem Cuiacius Iohanni tribuerat," *Annali di Storia di Diritto* 7 (1963), 149.

63. Who is apparently not definitely referred to as alive after 1187. Vincenzo Piano Mortari, "Glossatori," in *Enciclopedia de Diritto,* 19 (Milan, 1970), 625.

64. Kantorowicz, *Studies,* pp. 87-88, 168, 206-7.

65. On the *gosiani,* see Kantorowicz, *Studies,* pp. 87-8. On their openness to canon law, equity and the needs of society, see generally Paradisi, "Diritto canonico" (see above, n.14); Ennio Cortese, *La norma giuridica,* Ius nostrum 6.1, 6.2, (Rome, 1962) (fundamental).

be some outward manifestation of the change of status, normally involving the physical movement of the bride from her father's house to her husband's.

There is, admittedly, some suggestion that Martinus may not have insisted on the necessity of a *ductio*. A gloss which may be by Martinus on D.23.2.5 (the text on marriage between absents) states:[66]

> I do not understand from this that she is less a wife who is joined to a husband in her house by affection for the same wife, for any reason, either because the man does not have any house or does not have one of his own. For he said this because it happens more frequently that the wife is led into the house of the husband.

The glossator may be suggesting here that marriages are made by consent alone, but *affectio* not *consensus* is the word he uses. Nor does he deny the necessity of some outward manifestation of the change in status; he simply says that the man may come to the woman's house rather than vice versa.[67]

The early writings in the *Summa Codicis* tradition also insist on some outward manifestation of the change in status, normally involving the physical movement of the bride from her father's house to her husband's. We begin, of necessity, with the *Summa Trecensis*. While much about this work is controverted, it is generally accepted as the work of a *gosianus*, perhaps the youthful Rogerius, written before 1150.[68]

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66. Non ex hoc intelligo minus uxorem esse que in sua ipsius domo uxoris affectione viro coniungitur aliqua ratione vel quia vir aliquam domum non habeat vel naturalem. Hoc enim dixit ideo quia sepius eveniat ut in mariti domum uxor ducatur.
Vatican City, Biblioteca Vaticana, Ms. Vat. Lat. 1408, fol. 254vb. (The same gloss may be found, again without *siglum*, in the earliest *apparatus* of glosses in British Library, Ms. Royal 11.C.III, fol. 228vb, v° *absenti*, with a number of variants [including *talem* for *naturalem*] none of which affects the basic point.) The suggestion that this may be a gloss of Martinus' is based on the fact that it is written in the hand which inserted a number of glosses in the ms. with Martinus' *siglum*. See Gero Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600*, 2 (Frankfurt, 1972), *sub ms. cit.*; cf. Carlo Guido Mor, "La divisione in paragrafi delle leggi del digesto," *Rivista di Storia del Diritto Italiano*, 26-27 (1953-54), 145-6.

67. He may have been thinking of C.5.18.3; see below n.86 and accompanying text.

68. Kantorowicz, *Studies*, pp. 146-80; accord Stephan Kuttner, "Zur neuesten Glossatorenforschung," *Studia et Documenta Historiae et Iuris* 6 (1940), 309-11; contra Éduard M. Meijers, "Le Conflit entre l'equité et la loi chez les premiers glossateurs," in E. Meijers, *Études d'histoire du droit*, ed. Robert Feenstra, H.F.W.D. Fischer, 4 (Leiden, 1966), 143-5 & nn.8,17 (but only as to the attribution to Rogerius). See Weimar, *Handbuch*, pp. 198-9.

After a *distinctio* on prohibited marriages (based on I.1.10), the *Summa Trecensis* states: "In those which are permitted solemnity is required in the contracting and the retaining and the dissolving."[69] The next section proceeds to consider the requirement of parental consent. Following this we find:[70]

> In nuptials, nonetheless, neither writing nor pomp nor even dowry is required, for marriages are not united by dowry but by affect.[71] The other things are signs or appendages of the nuptials to be contracted. There are, however, persons who are compelled to make instruments [of marriage], such as senators and illustrious persons. Other people contract marriages by affect alone.

What does the summist think *affectu solo,* a phrase he finds in Nov.117.4, means? It is hard to say; he doesn't tell us much. We know, however, that he requires *solemnitates* for the formation of marriage, and, unless he is hopelessly inconsistent, writing or *pompa* or dowry are not among the required *solemnitates.* He does require parental consent, but it is hard to see that as a *solemnitas.* The only *solemnitas* other than writing or dowry regularly mentioned in the Roman texts is the *deductio,* and while the summist does not mention it, he may have been suggesting that the *deductio* or something like it is required.[72]

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69. "In his quidem quę permissę sunt, sollempnitas desideratur in contrahendis et retinendis et dissoluendis." *Summa Trecensis* 5.4.4, ed. Hermann Fitting, *Summa Codicis des Irnerius* (Berlin, 1894), p. 140. For the *distinctio* see above n. 51. The vocabulary "Affinitas est personarum regularitas" 87, ed. Federico Patetta, in *Scripta Anecdota Antiquissimorum Glossatorum,* Bibliotheca Iuridica Medii Aevi (hereafter BIMAE) 2 (Bologna, 1892), p. 136, offers this definition of marriage: "Matrimonium est viri et mulieris coniunctio quibusdam solemnitatibus additis." The work probably belongs to the twelfth century. See Weimar, *Handbuch,* pp. 258-60.

70. *In nuptiis* tamen scriptura seu pompa item dos non desideratur: non enim dotibus set affectu matrimonia copulantur, cetera uero argumenta seu appenditia sunt contractarum nuptiarum. sunt autem personę quę ad confectionem instrumentorum coguntur, ut senatores et illustres: ceteri affectu solo contrahunt matrimonia.
Summa Trecensis 5.4.6. p. 141.

71. Cf. C.5.4.22, where the key word is *consensu* not *affectu.*

72. Orestano, *La Struttura,* pp. 31-33, argues that the *Summa Trecensis* emphasizes the consensual nature of marriage, basing his view principally on the analogy which the summist draws at the beginning of the discussion between marriage and *societas.* The analogy was to be used by many writers, including those who did not have a purely consensual view of marriage. See below, n.90; text at n.104. I have tried to show in the text that the *Summa Trecensis* is at least ambiguous on the consensual nature of marriage.

It is tempting to go one step further: We know that the *Summa Trecensis* was written some time between 1140 and 1159.[73] Thus, it probably was composed shortly after the completion of Gratian's *Decreta*.[74] It may be that the emphasis on *affectus maritalis* in the *Summa* was the result of the influence of Gratian's notion of the perfection of marriage through intercourse.[75] While there is nothing in the Roman law to support a requirement of intercourse (and indeed much to oppose it), there are those texts which speak of *affectus* (or *affectio*) *maritalis* and *honor matrimonii*—behaving like husband and wife—and this may have been as close as the summist could come to reconciling the Roman and canonic traditions.

We cannot be sure that this was the direction in which the summist was heading, and unfortunately, the next book in the *Summa Codicis* tradition, the *Summa* known to be by Rogerius, does not reach the marriage sections of the Code.[76] By the time we reach Placentinus' continuation of Rogerius,[77] we have reached the early 1170s,[78] the tradition has become more subtle, and it has definitely rejected any requirement of consummation for the validity of marriage.

After quoting Modestinus' definition of marriage, Placentinus straight off shows both his knowledge and his disapproval of any idea that intercourse is necessary for a valid marriage:[79]

> And certainly nuptials are a joining of souls and (understand not out of necessity) of bodies. For it is not the deflowering of virginity that makes marriage but the conjugal pact. And coition does not institute marriage but consent alone.

This last remark he promises to explain more fully, but before he gets to that, he finishes out the section with a particularly charming

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73. Kantorowicz, *Studies,* pp. 163-6.

74. Completed around 1140. See Jacqueline Rambaud, "Le Legs de l'ancien droit: Gratien," in Gabriel Le Bras, Jacqueline Rambaud, Charles Lefebvre, *L'Âge classique,* Histoire du droit et des institutions de l'Église en Occident 7 (Paris, 1965), pp. 57-8; but cf. Adam Vetulani, "Autour du décret de Gratien," *Apollinaris* 41 (1968), 53-8.

75. And perhaps too of the concept of marital affection in Gratian. See Noonan, "Marital Affection" (see above, n.22), pp. 489-99.

76. The work was interrupted, probably by his death, at C.4.58. Weimar, *Handbuch,* p. 200.

77. Weimar, *Handbuch,* pp. 201-2, and literature cited.

78. On the date, see Weimar, *Handbuch,* p. 201, and below, n. 89.

79. et certe nuptie sunt coniunctio animorum, scilicet non ex necessitate, et corporum. nec enim defloratio virginitatis facit matrimonium, sed pactio coniugalis. sed nec coitus matrimonium instituit, sed consensus solus.

Placentinus, *Summa Codicis* 5.4.2, ed. Giovanni Battista Palmieri, "Rogerii Summa Codicis," in BIMAE 1, 2nd ed. (Bologna, 1913), p. 139. Titles

rendition of the case of the man who fell into the Tiber,[80] supporting again the proposition that intercourse is not necessary for marriage and preparing the way for his definitive statement on the necessity of a *ductio*:[81]

> Nuptials, however, are contracted by consent, as has been said, there intervening, nonetheless, the leading of the wife, to wit, into the house of the husband. And this is normal. Sometimes, however, abnormally, the husband is led by the wife, as [C.5.18.3]. Why is it said, then, that marriage is contracted by consent alone? Certainly this "alone" is not said so as to take away the leading which according to the laws is required of necessity for the consummation of the marriage but is said so as to take away dowry, dower, pomp, and writing, all of which are accidents of nuptials.[82]

The reference to "consent alone" is puzzling; its immediate object, of course, is the passage quoted above, "coition does not institute marriage but consent alone." But who ever said that? No place in the *Corpus Juris* is it said that marriages are made by consent alone.[83]

5.2-5.11 of the *Summa Tubingensis* on which Palmieri based his edition of Rogerius are, in fact, verbatim copies of Placentinus' *Summa Codicis* 5.2-5.11. Kantorowicz, *Studies*, pp. 176-7. I have compared the old printed edition of Placentinus (Mainz, 1536; repr., Turin, 1962), p. 196, which has insignificant variants.

80. "[N]am et virum, forte in scholis Rome agentem, et a cena non nuptiali ad hospitium redeuntem, inque Tyberim devolutem, uxore deducta domi, puta Tybule, in suum domicilium, per illius viri nuntium, ab illa muliere lugendum, iuris interpretes responderunt, inque eo casu mulier, forte virgo, et dotem habet et de dote actionem, *ut* [D.23.2.6]." Ibid.

81. Contrahuntur autem nuptie consensu sicut dictum est, interveniente tamen ductione uxoris, scilicet in viri domum. et hoc ex ordine. verum quandoque citra ordinem, vir ab uxore ducitur, *ut* [C.5.18.3]. quid est ergo quod dicitur matrimonium contrahi consensu solo? et certe istud "solo" non dicitur ad remotionem ductionis, que secundum leges ex necessitate exigitur ad consummationem matrimonii, sed ponitur ad remotionem dotis, donationem propter nuptiis, pompe atque scripture, que omnia sunt nuptiarum accidentia.

Placentinus, *Summa Codicis* 5.4.7, p. 139. The Mainz printing (p. 197) differs in a number of minor details and in the first sentence: "Contrahuntur autem nuptiae (sicut dictum est) consensu interveniente, traductione uxoris in viri domum. . . ."

82. On this last thought, cf. *Summa Trecensis*, above n.70.

83. The closest it comes are Nov.117.3, .4 ("ex solo affectu") and Nov.22.3 ("puro nuptiali affectu"). Compare Placentinus' phrase, "sed nec coitus matrimonium instituit, sed consensus solus," with D.24.1.32.13, "non enim coitus matrimonium facit, sed maritalis affectio." The Roman texts do say that *espousals* are made by consent alone. D.23.1.4.pr: "Sufficit nudus consensus ad constituenda sponsalia."

But the phrase may be found in Gratian's *Decreta,*[84] and this, coupled with the obvious reference to Ambrose ("nec enim defloratio virginitatis," etc.)[85] makes it fairly clear that what Placentinus is attacking is not any notion one might derive from Roman sources that consent alone makes a marriage, but rather the same notion as it might be derived from canonic sources.

Now why does Placentinus think that marriages are not made by consent alone? Other than his citation of the case of the man who fell into the Tiber, the only clue is his citation of C.5.18.3, a strange case concerning a woman who married a slave named Eros not knowing he was a slave, and is allowed to recover her dowry from his *peculium* when the marriage is dissolved by an adjudication that Eros is a slave. Not the least strange thing about the case is its initial phrase: "if not knowing the status of Eros, you led him as a free man,"[86] for in the *Corpus Juris,*[87] it is the man who leads the woman, not vice versa. Now Placentinus' purpose in citing this case was, I suspect, more than simply to show that strange things do happen. Rather, his point was that even in this strange case, where the man came to live with the woman rather than vice versa and where the marriage turned out to be invalid because the man was a slave, even here there could not have been a good faith *de facto* marriage if there had not been some sort of *ductio.* A *ductio,* to paraphrase a well-known English judicial opinion on the necessity for delivery of a gift of personal property, is more than evidence of a valid marriage, it is part of the proposition itself.[88]

That this is what Placentinus had in mind is indicated by the only original part of the *Summa Tubingensis,* title 5.1, written perhaps by a student of Placentinus, certainly by someone in his orbit, probably shortly after Placentinus had completed his own version of 5.2

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84. C.27, q.2, c.2 (the response of Nicholas I to the Bulgarians): "sufficiat solus secundum leges eorum consensus, de quorum quarumque coniunctionibus agitur." Cf. C.27, q.2, c.1 (pseudo-John Chrysostom): "Matrimonium quidem non facit coitus, sed voluntas."

85. C.27, q.2, c.5.

86. "Si ignorans statum Erotis ut liberum duxisti. . . ."

87. And in Latin authors generally, see Lewis and Short, *A Latin Dictionary* (Oxford, 1966), s.v. *ducere.*

88. *Cochrane v. Moore,* 25 Q.B.D. 57, 75 (C.A. 1890) (Esher, M.R.).

89. Placentinus began his *Summa* with 4.58, where Rogerius had left off, finished through book 9, then went back and did books 1 to 4.58. Kantorowicz, *Studies,* pp. 125-6. The author of the *Summa Tubingensis,* at least in the second redaction (which is the one that concerns us here), uses Placentinus for 5.2 to 5.11, writes his own 5.1, and slightly recasts the *Summa Trecensis* for the rest of 4.58 to 9.*fin.* Kantorowicz, *Studies,* pp. 176-80. Now why should

to 5.11.[89] The title begins with alternative *materiae,* the second of which states: "Let us hear of the partnership of male and female, which is also called marriage and which is united with a certain solemnity for the sake of the procreation of children,"[90] an interesting combination of one of the Augustinian "goods" of marriage with the undefined solemnity requirement of the *Summa Trecensis.*[91] After dealing with parental consent and a number of other topics, the title concludes with two *quaestiones legitimae:* "At this point it is customary to inquire whether espousals are contracts?"[92] The summist answers in the affirmative: *sponsalia* may even be specifically enforced, a view markedly different from Placentinus'.[93] "Is the consent of espousals or the espoused the same as marriage or is the consent of espousals something else?" To which the summist answers: "Certainly marriage is nothing other than the fulfilling or perfecting of the preceding consent. This normally happens by the leading of the wife into the house of the husband."[94] And in case we had not perceived how he is fitting Gratian's scheme to the Roman law, he

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the summist have used Placentinus wholesale for 5.2 to 5.11 and not in other places? If the answer is that this was all that was yet written of Placentinus' *Summa,* then we may date the *Summa Tubingensis* along with the first parts of Placentinus' *Summa* to the early 1170s. See above, n.78.

90. "De societate maris et femine audiamus, que et matrimonium appellatur, et ob liberorum procreationem, cum quadam celebritate copulatur." *Summa Tubingensis* 5.1.1, ed. Palmieri, BIMAE 1, 2nd ed. (Bologna, 1913), p. 135.

91. Above, text at n.69. Placentinus, *Summa Codicis* 5.1, in idem, p. 135 n.3, and Azo, *Summa Codicis* 5.1.1, ed. Henricus Draesius (Venice, 1566) (see below, n.120), p. 466, both state this purpose for marriage but without the solemnity requirement. Cf. D.50.16.220.3: "natura nos quoque docet parentes pios, qui liberorum procreandorum animo et voto uxores ducunt, filiorum appellatione omnes qui ex nos descendunt continere."

92. "Ad hec queri solet sintne sponsalia contractus?" *Summa Tubingensis* 5.1.2, p. 137.

93. Placentinus, ibid., poses the same question and answers it in the negative on the basis of C.5.1.5, allowing only an action for damages and return of the *arre.* See above, n.52; below, n.209.

94. "[S]itne matrimonium consensus sponsalium sive sponsaliorum, et idem seu alius consensus sponsalium? Certe nihil aliud est matrimonium quam precedentis consensus adimpletio sive perfectio. hoc quoque fit per ductionem uxoris in mariti domum ex ordine." *Summa Tubingensis* 5.1.2, p. 137. Placentinus, idem, p. 135, poses essentially the same question ("sitne idem consensus vel alius sponsaliorum et nuptiarum") and answers in a way that reflects his knowledge of Peter Lombard's theory of marriage (see above, text and n.9): "profecto idem, ut puto. nihil enim adiicitur, nisi quia mulier vel ducitur a viro, quod est ex ordine, vel ducit. sunt tamen quidam qui non inargute distinguunt et dicunt: immo sponsalium consensus est de futuro, nuptiarum de presenti."

repeats: "Indeed it is nothing other than the consent initiated in the espousals and brought to fact."[95]

Why is this so?:[96]

> Marriage therefore is not the name of a legal right but the name of a fact. . . . If you were an espoused woman and suffered me to lead you to my house, another or new consent is not begun but that which is begun before is perfected by the leading. Indeed, just as we have delivery in real contracts so we have the leading in contracts of persons. That is to say, just as delivery is required after a real contract, so the leading perfects the espousal or spousal contract.

Espousals, then, are the contract, marriage the conveyance. A *ductio* is required because, like delivery in the English law of gifts, it is "part of the proposition itself." Placentinus was suggesting this, but did not quite state it. He was unwilling to commit himself to an analogy of marriage to real contracts, perhaps because he felt that such an analogy could not be justified by his texts, perhaps because he felt that such an analogy would interfere too much with the policy that marriages ought to be free, perhaps because he felt that Peter Lombard's distinction between present and future consent, a distinction of which he was aware, might prove to be right.[97] His follower, bolder if not wiser, spelled out the point by analogizing Gratian's view of marriage to Roman real contracts, substituting the *ductio* of the Roman marriage texts for delivery in real contracts, on the one hand, and for Gratian's notion of the perfection of marriage by intercourse, on the other.

Thus, at least, on the question of the formation of marriage the orthodox Bolognese, the *gosiani* and the early writers in *Summa Codicis* tradition are in accord. That marriages are formed by both

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95. "[N]empe nihil aliud est quam consensus in sponsalibus initiatus, ad factum usque perductus." Ibid.

96. matrimonium ergo nomen non est iuris nomen sed facti. . . . si sponsa fueris, et me te in domum ducere patiaris, alius, sive novus consensus, non initur, sed qui retro fuerat initus, ductione perficitur. quippe, sicut se habet traditio in contractibus rerum, sic se ductio in contractibus personarum. hoc est, sicut traditio exigitur post contractum realem, sic ductio perficit et contractum sponsalitium sive sponsalem.

Summa Tubingensis 5.1.2, pp. 137-8. Similar ideas are expressed in Vacarius (below, text and n.105) and in the *Summa Coloniensis* (below, n. 108).

97. "[M]atrimonia debent esset libera" is found in C.5.1.5, but is also, of course, the heart of Alexander III's policy. For Placentinus' awareness of Peter Lombard's distinction, see above n.94.

consent and a *ductio* was something which they taught probably even before they became aware of an organized body of canon law on the topic.[98] After the appearance of the *Decreta* they adapted their requirements to Gratian's ideas and said that marriages are initiated by consent, perfected by a *ductio*. What survives in the *Summa Codicis* tradition explores more fully the doctrinal implications of this, but there is no reason to believe that similar speculations did not also occur among the orthodox Bolognese which simply have not come to light.

2. *Open Conflict: Vacarius vs. Bertram of Metz*

Neither the orthodox Bolognese nor the *gosiani* expressly state their disagreement with Gratian, although their awareness of his ideas is obvious. In two works of academically-trained civilians, however, the conflict between Roman and canon law on the formation of marriage is openly acknowledged and discussed: Vacarius' *Summa de matrimonio* and Bertram of Metz' commentary on D.50.17.30.

Although it has been in print for over three-quarters of a century, Vacarius' *Summa de matrimonio* has been unjustly neglected by scholars. Writing probably in the 1160s,[99] Vacarius refuses to do what both the "main stream" civilians and the *gosiani* were to do a few years later: accept Gratian's distinction between *matrimonium initiatum* and *matrimonium ratum* or *perfectum* and apply it to

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98. Or at least before they showed any awareness of it. It is chronologically possible that Bulgarus was aware of Gratian's theory (see above, n.56) and invented the *ductio* requirement to fit it, but there is nothing in his writing, as there is in Johannes, Placentinus, and the *Summa Tubingensis*, which shows that he knew Gratian.

99. Ed. F. W. Maitland, "Magistri Vacarii Summa de Matrimonio," *Law Quarterly Review* 13 (1897), 133-42, 270-87. Maitland's suggestion (pp. 141-2) of a connection between the piece and the Anstey case (1158-63) may help in dating it and also in explaining the argumentative nature of its style. May we suggest, as Maitland did not, that the piece originated as a brief in the Anstey case? It could have been written on behalf of Mabel de Francheville, who was seeking to upset an unconsummated present consent marriage and thus Vacarius' connection with the case would not necessarily have been mentioned in Richard de Anstey's narrative and accounts. Mabel's party apparently consulted with canonists at Oxford in connection with their appeal to the pope in November-December, 1161, and they could have been referred to Vacarius, then in the service of Roger de Pont l'Évêque. See Patricia M. Barnes, "The Anstey Case," in *A Medieval Miscellany for Doris Mary Stenton*, Pipe Roll Society 74 (London, 1962), pp. 12-20. Of course, Vacarius could also have found out about the case through Roger himself from whom Richard obtained a "breve de prece" to the Apostolic See. Ibid. See generally Stephan Kuttner, Eleanor Rathbone, "Anglo-Norman Canonists of the Twelfth Century," *Traditio* 7 (1949-51), 288.

Roman sources. He also rejects the view which was to become the law of the universal Church, that marriages are made by present consent alone. His arguments, though complicated, are worth at least a summary:

Vacarius says he has been brought to write by the fact that the whole question of the formation and dissolution of marriage seems so terribly confused. In particular, Gratian's distinction between marriage initiate and marriage consummate strikes him as ridiculous. Marriage is not initiated in espousals; the only thing appropriately called "initiated" is that which is completely formed. For example, a priest is initiated when he is validly ordained before he has begun to execute his office. Everything else is not initiation but preparation.[100]

Espousals, as Florentinus tells us, are the proposal and promise of future nuptials.[101] In espousals, *arre* are given, in nuptials, dowry; in espousals, the woman is called *sponsa,* not *uxor;* in espousals, neither age nor domicile nor presence matters, but solely consent, while in marriage, both age and either presence or domicile is required;[102] gifts are prohibited between man and wife, but not between *sponsus* and *sponsa.*[103]

But some might reply to this, Vacarius continues, that all of these things are simply matters of secular law, not of religious, and indeed, some texts seem to support the view that in ecclesiastical law, a marriage is initiated in espousals and perfected in intercourse. The problem, however, is that whatever these texts may say, they cannot change the nature of the juridical act. In a contract to form a *societas,* the obligation is perfected in the agreement to participate in the *societas* and is fulfilled in the participation. In a contract of gift, the obligation is fulfilled in the handing over of the thing. In the *societas* of persons, marriage, there are two contracts. The first is the contract of espousals in which the principal parties agree, with the usual financial arrangements, to take each other. The second is the contract of nuptials which binds the principal parties to render the carnal debt. It is somewhat like *depositum* or *commodatum.* One can make a binding pact to accept a thing, but once one accepts it, that obligation is discharged and a new obligation arises to keep the thing carefully. Indeed, one can have a marriage without an espousal at all, as in the case of Jacob and Leah.[104]

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100. Vacarius, *Summa de matrimonio* 2-3, 10, pp. 270-1, 274.
101. D.23.1.1.
102. A clear reference to the case of the man who fell into the Tiber.
103. Vacarius, *Summa de matrimonio* 4-5, p. 271.
104. Vacarius, *Summa de matrimonio* 6-10, pp. 271-4.

Some people, on the other hand, say that marriage is formed by consent with words of the present tense alone. This, however, is contrary to both civil and natural law, since we do not acquire ownership or possession by intent alone but rather by bodily apprehension. "The joining of marriage, then, is a joining of corporeal handing over and quasi-possession. . . . [And] thus, marriage is a real contract formed by mutual receiving."[105] When it is said that marriages are made by consent, it means that their legal form is determined by consent, because the consent determines whether or not it is marriage or concubinage.[106]

But if marriages are made by mutual handling over, are they perfected at that point? There follows a careful analysis of the authorities in which Vacarius shows that a number of them support his proposition that marriages are perfected at that point, and that most of the others can be distinguished. The most difficult, of course, are the ones that seem to allow the dissolution of marriage before intercourse, even after the mutual handing over, and these he distinguishes in a number of ways, but perhaps most powerfully when he suggests that a ratified and perfected obligation need not necessarily be indissoluble. Indeed, if indissolubility is made the characteristic of perfected and ratified marriages, then no one under the old law had a perfected and ratified marriage, non-Christians would not today, and no marriage in the civil law would have been ratified and perfected until the time of Justinian.[107]

Vacarius' ideas, of course, were not to prevail, although Alexander was to accept, if independently, his notion of the two contracts. Vacarius' position is important, however, because it represents, so far as I know, the first attempt by a civilian to make use of Roman

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105. "Corporalis etiam traditionis et quasi possessionis sit coniunctio matrimonii. . . . Ergo re, id est, mutua susceptione, contrahitur coniugium." Vacarius, *Summa de matrimonio* 11-12, p. 274.

106. Ibid. As the quoted passages indicate, Vacarius' theory, is not, ultimately, a property theory of marriage. He starts by analogizing marriage to the man acquiring ownership or possession of his wife, but then he refines his theory to an analogy to a real contract (roughly, bailment) which gives the bailee, in Roman law, not legal, but quasi possession. He does this, I would suggest, because it allows him to generalize from the Roman *deductio* and the Germanic *Trauung* (*traditio*) (hence the portmanteau word *traductio* [see above, nn.55, 57, 81]). See Gaudemet, "Originalité" (see above n. 13), pp. 536-42. It also allows him to replace the dominant relationship of the man implicit in a strictly property analogy with the much more modern notion of a *mutua susceptio*. Later on (17, p. 278) he will say: "mutua quasi traditione re ipsa coniugium copuletur."

107. Vacarius, *Summa de matrimonio* 17-38, pp. 278-87, especially 36, p. 285.

law ideas to resolve a debate among the canon lawyers.[108] The other civilians in this period were simply accepting Gratian's distinction and attempting to reconcile their texts with it, with, of course, considerable differences in result so far as the *ductio* is concerned.[109] Vacarius, on the other hand, accepts the wisdom of his Roman law texts more or less as given (there are two consents and marriages are perfected by *traditio* or *mutua susceptio*) and attempts to force the canon law to fit into his mold. Why his views or ones like them were not accepted, persuasive as they may seem, is a topic for the final section of this paper.

The virtually unanimous opinion of the glossators that some sort of handing over or mutual acceptance of bride and groom was required for a legally valid marriage was shaken by the decretals of Alexander III. The glossators now had to deal not with the opinions of an academic canonist but with the pronouncements of the pope, which were rapidly being collected and organized along much the same lines as Justinian's *Digest* or *Code*.

The first work I have found to call the attention of the glossators' world to this fact is Bertram of Metz' commentary on D.50.17.30, written probably some time after Alexander's death (1181), and certainly before Bertram's (1212).[110] After some tra-

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108. It is tempting to see a connection between Vacarius' ideas on marriage and those of the author of the *Summa Coloniensis* (c.1169), who also urges a requirement of *traditio*: "Illud enim generale est in hujusmodi contractibus, ut traditione rei dominium transferatur." Excerpt in A. Scheurl, *Die Entwicklung des kirchlichen Eheschliessungsrechts* (Erlangen, 1877), p. 169. See Kuttner, "Anglo-Norman Canonists," p. 300. The idea, however, is also found in the *Summa Tubingensis* (above, at n.96), and any resolution of the question of influence had best await further volumes of Gérard Fransen, Stephan Kuttner ed., *Summa "Elegantius in iure divino" seu Coloniensis*, Monumenta Iuris Canonici, Series A: Corpus Glossatorum 1 (New York, 1969). See below, n. 114. Even after Alexander *traductio* continued to have some juridical significance for some of the canonists. See, *e.g.*, Pietro Vaccari, "Dalla *Summa de matrimonio* alla *Summa decretalium* di Bernardo da Pavia," in *Studi di storia e diritto in onore di Carlo Calisse*, 2 (Milan, 1940), 343.

109. The *Summa Tubingensis* (above, text at n.96) is a possible exception, but compared to Vacarius' the summist's effort is pretty amateurish.

110. Bertram knew Placentinus' *additiones* to Bulgarus' commentary, which date from around 1170, so Bertram's work must date after 1170. See Weimar, *Handbuch*, p. 261. A gloss in the Brussels ms. (Bibliothèque Royale 1485-1501, fol. 244v) ascribes the work to "Magistri Bertrami Metensis Episcopi," and Bertram was bishop of Metz from 1180-1212. Stephan Kuttner, "Bertram of Metz," *Traditio* 13 (1957), 501-2. That still does not exclude the possibility that the work was written before Bertram became bishop and the Brussels ms. copied afterwards. This evidence, however, coupled with Bertram's certainty that marriages are made in canon law by consent and not *copula* (below text

ditional comments on the definition of marriage, Bertram squarely poses the problem:[111]

> The Roman lawyers say that if a man and a woman consent so that she is led into the house or lodging of the man, after both, that is after the consent and the leading, there is then a firm marriage, and they do not concede that it is firm by handing over alone unless both things are present, to wit, consent and the handing over [*traductio*].

He thus confirms what we already had suspected, that the glossators had been virtually unanimous in teaching that marriages are made by consent *and* a *ductio*. They even say, Bertram continues, that if I send my friend for a woman who has been promised me by her parents and she follows him, then, should I happen to drown, she must mourn me as widow and virgin, and all my goods will be hers, even if I never spoke to her—an obvious, if somewhat distorted, reference to the case of the man who fell into the Tiber, except that the Tiber has become the Rhine.[112] But the canons teach us, Bertram continues, that both parties must be present and express their consent by words of the present tense: "Which done, although carnal copulation does not follow or handing over, there is a marriage and in this place the canons derogate from the laws . . .," citing Nov.83.1.[113]

Bertram's argument is essentially an appeal to authority,[114] the

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at n.113), leads to the statement in the text. Peter Stein, "The Formation of the Gloss 'De regulis iuris' and the Glossators' Concept of 'Regula,'" in *Atti Accursiani* (see above, n.14) 2:712, suggests that it was composed after Bertram's exile from Metz in 1187.

111. Legiste dicunt quod si vir et mulier consentiant ita quod illa ducatur in domum viri vel in hospitium, post utrumque, i(dest) post consensum et traductionem, est ibi firmum coniugium; et non concedunt firmum esse traductione tantum, nisi uterque [!] sit, s(cilicet) consensus et traductio.

Bertram of Metz, *De regulis iuris* 30, ed. Severino Caprioli, *Annali di Storia di Diritto* 8 (1964), p. 262. The extension of "idest" is mine.

112. Et dicunt quod si mittam amicum meum pro uxore mea ex quo parentes eam michi dederint, licet et ego numquam loquar ei, tamen si mando ei consensum meum et illa sequitur amicum meum, quod exprimit consensum eius, tunc, si forte sequens eam cado in Tiberim vel in Renum et submergor, illa in lugubri veste mortem meam per annum deflebit et simul erit virgo et vidua et omnia mea eius erunt, quod non fieret si traducta non fuisset.

Ibid.

113. Ibid.

114. If Bertram of Metz did write the *Summa Coloniensis* (see above, n.108; Peter Gerbenzon, "Bertram of Metz the Author of 'Elegantius in iure divino' [Summa Coloniensis]," *Traditio* 21 [1965], 510-11), he certainly markedly changed his views as a result of Alexander's decretals.

authority of Alexander's decretals, which, he implies, the glossators must accept if they take Nov.83.1[115] seriously. Other than as an appeal to authority, his argument does not have much force. It seems no more ridiculous to say that a virgin-widow led by a man's friend to his house or lodgings should mourn him *lugubri veste,* even if she had never spoken to him, than it does to say that she should similarly mourn a man whom she met at the church door and who died of a heart attack during the nuptial mass. As to the financial side, neither the Roman text nor the glossators suggest that the virgin-widow of the man who fell into the Tiber should have all his goods, simply that she should have her dowry. Further, although some canonists expressed the view that marriages between absent parties were invalid, that view was not unanimous, even in Bertram's day, and was not to prevail.[116] The real question, of course, other than the relative authority of the glossators' reading of the Roman law versus Alexander's statement of the canon, is why the glossators required a *ductio* and Alexander did not, and this question, unfortunately, Bertram does not reach.

3. *Reinterpretation of the text: Azo and Accursius*

Once it became apparent that the canon law was not going to follow what the glossators thought was the Roman law in the matter of the formation of marriage, the glossators had three alternatives open to them: they could continue to state the Roman law as they perceived it, with or without recognition that the canon law differed; they could attempt to argue that the canon law was wrong, as they had to some extent in the case of Gratian; or they could try to reconcile their texts with the canon law. They chose the last course. We may see the beginnings of this process already in the first version of Azo's (Johannes Bassianus'(?), Hugolinus'(?)) *Summa Codicis,* a work probably written between 1185 and 1190.[117] Only one passage impinges on our present concern, but it is crucial:[118]

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115. On the importance of this novel, see Paradisi, "Diritto canonico" (see above n. 14), pp. 177-84.

116. Dauvillier, *Mariage,* pp. 100-1. There is a suggestion in the Accursian gloss that marriage among absents may be invalid in canon law. D.23.1.4, v° *constat* (1612), col. 2133. See below n.209.

117. Brussels, Bibliothèque Royale, Ms. 131-134, fols. 62r-103v. On the attribution and date see Weimar, *Handbuch,* p. 202; literature cited in Dolezalek, *Verzeichnis,* 1, *sub ms. cit.*

118. Item quando perficiatur matrimonium?: si verba de presenti intercedunt, puta "accipio te in meam," et "in meum" a parte uxoris; (Et hoc est quod dicit lex, solo consensu contrahitur matrimonium, ut [D.50.17.30].)

> Item, when is marriage perfected?: if words of the present tense come between them, such as "I [the man] take thee as mine" and "as mine" on the part of the wife;[119] (And this is what the law says, marriage is contracted by consent alone [D.50.17.30].) or if espousals of future nuptials are made, there is no marriage unless there is a *ductio* into the house of the husband present or absent. A man, however, does not become a husband, even though he is led into the house of an absent woman. And this is what is said about the *ductio:* "not [in the house of the wife as if into the marital domicile]" [D.23.2.5].

The suggestion, then, is that the civilians will accept the canon law scheme, save that the *ductio* rather than intercourse will perfect a marriage begun by future consent.

It is not until the published *Summa Codicis* uncontrovertably by Azo (probably written between 1208 and 1211)[120] that we get a full exploration of the consequences of this acceptance. Azo feels compelled not only to reconcile, to the extent possible, the canon law with the Roman texts, but also to do as little violence as possible to the work that is before him as he writes, Placentinus' *Summa Codicis.* His effort is a masterpiece of craftsmanship. The process begins in the definition of espousals: "For spousals are the proposal and promise of future nuptials," he says, quoting Florentinus (D.23.1.1), as Placentinus had before him, "And this is a consent of future marriage. The consent of nuptials, however, is of present marriage, although Placentinus said that the consent of espousals and that of nuptials are the same."[121] The idea that the *de presenti/de futuro* distinction is consistent with Roman law had been suggested by Vacarius fifty years earlier. Now that the canon law has adopted the distinction, we need no longer torture the Roman texts to arrive at

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> sive sponsalia de futuris nuptiis interceduntur, non sit matrimonium nisi est ductio in domum mariti presentis vel absentis. Maritus vero non est licet in domum absentis mulieris ducatur. Et hoc est quod dicitur de ductione, "non, etc." ut [D.23.2.5].

Idem, fol. 81rb.

119. Cf. Alexander III's decretals, *Licet praeter solitum,* X 4.4.3, and *Significasti,* 1 Comp. 4.4.6(8).

120. Kantorowicz, *Studies,* p. 44 n.10. I have used Henricus Draesius ed., *Summa Azonis* (Venice, 1566), which has certain pretensions to criticality (see Friedrich C. Savigny, *Geschichte des römischen Rechts im Mittelalter,* 5 [Heidelberg, 1850], 36-7) and compared it with *Summa Azonis* (Pavia, 1506) = CGIC 2 (Turin, 1966).

121. "Sunt enim sponsalia mentio et repromissio futurarum nuptiarum. Et iste consensus est de futuro matrimonio. Consensus vero nuptiarum est de presenti matrimonio, licet Placentinus dixerit eundem esse consensum sponsaliorum et nuptiarum." Azo, *Summa Codicis* 5.1.pr, col. 465.

a single consent which initiates marriage. Nor need we say that marriage is perfected in a *ductio,* not in intercourse, for, as Azo points out in his comment on Modestinus' definition of marriage (D.23.2.1.; I.1.9.1): "It is to be understood to concern the joining which comes through the mind of each party by words of the present tense and not the joining of bodies."[122] But what will he do with the *ductio* texts?: "The joining of bodies makes the consummation of marriage, but consent initiates and perfects marriage, although handing over is required so far as the prohibition of gifts is concerned."[123] He still has a problem, however, with the man who fell into the Tiber, but this case, he notes, has to do with the action for dowry[124] (ignoring that it also concerned the period of mourning). The distinction, although not spelled out, is clear enough: the marriage itself is formed *lege divina,* and to it human law must bow,[125] but so far as marital property law is concerned, something more is required—the *deductio.*

Azo, however, still has to deal with the second part of Alexander's rules, that marriages are made by future consent plus intercourse. Here he can find no support in his texts, so he falls back on the method of his predecessors—reconciliation where possible and opposition, though tacit, where not—and he insists on a *deductio* into the man's house for perfecting *de futuro* marriages.[126] In this he is more strict than some of his predecessors, dismissing the case of the woman who led the slave Eros (C.5.18.3)[127] as an invalid *ductio,* "for the house of the husband is like the domicile of the marriage, and laws are adapted to those things which happen

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122. "De coniunctione quae fit per animum utriusque per verba de presenti, non de coniunctione corporum est intelligendum." Azo, *Summa Codicis* 5.4.3, col. 472, citing D.50.17.30; D.24.1.32.13. See above, text at n.21.

123. "Coniunctio tamen corporum facit consummationem matrimonii, sed consensus initiat et perficit matrimonium, licet exigatur traductio quantum ad prohibitionem donationum." Ibid., citing his previous discussion of C.5.3.6 (and D.24.1.66.1), which, however, makes a somewhat different distinction. Cf. below n.144.

124. Ibid.

125. As he says in his comment on *divini et humani iuris communicatio* in Modestinus' definition: "Humani autem iuris communicatio ideo dicitur, quia matrimonium debet contrahi secundum leges humanas, vel secundum legem divinam si illa inveniatur contraria legi humanae." Azo, *Summa Codicis* 5.4.2, col. 472.

126. . . . matrimonium contrahitur et perficitur solo consensu, ut dictum est, si consensus sit de presenti. Nam si sit de futuro matrimonio, necessaria est deductio sponsae ad domum sponsi praesentis vel absentis.

Azo, *Summa Codicis* 5.4.15, col. 474.

127. See above, nn.27, 86.

more frequently."[128] He clearly has in mind here the text concerning marriage between absents (D.23.2.5) which he later correctly states does not allow the woman to marry by messenger.[129]

All this, however, has led Azo quite far from his source, Placentinus, whom he is not prepared to say was wrong: "Placentinus, however, says that marriages are not contracted in Roman law[130] by words of the present tense unless a leading follows."[131] And Placentinus says that the texts which talk of *solo consensu* are not denying the essentiality of the *ductio,* but other, non-essential elements in a marriage. There are, indeed, even some cases where writing is required: when *illustres* contract marriage (Nov.117.4), or when someone marries his concubine (I.1.10.13). But this latter text may refer simply to the subsequent legitimation of children.[132]

Azo's technique of reconciliation is a standard one for lawyers, both in his day and in our own. He distinguishes away the cases which seem to conflict on the ground that the issues to be decided in those cases—marital property and legitimation of children—are separable from the issue which he is deciding, what is required for a valid marriage. But why does *he* want to know whether the marriage is valid? For Alexander, the issue, in almost every case, is dissolubility: whether subsequent marriages are barred. But for Azo that is not the main point (although he touches on it).[133] For Azo, the main issues are dowry and children in power,[134] and here he comes perilously close to contradicting himself, since he has just said that

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128. "[Q]uia domus mariti est quasi domicilium matrimonii, et ad ea quae sepius contingunt, aptantur iura." Azo, *Summa Codicis* 5.4.15, col. 474. The final phrase is taken from D.1.3.5, and its application to this situation is suggested in a gloss attributed to R[ogerius]. D.23.2.5, v° *per literas eius* (1612), col. 2137-8.

129. Azo, *Summa Codicis* 5.4.16, col. 474.

130. *secundum leges, i.e.,* as opposed to *secundum canones;* Placentinus does not say *secundum leges;* for Placentinus on *verba de presenti,* see above, n.94.

131. "Placentinus tamen dicit non contrahi matrimonium secundum leges per verba de presenti nisi ductio sequatur." Azo, *Summa Codicis* 5.4.15, col. 474.

132. Azo, *Summa Codicis* 5.4.17-.18, col. 474. The glossators consistently maintained the Justinianic rules requiring a writing for the marriages of *illustres,* for certain kinds of cross-class marriages, and for marriages of those *impares honestate.* C.5.4.23; C.5.27.10-.11; Nov.89.8-.9; Nov.117.4.6. See *Summa Trecensis* 5.4.6, p. 141 (above n.70); Placentinus' *additiones* to Bulgarus, in Beckhaus, *Búlgarus,* p. 30 (see above n.110; cf. Peter Stein, *Regulae Juris* [Edinburgh, 1966], p. 138, for the suggestion that Placentinus is contradicting Bulgarus); Placentinus, *Summa Codicis* 5.4.7, p. 139; Bertram of Metz, *De regulis iuris* 30, p. 262 (particularly striking in the light of Bertram's other views).

133. Azo, *Summa Codicis* 5.4.14, col. 474.

134. Azo, *Summa Codicis* 5.4.18, cols. 474-5.

for purposes of marital property (including dowry in D.23.2.7), and in some cases, legitimation of children, present consent may not be enough to make a marriage.

It was left for Accursius in his great *glossa ordinaria* (mostly written before 1234)[135] to resolve this problem and to reject firmly the previous view on the necessity of a *deductio*. Curiously, Accursius' version of the case of the man who fell into the Tiber does not prepare us for this rejection. It was the woman, he suggests, who was absent (staying closer to the text), but the man had his friends lead her to his house, and he dined with her there. Then, returning to some roguery (*malitia*) or some business he had undertaken, he perished.[136] Thus Accursius twists the text to make it make sense in terms of a *ductio*, and it is surprising to find what juridicial significance he attaches to the *ductio*. In the chief text on marriages between absents (D.23.2.5) he says: "At that moment [*i.e.*, at the moment of the *ductio*] the espoused woman is presumed to become wife, if it does not appear otherwise."[137] Again in the same text, at the phrase *deductione opportet esse*, he says, "that is to say, so that there be sufficient evidence of the nuptials.[138]

Accursius' theory becomes clearer in the glosses on D.24.1.66.pr and D.24.1.66.1, a troublesome pair of texts which seem to deny the necessity of a *deductio* in the case of interspousal gifts, but which came to the glossators (and to us) in such a corrupt form that it is hard to know precisely what they mean. One opinion, the gloss tells

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135. See Weimar, *Handbuch*, p. 174; below n. 197.

136. D.23.2.6, v° *absentem*, v° *rediens*, v° *a cena* (1612), col. 2138.

137. "[E]o ipso sponsa praesumitur uxor facta, si aliud non liqueat." D.23.2.5, v° *per literas eius* (1612), col. 2137. On the theory of *matrimonium presumptum* in canon law (future consent plus intercourse creates a *de jure* presumption of present consent), see Dauvillier, *Mariage*, pp. 55-75. But Accursius is not talking about a *de jure* presumption ("si aliud non liqueat"), nor is there any indication, other than in his use of the word *sponsa*, that he is thinking of a situation involving only future consent. Vivianus' *casus*, on the other hand (above, n.2), does take the case to refer to future consent, and he states that after the *deductio:* "est ergo ipsa uxor praesumptione iuris." He thus adapts Azo's view of future consent (above, n.126) to the developments in canon law, but replaces, as Azo did, intercourse with *deductio*.

138. "Scilicet ut ea sit sufficiens nuptiarum testimonium." D.23.2.5., v° *deductione* (1612), col. 2138. The first instance I have found of a civilian using the *deductio* for creating a presumption (with all the ambiguity as to whether that presumption is *de facto* or *de jure*) is in Hugolinus' *apparatus* on the *Digestum vetus*, London, British Library, Ms. Royal 11.C.III, fol. 228vb. [D.23.2.5], v° *nuncio:* "quid autem si non habeat domum vel ipse ad domum uxoris? Nichilominus legitimum est matrimonium, sed ideo sic dicit quia cum ducatur in domum viri presumitur uxor <et> presumitur matrimonium, ac in alio casu non presumitur, sed nichilominus si aliter appareat, legitimum est matrimonium. h."

us,[139] holds that the text means that all the facts given were of no moment except whether the *deductio* was made before or after the gift. This is probably a reference to Azo's view, and the gloss points out that D.23.2.5 supports it. But this is not Accursius' view. His view is expressed in the gloss on *contracted matrimony which is understood to be by consent,* "that is to say, lawful and present [consent], and if there is doubt whether it was made before the marriage or after say as in [C.5.3.6]."[140] And again in the next text: "If there is doubt whether it be before the marriage or after, then distinguish whether she was led into the house or not as in [C.5.3.6]."[141] Again at D.35.1.15, the original locus of Ulpian's *regula* (D.50.17.30),[142] we find at the word *ducta:*[143]

> Here is an argument that a *ductio* is necessary for marriage and [C.5.3.6, and D.23.2.5.] are argued, but say to the contrary, as in the end of this law and [D.50.17.30], and this is said when it is not apparent whether it was before the marriage was contracted.

Thus, by the time we reach C.5.3.6, we should be ready for the following terse dismissal of the *ductio* theory: "And note that some foolishly gather from this text that according to Roman law a handing over is necessary for marriage and that this is not so according to canon law. I do not like this view."[144]

Accursius' gloss marks the end of the *ductio* theory, so far as I can tell, for the Middle Ages. A sampling of the writings of

139. D.24.1.66.pr, v° *attinuisse* (1612), col. 2245; (1488) fol. 349v: ". . . Vel hic respondet Scaevola: non attinuisse, id est non pertinuisse ad rem, exprimi tempus, scilicet, an donatio facta esset antequam domum ducatur, aut, pro et, et non attinet ["aut pro, et attinet" in 1488 ed.] exprimi tempus tabularum simul cum prima [=? cum primo tempore] quae plerumque, etc., et bene insert 'itaque,' quod dicit non est necesse exprimi illa duo, sed primum tantum, itaque, etc. Et. secundum istos ductio impedit donationem, etsi non sit uxor, etc., sed non placet. Sed pro hac [D.23.2.5]." The first sentence in both editions is pretty clearly corrupt, even if we extend "pro &" to "pro et contra," but the meaning seems to be as given in the text.

140. "Scilicet legitimo et de presenti, sed si hic sit dubium an sit facta ante matrimonium vel post, dic ut [C.5.3.6]."

141. "Si autem esset dubium ante nuptias vel post nuptias tunc distinguitur an esset deducta in domum vel non, ut [C.5.3.6]."

142. See above, n.18.

143. "Hic est argumentum quod opus est ductione ad matrimonium et arguitur [C.5.3.6.; D.23.2.5] sed dic contra, ut in fine huius legis et [D.50.17.30], et hic loquitur quando non constabat esse ante contractum matrimonium." D.35.1.15, v° *ducta* (1612), col. 1458-9.

144. "Et nota quod fatue quidam hic collegunt quod secundum leges traductio sit necessaria ad matrimonium, secus secundum canones, quod non placet." C.5.3.6, v° *retrahi* (1612), col. 1118, citing D.50.17.30; Nov.22.3; D.24.1.66; D.23.2.5; D.23.2.6.

Odofredus[145] and of the commentators[146] indicates that they accepted Accursius' view that the texts that speak of *ductio* were speaking of a method of proof, not a requirement for the validity of marriage, except, perhaps, in the situation of *de futuro* consent.[147] Thus, in this respect, the Roman law was harmonized with the canon, not the other way around, and thus, what so far as I can tell was the virtually unanimous view of the glossators was reversed in order to accommodate the decretals of Alexander III.[148]

B. Parental Consent

If the glossators, under the influence of canon law, reinterpreted their texts in the light of canon law doctrines, no such reinterpretation can be discerned in the case of the texts concerning parental consent. Whatever development there is seems to be in the nature of greater command of what the Roman texts say,[149] and the only work which even recognizes that canon law might be different is Accursius' gloss.

As we noted above,[150] the necessity of parental consent for the marriages of children in the power of their fathers is the only rule about marital consent stated in Justinian's *Institutes*. The glossators never waver from their adherence to this rule. It can be found in large works and small, from Azo's great *Summa*[151] to anonymous

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145. E.g., Odofredus, *Lectura super digesto veteri* 24.1.66 (Lyon, 1552) (= Opera Iuridica Rariora [OIR] 2.2 [Bologna, 1968]), fol.191r; Odofredus, *Lectura super codice* 5.3.6 (Lyon, 1552) (= OIR 5.1 [Bologna, 1968]), fol. 263v.

146. E.g., Baldus de Ubaldis, *Ad librum quintum codicis*, quoted in Orestano, *La Struttura*, p. 55; Cino da Pistoia, *Commentaria in codicem* 5.3.5 (Frankfurt, 1578; repr. Turin, 1964), fol. 289r.

147. See above, n. 137.

148. Alexander (1) firmly separated engagement from marriage and (2) made marriage dependent on the exchange of present consent without further act or ceremony being required. The first idea is Roman. It may have come to Alexander through the Roman texts; it certainly came to him through the French theologians, some of whom at least knew some Roman law. See Gaudemet, "Originalité," p. 544 & n.5. On the other hand, the glossators in Alexander's time were in the process of reconciling this part of the Roman law with Gratian's ideas. The second idea may be Roman, but it is not the view of the glossators of Alexander's day. It is not impossible that Alexander read the Roman texts and formed his own view, but it seems unlikely.

149. Compare, e.g., *Summa Trecensis* 5.2.3, 5.4.5, pp. 139, 140-1; and *Summa Vindobonensis* 1.11.2, ed. Giovanni Battista Palmieri, in BIMAE 1, Additiones (Bologna, 1914), p. 12 (see Weimar, *Handbuch*, pp. 206-7); with Azo, *Summa Codicis* 5.1.5, 5.4.5-.7, cols. 466, 472.

150. N.44.

151. Azo, *Summa Codicis*, 5.4.5-.6, col. 472.

works of lesser minds,[152] from the first half of the twelfth century[153] to the time of Accursius.[154]

Granted, however, the inviolability of the basic rule, we do find the glossators discussing a number of issues which impinge on it: 1) If paternal consent is required for marriages of children in power, how must this consent be manifested? What about the father who is mad or absent? 2) Conversely, if marriages even of children in power require the consent of the children as well, how must this consent be manifested? 3) If marriages require the consent of the fathers of children in power, what about emancipated children? 4) How are children emancipated? 5) What happens if a child marries without parental consent?

The case of the mad father was the easiest because its solution (C.5.4.25) is referred to in the *Institutes* (I.1.10.pr.). The glossators did not pause to consider why it was that it took until Justinian's time to allow the son of the mad father to marry without the latter's consent, whereas it had long so been held so far as a daughter was concerned; the rule "today" was that either could marry without consent.[155] A similar rule can be derived from the Roman texts concerning fathers who are absent and unknown or captive for more than three years.[156]

How the parental consent was to be manifested was a more difficult problem. D.23.1.7.1: "The father is always understood to consent to the daughter unless he plainly dissents,"[157] was troublesome not only because of the general difficulties of a notion that consent may be presumed from silence,[158] but also because if we require express parental dissent, the parental consent requirement will have no effect in just that situation where it is most needed—where the child runs away and marries without the parent's knowledge. The

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152. E.g., *Abbrevatio Codicis* 5.4 ed. Giovanni Battista Palmieri, in BIMAE 1, Additiones (Bologna, 1914), p. 267. See Weimar, *Handbuch*, pp. 250-1.

153. *Summa Trecensis* 5.4.5, p. 40; *Summa Vindobonensis* 1.11.2, p. 12.

154. I.1.10.pr, v° *patres familias*, v° *in potestate*, v° *et civilis*, v° *debeat*, v° *unde* (1612), cols. 47-8.

155. E.g., *Summa Trecensis* 5.4.5, p. 140; Azo, *Summa Codicis* 5.4.6-.7, col. 472. Accursius, however, seems to require not only the consent of the father's curator for dower and dowry (which C.5.4.25 expressly requires), but also for the marriage itself. I.1.10.pr, v° *secundum datum* (1612), col. 48. The *casus* (C.5.4.25 (1612), col. 1141) confirms Accursius' view. See below, n.184.

156. D.23.2.9.1, D.23.2.10, and D.23.2.11. See Azo, *Summa Codicis* 5.4.7, col. 472.

157. "Intelligi patrem consentire nisi evidenter dissentiat."

158. See C.5.4.5, v° *non contradixit* (1612), col. 1130, for a series of citations on both sides of the proposition, "qui tacet consentit."

ultimate resolution is short but effective: "Note that the father is understood to consent unless he contradicts from the time when he knows."[159]

That still, however, suggests that the children take the initiative and the fathers have a veto power, whereas, as will be argued below, the glossators lived in a world where quite the opposite was the case. In order to put the initiative back with the parents, the glossators combined D.23.1.11, "as in nuptials, so in espousals it is necessary for a daughter in power to consent," and D.23.1.12, "but she who does not strongly oppose her father's will is understood to consent,"[160] and balanced the combination against D.23.1.7:[161]

> A father is always understood to consent to the daughter unless he plainly dissents [D.23.1.7]. Conversely, if a father contracts espousals in the name of the daughter in power, it is necessary for the daughter in power to consent, but she who does not strongly oppose her father's will is understood to consent. . . . [D.23.1.12].

By allowing tacit consent on either side, the glossators were, in fact, giving parents an insurmountable advantage. In Roman law, as in canon, contracts of espousal could be made by (and we really should say "for") children of any age over seven.[162] Thus, only in the situation where the parents failed to make a match for the child (something which the Roman law virtually obliged them to do)[163] would the question of the child's independent choice become an issue.

But the texts allowed the glossators to go even further. Suppose the child did refuse to consent? In the case of daughters D.23.1.12 says: "License to dissent from the father's [wishes] is given to a daughter, only if the father chooses someone as a spouse who is unworthy in character or disgraceful."[164] Now this clearly implies, as

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159. "Nota intelligi [patrem] consentire nisi contradicat ex quo scit. . . ." D.23.1.7, v° *evidenter* (1612), col. 2134.

160. "[S]icut nuptiis, ita sponsalibus filiam familias consentire opportet." D.23.1.11. "[S]ed quae patris voluntati non repugnat consentire intelligitur." D.23.1.12.

161. Intelligitur tamen pater semper filiae consentire nisi evidenter dissentiat, ut [D.23.1.7]. Sic et econverso si pater nomine filie familias contrahit sponsalia opportet filiam familias consentire, sed quae patris voluntate non repugnat consentire intelligitur. . . . [D.23.1.12].

Azo, *Summa Codicis* 5.1.5 col. 466. An even stronger statement appears in *Summa Tubingensis* 5.1.1, p. 136.

162. D.23.1.14. For the canon law, see below n.236.

163. See D.23.2.19. See above, text following n.36.

164. "[S]olum dissentiendi a patre licentia filiae conceditur, si indignum moribus vel turpem sponsum ei pater eligat." D.23.1.12.

a gloss attributed to Johannes Bassianus points out,[165] that if the father chooses a worthy spouse the daughter may not dissent. Azo agrees,[166] although a difficult gloss in the Accursian text expresses some doubt.[167]

The glossators recognized that the texts did not allow the father the same freedom with a son in power as they did with a daughter: "If a son in power dissents, espousals cannot be made in his name."[168] There is, however, one text which appears to allow the father considerable latitude in persuading his son to marry someone whom he might not otherwise have married (D.23.2.22).[169] This text Azo slightly rewrites, and by ignoring the previous text, he turns D.23.2.22 into a powerful weapon for determined fathers:[170]

> Just as the consent alone of sons in power does not make a marriage, so too the consent alone of parents does not make marriage, for it is necessary that a son in power consent either willingly or at his father's insistent urging. For if at his [father's] insistent urging the son marries a wife whom he would not have married if he had had his own choice, he nonetheless contracts marriage (which is not contracted among people who do not will it); for he will be deemed to have preferred this, as in [D.23.2.22].

So far as emancipated sons are concerned, the Roman law texts give the glossators no room in which to maneuver: "An emancipated son can marry a wife, even without his father's consent."[171] They could have read the text on parental compulsion (D.23.2.22) to apply to any kind of son, but they were probably correct in reading it together with D.23.2.21 to apply only to sons in power.

In the case of emancipated daughters, the texts, as we noted above,[172] are considerably less clear. Azo's reconciliation probably

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165. D.23.1.12, v° *eligat* (1612), col. 2135.
166. Azo, *Summa Codicis* 5.1.5, col. 466.
167. D.23.1.12, v° *eligat* (1612), col. 2135. See below, n. 203.
168. "Filio familias dissentiente sponsalia nomine eius fieri non possunt." D.23.1.13. See D.23.2.21. Cf. *Summa Vindobonensis* 1.11.2, p. 12.
169. See above, n.42, and accompanying text.
170. Sicut ergo solus consensus filiorum familias non facit matrimonium, ita nec solus consensus parentum facit matrimonium, quia opportet filium-familias consentire vel sponte vel patre cogente. Nam si eo cogente ducat uxorem quam non duceret si sui arbitrii esset, contrahit, tamen, matrimonium, quod inter invitos non contrahitur; maluisse enim hoc videtur, ut [D.23.2.22].
Azo, *Summa Codicis* 5.4.7, col. 472.
171. "Filius autem emancipatus etiam sine consensu patris uxorem ducere potest, ut [D.23.2.25]." Ibid.
172. Text following n.39, above.

gives more freedom of choice to the emancipated daughter than is strictly necessary, but it is also intellectually the most satisfying reconciliation of a body of texts that are inherently irreconcilable: According to Azo,[173] an emancipated daughter under twenty-five can make her own marriage contract like an emancipated son, but the law has *advised* her ("consuluit ei lex") not to marry without her father's judgment. If she opposes her father's will, a court should decide which of the competitors for her hand is preferable, and weight should be given to the one she has chosen. If the girl's father is dead and she is under twelve, her tutor and mother should decide on a match, and if they disagree, the judge should decide between them. If she is between twelve and twenty-five, her choice is binding. If she, *cultu verecundiae,* does not wish to choose, then those closest to her should choose, and if they disagree, a court must decide. This resolution is generally accepted by the Accursian gloss.[174]

With respect to what was necessary for emancipation, the glossators seem to have stretched the texts somewhat to fit the circumstances of the day. Of course, a formal act of emancipation would release the child from power as would the death of a father who was himself *sui juris.* There are also, however, some hints that a child of either sex is automatically emancipated upon reaching the age of twenty-five.[175] The age obviously is borrowed from the age at which

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173. Azo, *Summa Codicis* 5.4.8-.11, col. 473, citing C.5.4.18; C.5.4.1; C.5.4.8; C.5.4.20.

174. C.5.4.18, v° *sententia,* v° *pares* (1612), col. 1135; C.5.4.1, v° *arbitrium* (1612), col. 1129; C.5.4.8, v° *eius voluntas* (1612), col. 1132. Baldus in a rubric to C.5.4.20 (1612), cols. 1131-2, suggests that the consent of the father is necessary for the marriage of any daughter, emancipated or not.

175. If we look to the standard texts on emancipation (e.g., Azo, *Summa Institutionum* 1.12 [Venice, 1566], cols. 1056-7), we will find a summary of the late Roman rules: *patria potestas* is dissolved by the natural or civil death of the father, by the installation of the son in some dignity, and by emancipation before a judge. The marriage texts, however, reveal here and there that that is not the way the glossators were thinking. E.g., D.23.2.25, v° *emancipatus* (1612), col. 2124: "major xxv annis; consulitur tamen ei ut consensu patris faciat, ut [C.5.4.18]." In describing C.5.4.18 Azo begins: "Quod autem dixi in filio emancipato ad filiam emancipatam minorem xxv annis extendenum est. Si autem emancipata filia sit minor xxv annis consuluit ei lex ne in secundas nuptias sine patris sententia conveniat." *Summa Codicis* 5.4.8-.9, col. 473. Why *minorem* in the first sentence? It could be a mistake for *maiorem,* but the word is in both printed editions. It makes sense, however, if we posit that Azo was *assuming* that a daughter over twenty-five would be emancipated; he need only talk about the unusual situation, the daughter under twenty-five and emancipated. Automatic emancipation at age twenty-five would, of course, fit better with the customary law of Azo's day. See, e.g., Melchiorre Roberti, *Svolgimento storico de diritto privato in Italia,* 2nd ed., 3 (Padua, 1935), 270-2.

the *cura minorum* ends, but the glossators clearly perceived the distinction between *patria potestas* and *cura,* and it is hard not to conclude that they deliberately confused the two.

Finally, and perhaps most important, what if a father does not consent when his consent is required, and the child goes ahead and marries anyway? As we have seen in the case of a daughter who refuses her father's choice the glossators knew how to distinguish between a penalized act and an invalid one when they wanted to. There is, moreover, a suggestion in some of the earlier literature that marriages formed without parental consent may be penalized by loss of dowry or *patria potestas* over the children of the marriage but are still, nonetheless, marriages.[176] The Accursian gloss, however, does not equivocate on this topic: where parental consent is required and not obtained, the marriage is void.[177]

Further, if the man takes the woman away from her father's house, even if she consents, even if she is his *sponsa,* he is subject to the penalties for *raptus* (C.9.13.1).[178] These include loss of life, loss of property, and, in a provision which suggests that capital punishment would not always be inflicted, a total ban on marrying the *rapta,* even if her parents consent.[179] The glossators, however, do not seem to have extended, as some of the earlier canonists did, the penalties for *raptus* to the situation where force was not employed, but the parents were simply unaware of the abduction.[180]

Thus, it seems fair to say that the glossators adhered to the basic position of their texts that parental consent was required for the marriages of children, at least the first marriages of children under the age of twenty-five whose fathers were living and not insane or missing. Did they even recognize that the canon law, at least after Alexander, did not require parental consent for the validity of

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176. E.g., *Summa Trecensis* 5.4.8, p. 141: "in contrahendis et in reconciliandis matrimoniis parentes consentire debent; alioquin iniustum erit matrimonium." *Summa Vindobonensis* 1.11.2, p. 12: "[nuptie] que autem permittuntur iuste dicuntur, quas cives Romani, consensu proprio et eorum in quorum sunt potestate, legitime contrahunt. . . ."

177. I.1.10.pr, v° *debeat* (1612), col. 48: "alias non valet," citing D.1.5.11, which holds a child illegitimate if he is born of a marriage to which his mother's father did not consent; D.1.5.11, v° *Paulus* (1612), col. 89: "Hic filia nupsit patre ignorante, unde matrimonium non valuit," citing C.5.4.5, D.32.1.1.1, D.23.2.57, .65, the first of which has to do with tacit consent, the others with the Roman rule against acquiring legal status *nunc pro tunc.*

178. Azo, *Summa Codicis* 9.13, cols. 894-5.

179. See below, nn.196, 197, and accompanying text.

180. See Rudolf Köstler, *Die väterliche Ehebewilligung,* Kirchenrechtliche Abhandlungen 51 (Stuttgart, 1908), p. 109.

marriage? We get no hint of it until the Accursian gloss,[181] and he vacillates in what he reports. In a gloss on a passage of the *Digest* (D.1.5.11) on the illegitimacy of children born to marriages to which the father did not consent, Accursius firmly asserts the invalidity of such marriages.[182] He then considers the possibility of ligitimation by the subsequent death of the father (and hence the automatic validity of the marriage) by analogy to C.5.27.10, which provides for the *ex post* legitimation of the children of a man who marries his concubine. He rejects this analogy; then he, or some later emendator, says, without citation of authority: "Today, by canon law, such a marriage is valid even without the consent of the father, and the children are legitimate."[183] The question, of course, is to what does "such" refer: marriages to which the bride's father subsequently consents tacitly or expressly (the immediate referent)? marriages to former concubines? marriages without parental consent after the father dies (which is what D.1.5.11 is about)? or marriages without parental consent generally? A similarly ambiguous passage occurs in the glosses on the parental consent requirements in the *Institutes*.[184]

Citations to canon law do occur in the glosses on C.5.4.12, a constitution which notes that a son in power cannot be compelled to marry, but neither may he marry without the consent of his father. The gloss notes that C.32, q.2, *dictum post* c.12 and C.32, q.3, c.1 support this proposition but that C.27, qu.2, c.2 may be cited to the contrary.[185] The first citation is to Gratian's dictum: "Paternal con-

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181. This in itself is not very surprising. See Lefebvre, "Glose décret et décrétales," pp. 252-6.

182. See above, n. 177.

183. "Hodie iure canonico valet tale matrimonium etiam sine patris consensu, et filii sunt legitimi." D.1.5.11, v° *Paulus* (1612), col. 89; (1488), fol. 11r. Lefebvre suggests that general citations to canon law are rather rare in Accursius. "Glose, décret et décrétales," p. 253, n.26.

184. I.1.10.pr, v° *secundum datum* (1612), col. 48, the passage concerning the marriage of children of madmen:

> Scilicet cum auctoritate curatoris et dote secundum quantitem patrimonii patris, ut [C.5.4.25], sed iure canonum sufficit consensus eorum de quorum matrimonio agitur. Sed illud forte in aliis non in filiis familias intelligitur. Vel credo quod hoc corrigitur, quia ita honesta est res contrahere matrimonium sicut et intrare monasterium, ut [Nov.123.37].

Does Accursius mean to suggest that the whole parental consent requirement, which he has just carefully explained, has been "corrected" by the canon law? I do not think so. It is far more likely that *hoc* refers simply to the requirement of the curator's *auctoritas* in the case of children of madmen in C.5.4.25, and indeed, other glossators did not read the constitution as requiring that *auctoritas* for the validity of the marriage. See above, n. 155.

185. "[E]t facit [C.32, q.2, *dictum post* c. 12; C.32, q.3, c.1]; arguitur contra [C.27, q.2, c.2.]" C.5.4.12, v° *iuris preceptis* (1612), col. 1133. The latter two citations are not in Lefebvre, "Glose, décret et décrétales," p. 281.

sent is required in marriage and without it there cannot be lawful [*legitimae*] nuptials . . .";[186] the second to a text ascribed to Pelagius which states that the free grandfather, not the slave father, has the right to choose the spouse of his granddaughter; the *contra* citation is to Nicholas I's *solus consensus* letter to the Bulgarians.[187] That Accursius after the pontificates of Alexander III and Innocent III could have thought that the question of parental consent to marriage was still an open one in *canon* law seems hard to believe.[188] I shall try to suggest an alternative explanation for his curious treatment of the canon law on the topic in the following section.

III. THE POLICY OF THE GLOSSATORS' THEORY OF MARRIAGE

We have seen that the glossators reacted to two key elements of Alexander's rules in two different ways. In the face of the rule that marriages are made by present consent even without solemnity or ceremony, they abandoned their previous position that marriages are made by consent plus a *ductio* and reinterpreted their texts, so that the *ductio* became simply a piece of evidence in cases where there was doubt about the consent. In the face of the rule that marriages are made by consent of the parties to the marriage and not that of their parents as well, however, the glossators stood firm, only barely suggesting that the canon law might be different. This difference in approach calls for at least an attempt at explanation.

One possible explanation might lie in the nature of both the canon and Roman law texts on these two topics. Alexander's decretals

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186. "[P]aternus consensus desideratur in nuptiis, nec sine eo legitimae nuptiae habeantur. . . ." C.32, q.2, *dictum post* c.12.

187. See above, n.84. The same technique is employed in the gloss on C.5.4.7, v° *non penitente* (1612), col. 1133, in which a father is allowed to bring an action for dowry when his daughter, who had divorced her husband, returns to him against the father's will. After commenting on the fact that in this situation the father can recover the dowry even against the daughter's will, he adds: "et facit [D.1.5.11; D.23.2.2; C.32, q.3, c.1]; sed contra [C.27, q.2, c.2; X 5.17.6 (= 1 Comp. 5.14.4); D.23.4.29.1]." The 1488 edition (fol. 131r) reverses the two Gratian citations and substitutes X 4.14.1 for X 5.17.6. Neither the reversal nor the substitution makes any sense in this context. See below, n.197.

188. Particularly considering that Johannes Teutonicus' gloss to the *Decreta* (completed shortly after 1215) in discussing the cited texts and those near to them makes clear that parental consent is not required for the validity of marriage. See C.27, q.2, C.2, v° *solus* (Venice, 1572) (see above, n.2), p. 987; C.32, q.2, C.16 *rubric* and v° *parentum*, p. 1054; noting in all three cases the possible conflict with Roman law. See further Köstler, *Väterliche Ehebewilligung*, p. 146, n.3.

on the formation of marriage by present consent without solemnity or ceremony (much less intercourse) resolved a great debate on the topic.[189] A number of the most important of these decretals found their way into the *Compilatio Prima*[190] and were widely disseminated.[191] The denial of a parental consent requirement, on the other hand, was much less dramatic. Gratian seems to have made less of an attempt to resolve the conflicting canonic texts on the topic;[192] although Alexander's views on the topic both in the *Stroma*[193] and in the decretals are clear enough, they are not directly stated in the latter;[194] the topic does not seem to have crystalized into an academic debate; and the definitive resolution of the parental consent question in canon law, in a certain sense, does not come until Innocent III's decretal *Accedens*.[195]

This part of the argument does not have much weight. Alexander's decretals do not come right out and say that a *ductio* is not required either, and it is just as clear from their language that parental consent is not required as it is that a *ductio* is not required. Further, the Accursian gloss, at least, indicates an awareness of *Accedens*. It is cited in connection with the discussion of the rule of C.9.13.1, that the victim of a *raptus* cannot marry her abductor even if her parents consent.[196] The canon law is *contra,* the gloss notes, citing C.36, q.2, c.8 and C.36, q.2, *dictum post* c.11. This citation allows the glossator to lose the battle but win the war: the cited chapter and *dictum* do indeed say that the *rapta* may marry her *raptor,* but only with the consent of her parents, and the *palea* following the *dictum*

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189. See above text and nn.8-9.

190. E.g., 1 Comp. 4.4.3 (= X 4.4.3); 1 Comp. 4.4.5(7); 1 Comp. 4.4.6(8); see also 2 Comp. 4.1.2 (= X 4.1.15). The *Compilatio Prima* was composed befor June, 1192. Stephan Kuttner, *Repertorium der Kanonistik,* Studi e Testi 71 (Vatican City, 1937), p. 322.

191. Idem, pp. 322-44.

192. See Köstler, *Väterliche Ehebewilligung,* pp. 106-13; Donahue, "Policy," (see above, n.3), p. 273, n.71.

193. C.30, q.2; C.36; ed. Friedrich Thaner, *Summa Magistri Rolandi* (1874; repr., Aalen, 1962), pp. 169, 233-4. But see John T. Noonan, "Who was Rolandus?," in *Law Church and Society: Essays in Honor of Stephan Kuttner* (Philadelphia, 1977), 21-48, which casts serious doubt on the identification of the author of the *Stroma* as Alexander III.

194. See Köstler, *Väterliche Ehebewilligung,* pp. 131-2.

195. X 5.17.7 (= 3 Comp. 5.9.1) (the 3 Comp. is dated in 1210 [Kuttner, *Repertorium,* p. 355]). See also Köstler, *Väterliche Ehebewilligung,* pp. 132-6, and sources cited.

196. C.9.13.1, v° *exposcere* (1612), col. 2365. On the problem of *raptus* and *raptus in parentes,* see generally Köstler, *Väterliche Ehebewilligung;* Bartholomew F. L. Fair, *The Impediment of Abduction,* Catholic University of America, Canon Law Studies 194 (Washington, D.C., 1944).

supports this proposition with a long list of citations to Roman law. Then comes *Accedens,* almost as an afterthought: "you might see [X 5.17.7]."[197]

There is something, however, to the idea that the Roman law texts were more malleable on the *ductio* requirement than they were on the parental consent requirement. After all, a highly respectable body of modern scholarship holds that Accursius' view that the *ductio* is a matter of evidence, not a legal requirement, is in fact an accurate rendering of the classical Roman law.[198] On the other hand, no one could seriously maintain that the Roman texts do not require parental consent for the valid marriage of children in power. Thus, the glossators' approach to Alexander's two rules was dictated by the nature of the texts before them: they manipulated the texts where they could, as in the case of the *ductio* requirement. The parental consent requirement, however, could not be manipulated.

This argument seems to underestimate the tools the glossators had available to them for reconciling texts where they wanted to. We have already seen them use some of the techniques which might have been brought to bear here. For example, we noted that relatively few Roman texts deal with the validity of marriage because marriages were dissoluble and concubinage was legally recognized.[199] The glossators might have said, as they did in the case of C.5.4.18, that Justinian *counseled* children not to enter into marriages without their parents' consent, but that such marriages were not invalid,[200] or they

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197. "[V]ideas [X 5.17.7]." Ibid. Indeed, it may be an afterthought, either of Accursius or of a later writer (see Weimar, *Handbuch,* p. 174; Lefebvre, "Glose, décret et décrétales," p. 251), and the citation is not found in the 1488 edition (fol. 378v). On the other hand, Accursius certainly could have known of it (above n.135), and Lefebvre who compared the printed text with 13th c. mss. "pour certains points d'interprétation particulièrement délicate," lists the citation as genuine. "Glose, décret et décrétales," pp. 251, n.13, 284. The form of the citation is, of course, no help, since that could have been corrected in the mss. after the appearance of Gregory IX's *Decretals* in 1234. Idem, p. 251.

Accursius also cites Lucius III's decretal *Quum causam* (X 5.17.6 = 1 Comp. 5.14.4), which like *Accedens* makes clear that in a case of *raptus* it is the woman's choice and not her parents' that is to prevail. See above, n.187. Although there are also problems with this text (for which see above, n.187), the use Accursius makes of the decretal again seems to be designed to suggest that the question of parental consent is still open in canon law.

198. See sources cited above, n.30.

199. See above, nn.31-33, and accompanying text.

200. See above, nn.173, 174, and accompanying text. This is the method of reconciliation employed in the *glossa ordinaria* to Gratian. C.27, q.2, c.2, v° *solus,* p. 987:

might have said, as Azo did in the case of the *ductio* texts, that marriages without the father's consent do not give the marriage partners marital property rights,[201] or that such marriages are not fully *justae nuptiae* in that the children of such marriages are not in power,[202] or they might have said, as Accursius suggested when he was trying to reconcile D.23.1.11 and D.23.1.12, that a child who does not obtain his father's consent incurs a *causa ingratitudinis*.[203]

Further, the glossators had a number of ways of acknowledging that a rule stated in the Roman texts was simply not the law in their day.[204] For example, as we noted above,[205] the *Institutes* and numerous other Roman texts hold that the marriage of slaves is no marriage. The gloss on the *Institutes* states this and then adds: "But it is otherwise by the law of the canons which prevails, as in [Nov.83.1], where it is said that canons are to be taken for laws."[206] Another formula for expressing the same thought, without perhaps quite so much deference, is found in the *Summa Vindobonensis* (mid-tweltfth century) with regard to the differing rules of canon and Roman law on incest: "In the contracting of marriages today the law of heaven

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> [H]aec dictio "solus" non excludit consensum parentum . . . quasi dicat solus eorum consensus est causa effectiva matrimonii. Et ideo non sunt contrariae leges illae, [C.5.4.12; D.23.2.2], quae dicunt quod in matrimonio requiritur consensus parentum. Sed dic quod requiritur ex honestate non ex necissitate.

And again C.32, q.2, c.16, v° *parentum*, p. 1054: "Hoc [C.5.1.4] tamen ad honestatem referas."

201. See above, nn.123-5, and accompanying text.

202. See above, text and n.176. Cf. above, text at n.132.

203. D.23.1.12, v° *eligat* (1612), col. 2135; (1488), fol. 329v:

> ergo si dignum eligat pater contrahuntur sponsalia sine voluntate filiae; secus tamen asseritur in filio, ut [D.23.1.13]. Johan[nes Bassianus]. Tamen dic idem in filia quod in filio, ut numquam consistant sponsalia sine voluntate filiorum et filiarum, sed tamen ubi dignum eligat pater, contrahit causam ingratitudinis nisi consentiat ut in aliis causis, ut [Nov.115.3.11].

The rest of gloss considers whether C.5.4.18 (above, text following n.43) is *contra*, and concludes (at least in the 1488 ed.) that the two texts may be reconciled either on the ground that C.5.4.18 concerns an emancipated daughter and D.23.1.12 one in power (above, text at n.40 and following n.43), or on the ground that D.23.1.12 denies the daughter power to choose only where she has chosen someone unworthy (and the father someone worthy).

204. See further Lefebvre, "Glose, décret et décrétales," pp. 258-63.

205. See above, text and n.45.

206. "Sed aliud est iure canonum quod praevalet, ut [Nov.83.1], ubi dicitur quod canones sunt servandi pro legibus." I.1.10.pr, v° *cives Romani* (1612), col. 47. According to Lefebvre ("Glose, décret et décrétales," p. 263), the phrase "ubi . . . legibus" was added in Accursius' second recension. See Weimar, *Handbuch*, p. 174. On the use of Nov.83.1, see above, text at n.115.

rather than that of the forum is more observed, since today those who are within the sixth generation among themselves are prohibited by the church from contracting nuptials."[207] There is a still less polite formula in the *Summa* "Iustiniani est in hoc opere" on the same topic: "The canons, however, say the opposite."[208] And there is Azo's positively rude, though not totally unjustified, remark on the same topic: "The canon lawyers have established many degrees of this type of affinity for no purpose other than to trap men."[209]

In the case, however, of the parental consent requirement, the glossators do none of these things; they neither attempt to modify the Roman law rule, except to the modest extent noted above,[210] nor do they really recognize, deferentially or not, that the canon law is different. The closest they come are the few citations in the Accursian gloss, which, if not designed to be misleading, are at least quite out of date in their suggestion that the question is debatable in canon law. The conclusion is hard to escape that the glossators did not recognize the canon law rule because they found it far less palatable than the rule that present consent makes a marriage even without solemnity.

The clearest explanation of why the glossators supported the parental consent rule is found in Vacarius' *Summa*.[211] Young people,

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207. "In nuptiis autem contrahendis hodie potius ius poli quam fori spectatur, cum hodie ab Ecclesia qui sunt etiam in VI. [!] generatione inter se nuptias contrahere prohibentur." *Summa Vindobonensis* 1.11.2, p.12.

208. "Canones tamen contra dicunt." 1.6.1, ed. Pierre Legendre, *La Summa Institutionum "Iustiniani est in hoc opere,"* Ius Commune, Sonderhefte 2 (Frankfurt, 1973), p. 31.

209. "Huius modi affinitatis multa genera constituerunt decretistae, quod nihil aliud fuit quam homines illaqueari." Azo. *Summa Codicis* 5.4.13, col. 473; but cf. 5.4.12, col. 473 where he cites C.35, q.3 on incest among collaterals and 5.4.2, col. 472, on "divini et humani iuris communicatio," quoted above, n.125. There are a number of areas other than those mentioned in the text where the glossators proceed with their own rules despite the conflict with canon law. E.g., the prohibitions on cross-class marriages as modified by Justin and Justinian (above, nn.46, 49, and accompanying text) and the prohibitions on marriage because of an official or quasi-official position (above, nn.47-8, and accompanying text). See I.1.10.11 v° *enumerari* (1612), col. 54. Perhaps the most important from the theoretical point of view is Accursius' continued insistence that marriage is an act ("actus legitimus iure canonico introductus") not a contract (see above, nn.61, 93, 116, and accompanying text), a view which gives him some difficulty with marriage among absents and a great deal of difficulty with conditional marriages. See D.23.1.4, v° *constat* (1612), col. 2133; D.50.17.30, v° *nuptias* (1612). col. 1882; see further Rudolf Weigand, *Die bedingte Eheschliessung im kanonischen Recht*, Münchener Theologische Studien 3, Kanonistische Abteilung 16 (Munich, 1963), pp. 28-58. From a social point of view, however, I think their continued adherence to a parental consent requirement was the most significant.

210. Above, text at nn.172-4.

211. See above, nn.99-109, and accompanying text.

Vacarius tells us, particularly young women, cannot be trusted to make marriage choices. They will be deceived and will bring disgrace on themselves and on their families.[212]

There is, of course, another, perhaps less attractive side to Vacarius' concern. It need hardly be pointed out that marriage in the Middle Ages, as a matter of social fact if not of law, was not the exclusive concern of the marriage partners. At all levels of society, family, financial and feudal concerns, and at the upper levels of society, political and military concerns as well, dictated, in many instances, marriage choice.[213] Vacarius' rules reflect these social realities. Marriage is at least a three-party transaction, involving the future husband and wife and her father, perhaps as often a four-party transaction, involving the future husband's father as well. Requiring the consent of the fathers for the validity of marriage ensures that the social, economic and political aspects of the marriage are properly considered.

Even Vacarius' *traditio/deductio* requirement may be seen as supporting the interests of the marriage partners' families in the marriage. Any required ceremony, of course, makes "runaway" marriages more difficult, and this is particularly true if the ceremony involves, or even arguably involves, the formal handing over of the bride by her father or guardian.[214]

There is no statement of policy about parental consent in the writings of the later glossators as clear as Vacarius', but their retention of the parental consent requirement indicates that they retained the bias of his policy. Certainly there are strong indications that the glossators in every period were interested in the practical and financial aspects of marriage. They debated the question whether an action will lie for breach of a contract to marry,[215] and Accursius concludes

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212. Vacarius, *Summa de matrimonio* 16, pp. 276-7:
non est infirmanda observatio constitutionis pape Evcharistii [C.30, q.5, c.1] omni equitate plena et pietate, maxime cum generalis non sit ea constitutio sed specialiter ad eas pertinet puellas que in potestate uel custodia parentum sunt constitute non uidue sed uirgines bene custodite. Sicut etiam in decreto pape Leonis ostenditur [C.30, q.5, c.4]. In nuptiis enim talium puellarum de naturali etiam ratione exigitur consensus parentum et propinquorum. [Cf.I.1.10.pr.] quid enim iustius est quam ut consilio parentum et voluntate huiusmodi puelle propter sexus fragilitatem consulatur, ne inconsulta facillitate et plerumque lubrico etatis decepte in perniciem propriam et parentum dedecus turpissime nubant?
Certainly the documents from the practice of the church courts would indicate that at least in some instances Vacarius was right. Donahue, "Policy," p. 262.

213. See Donahue, "Policy," pp. 256-7, and sources cited.

214. See Donahue, "Policy," pp. 272-3.

215. See above, n.52, and accompanying text.

that it will, at least, give rise to an action for money damages.[216] One of the earliest known of their treatises is Martinus' *De iure dotium,*[217] and dowry appears continuously in the *quaestiones, distinctiones* and *dissensiones* literature.[218]

The glossators were not the only writers to use Roman law to support the practical interest of the medieval family in the marriage choices of their children. We can see the same process at work in the marriage sections of the *Exceptiones Petri* and the *Tübingen Lawbook*. While much about these books is controverted, what we need to know about them is relatively uncontroversial:[219] In the form in which we have them, these books were composed in the south of France, probably in the twelfth century, but certainly before the time of Alexander's decretals. They are not academic products, but compendia of what the authors thought would be useful for practicing lawyers and judges to know about Roman law. One passage only need detain us:[220]

> Neither feasts nor witnesses nor dowry nor dower nor priestly blessing but solely the resolution of mind of man and woman and the consent of the parents in whose power they are makes nuptials. These other things make evidence and proposal of nuptials.

The mention of parental consent is not a side remark. It is restated in three other excerpts.[221]

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216. D.23.1.2, v° *stipulari* (1612), col. 2133: ". . . Ex hac tamen stipulatione non reperio agi. Sed cur non agatur ad interesse, si femina dives est, cum sit rei honestae stipulatio?"

217. Kantorowicz, *Studies,* pp. 94-102, 254-66.

218. E.g., *Quare Chisiana* 6, ed. Erich Genzmer, "Quare Glossatorum," in *Gedächtnisschrift für Emil Seckel,* Abhandlungen aus der Berliner juristischen Fakultät 4 (Berlin, 1927), p. 67; *Collectio Bambergensis* (Distinctions) 65, 66, 105, ed. Seckel (see above, n.53), pp. 393, 398; Hugolinus, *Dissensiones dominorum* 269 (see above, n.52), pp. 441-2.

219. See Peter Weimar, "Zur Entstehung des sogenannten Tübinger Rechtsbuchs und der Exceptiones legum Romanorum des Petrus," in *Studien zur europäischen Rechtsgeschichte [fur] Helmut Coing,* ed. Walter Wilhelm (Frankfurt, 1972), pp. 1-24, and literature cited; Weimar, *Handbuch,* pp. 255-7.

220. Non conviva, non testes, non dos, non propter nuptias donatio, non sacerdotalis benedictio, sed sola destinatio animi viri et mulieris, et parentum consensus, quorum in potestate sunt, faciunt nuptias; testimonium tamen et mentionem nuptiarum faciunt.

Exceptiones Petri 1.51, ed. Savigny, *Geschichte* 2:346 (= *Tübingen Lawbook* 105, ed. Max Conrat, "Il Libro di diritto di Tubinga," *Bullettino dell' Istituto di Diritto Romano* 3 [1890], 105). Carlo Guido Mor's ed. in *Scritti giuridici preirneriani* 1-2 (Milan, 1935-8) was unavailable to me.

221. *Exceptiones Petri* 1.31 (= *Tübingen Lawbook* 96), 1.57 (= 102), 1.49 (= 103); pp. 337, 345, 347 (= pp. 131-2, 133, 134).

What is important about this excerpt, other than its startling anticipation of the glossators' ultimate resolution of the *ductio* problem, is what it tells us lawyers and judges in the practical world wanted to use Roman law for. The *ductio* requirement did not interest them. What they were interested in was parental consent.

If we may rely on the evidence of the *Exceptiones Petri,* Alexander's decretals eliminating any ceremony requirement for marriage did not deprive the practical world of anything which it had perceived as useful. Alexander's denial of a parental consent requirement, on the other hand, deprived that world, again if we may rely on the *Exceptiones Petri,* of something which it wanted. In the case of ceremony, the glossators yielded to Alexander's decretals and abandoned the *traditio/deductio* requirement, despite the advantages which that requirement afforded parents who wished to prevent the runaway marriages of their children. In the case of parental consent, however, the glossators responded to the desires of the practical world and maintained the requirement.

The progress of the glossators' thought from Irnerius to Accursius has been characterized as a progress from the harsh and impractical world of the *Corpus Iuris* to the development of a practical law, molded by notions of canonical equity and in tune with the needs of the times. In this, Martinus and his followers are said to have played a leading role. In the case of marriage, however, practicality and the demands of the *Corpus Iuris* were on one side and the canon law, at least after Alexander, on the other. That the glossators chose to side with their text, which also happened to coincide with practical realities, is not at all surprising. They were, after all, largely laymen, counsel to princes, and princes, perhaps more than other laymen, need to control the marriages within their families if not among a wide range of their followers.[222] Indeed it is not the glossators' position that is surprising; it is Alexander's. For in a world of tight family networks, he adopted a solution that went against those networks. He is the visionary, the glossators the practical men. He puts an extraordinary faith in individual choice; they, more earthbound, see safety in collective decision.[223]

But what did the glossators hope to achieve by retaining the parental consent requirement? Jurisdiction over marriage cases, after all, lay in the ecclesiastical courts not the secular, and the ecclesiastical courts were bound by Alexander's rules. What effect could the glos-

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222. See generally Paradisi, "Diritto canonico"; Cortese, *La norma;* Johannes Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert,* Forschungen zur europäischen Rechtsgeschichte 21 (Cologne, 1974).

223. See Donahue, "Policy," pp. 270-9.

sators hope to have when the law of the courts which had jurisdiction over marriage cases opposed them? To attempt a full answer to this question lies beyond the scope of this paper. It involves not only the broad and difficult question of what the glossators thought was the purpose of their prodigious exercise, but also a whole range of evidence which lies well beyond the mid-twelfth to mid-thirteenth centuries. I would like, however, to suggest a line of argument which I hope to pursue further on another occasion.

Elsewhere I have tried to argue, on the basis of records of the later medieval church courts and on the basis of the objections which were raised to Alexander's rules at the time of the Reformation and the Council of Trent, that those rules had the effect of breaking down the influence of the family on the choice of marriage partner. I then attempted to argue back from this evidence to the proposition that Alexander intended his rules to have this effect.[224] The same type of argument, I believe, can be made in the case of the glossators' retention of the parental consent requirement, but tracing the effect of that retention is far more difficult. Unlike Alexander's rules, the glossators' rule may not be seen on the face of ecclesiastical court records. Perhaps, however, it can be seen behind those records, perhaps also in the records of secular courts, in secular legislation, and in debates about what the law ought to be.

For example, in England, where Roman law had only an indirect influence on the practice of the secular courts,[225] there survive substantial records of the practice of the medieval church courts in marriage cases.[226] In the vast majority of these cases, it is the core rule of Alexander's synthesis—that marriages are made by present consent freely given between capable parties, even absent solemnity or the consent of family or lord—that is at stake.[227] Further, the cases reveal a strikingly large number of informal marriages.[228] In many cases, the reasons why the parties chose to marry informally rather than solemnly are obscure, but there are some cases in which we may conclude that they chose informal marriage in order to escape pressure from their families or lords.[229]

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224. Donahue, "Policy."

225. See generally John Barton, *Roman Law in England,* Ius Romanum Medii Aevi 5.13a (Milan, 1971).

226. Helmholz, *Marriage Litigation* (see above, n. 7), pp. 6-24, 233-6.

227. Helmholz, *Marriage Litigation,* pp. 25-47, 74-107; Michael M. Sheehan, "The Formation and Stability of Marriage in the Fourteenth Century: Evidence of an Ely Register," *Mediaeval Studies* 53 (1971), 262; Donahue, "Policy," pp. 262-7.

228. Helmholz, *Marriage Litigation,* pp. 25-31; Sheehan, "Ely Register," pp. 249-50.

229. Donahue, "Policy," pp. 268-70.

On the other hand, the Register of the Official of Paris (1384-87)[230] stands in marked contrast to the English records in that it reveals very few cases of informal marriage and, indeed, very few cases to enforce *de presenti* marriages at all. The principal types of cases are: cases involving *de futuro* consent to marry, cases of separation from bed and board and separation of goods, and cases involving children in power and orphans. A number of the *de futuro* consent cases involve the Alexandrine rule about *de futuro* consent followed by intercourse, but a majority of them are simple contract enforcement actions.[231]

We do not know yet whether the difference between what the records seem to show for England and what they show for one place over a short period of time in France will hold true as a general matter.[232] But at least the Paris register both in the absence of many informal marriages and in the presence of a large number of cases dealing with contracts to marry differs markedly from what the English records would lead us to expect. What could be the cause of these differences?

Perhaps, the reasons for both the small number of informal marriages and the large number of marriage contract cases are connected. France, unlike England, had a strong tradition of Roman law learning throughout the Middle Ages. The *coutume* of Paris, unlike the English common law, suggests in a number of places an institution like *patria potestas,*[233] and the French *coutumes* and documents of secular practice show that marriage without consent of the family was punished, by loss of property rights, by infamy in some places, etc.[234]

It also seems probable that the Roman[235] institution of espousals

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230. Joseph Petit, ed., *Registre des causes civiles de l'Officialité épiscopale de Paris, 1384-87,* Collection de documents inédits sur l'histoire de France (Paris, 1919).

231. The contents of the register are nicely analyzed and discussed in Jean-Phillipe Lévy, "L'Officialité de Paris et les questions familiales à la fin du XIV^e^ siècle," in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras,* 2 (Paris, 1965), 1265-94.

232. Those who know the French records far better than I do have suggested that informal marriages were common there as well. E.g., Juliette M. Turlan, "Recherches sur le mariage dans la practique coutumière (XII^e^-XVI^e^ s.)," *Revue Historique de Droit Français et Étranger,* 4th ser. 35 (1957), 503-16.

233. See François T. M. Olivier-Martin, *Histoire de la coutume de la prévoté et vicomté de Paris,* 1 (Paris, 1922), 151-9.

234. Turlan, "Recherches," pp. 487-99; Reinald Gräfe, *Das Eherecht in den Coutumiers des 13. Jahrhunderts,* Göttingen Studien zur Rechtsgeschichte 6 (Göttingen, 1972), pp. 21-7.

235. Of course, the Germanic law knew a preliminary marriage arrangement as well, the *Verlobung.* See Gaudemet, "Originalité" (see above, n.13),

provided French parents with a means of undermining Alexander's rules. They could persuade their children from any time after the age of seven to make contracts to marry with those whom the parents wished them to marry. Indeed, they could have children between the ages of seven and puberty go through present consent marriages, although the legal effect of such marriages was, because of the nonage, simply that of a contract to marry. In canon law the child could repudiate the contract when he reached the age of puberty,[236] but at least in France, there was a doctrine to the effect that he had to do so before the church authorities.[237]

I do not mean to suggest here that the presence of Roman law learning in France provides a complete explanation for the difference between the French and English records. If the difference proves to be a general one, its roots must lie deep in differences in social practice in the two countries and may be reflected in the law in ways quite unrelated to Roman law rules.[238] I do mean to suggest, however, that where it was available, Roman law was being used by those who sought to resist the effects of the Alexandrine rules. That in turn leads to the further suggestion that the glossators saw what the effects of the Alexandrine rules were going to be, and, by their retention of the parental consent rule, sought to support those elements in society which would find Alexander's rules, or at least their tendency to promote runaway marriages, unacceptable. The glossators may not have foreseen how that support would be used, but they kept alive an academic tradition that parental consent was "the law."

If "the law" was probably being used as the basis of secular laws and institutions in fourteenth century France, at the time of the Council of Trent it was used to support an argument for a change in the canon law, and failing that, again as a basis for secular law: The representatives of the King of France at the Council of Trent were instructed to press for a restoration of the Roman law rule (as inter-

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pp. 536-9. The institution that we see on the Paris register, however, seems more Roman than Germanic, whatever its origins.

236. X 4.2.7; X 4.2.8; X 4.2.14. For evidence of this institution in England in the sixteenth century, see the Chester depositions (1561-66), in F. J. Furnivall, ed., *Child-Marriages, Divorces and Ratifications,* Early English Text Society, o.s. 108 (London, 1897).

237. See Lévy, "Questions familiales," pp. 1273-74, and sources cited.

238. For example, France, in contrast to England, had an unusually strong series of provincial church statutes which excommunicated the participants in a clandestine marriage. See Étienne Diebold, "L'Application en France du canon 51 du IV[e] concile du Latran d'après les anciens statuts synodaux," *L'Année Canonique* 2 (1953), 194-5; Lévy, "Questions familiales," p. 1266 & n.7; for the English statutes see Sheehan, "Marriage Legislation" (see above, n.4), pp. 212-14; Sheehan, "Ely Register," pp. 239-43.

preted by the glossators) that marriages by children under 25 could not be made validly without the consent of their parents. The French representatives narrowly failed in having this view accepted, and the decrees of the Council of Trent concerning marriage were never promulgated in France. Their place was taken by royal legislation which restored the old parental consent rule.[239] Today, in virtually every Western country secular law forbids minors from marrying without the consent of their parents, although the age of majority has been reduced from 25 years to the now-prevailing 18 or 21.[240] The Code of Canon Law, however, still does not require parental consent for the validity of marriage.[241]

While the Council of Trent did not make parental consent a requirement for a valid marriage, it did, as is well known, require that marriage be contracted before the parish priest.[242] Over time, the secular legislation of virtually every country in the world has also come to require some sort of ceremony, secular or religious, for the formation of a valid marriage.[243]

Thus, it may seem that the Roman law view of the matter ultimately triumphed. While participation by a clergyman was hardly what Vacarius was asking for when he stated that there is a requirement of *traditio* or *mutua susceptio,* that participation served the same function of publicity and added that same element of formality to the ceremony which Vacarius was insisting upon, and it was perhaps even better designed than Vacarius' rules to prevent runaway marriages.[244] The parental consent requirement, of course, has been

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239. On Trent see Donahue, "Policy," pp. 259-60 & nn.42-3; for the French legislation, see André Rouast, "Le Consentement des parents au mariage," in *Actes du Congrès de droit canonique . . . Paris, 22-26 avril 1947* (Paris, 1949), pp. 386-92; for the theory by which the French reconciled this legislation with the decrees of the Council of Trent, see Adhémar Esmein, *Le Mariage en droit canonique,* 2nd ed., R. Genestal, J. Dauvillier eds., 2 (Paris, 1935), 192-5, 279-86.

240. Giuseppe Prader, *Il Matrimonio nel mondo* (Padua, 1970), *passim.*

241. *Codex Iuris Canonici* c.1034 (Rome, 1917). Parish priests are, however, to dissuade minor children (those under 21; see c.88.1) from marrying without the knowledge or against the reasonable wishes of their parents.

242. Council of Trent, sess. 24, *Tametsi* c.1, in Josephus Alberigo, et al., eds., *Conciliorum oecumenicorum decreta,* 3rd ed. (Bologna, 1973), pp. 755-7.

243. See generally Prader, *Matrimonio,* pp. 9-55. It was not until the middle of the eighteenth century that participation of a clergyman became essential for the validity of a marriage in England. Lord Hardwicke's Act, 26 Geo. 2, c.33 (1753).

244. *Tametsi* c.1, p. 756, does, however, allow the parish priest to dispense with the reading of the banns before the celebration of the marriage if "probabilis fieret suspicio, matrimonium malitiose impederi posse," and it also says (p. 755): "iure damnandi sint illi . . . qui ea vera ac rata esse negant

eroded from what Vacarius thought it ought to be, but no Western jurisdiction that I know of goes so far as to make marriages of children of the age of 14 and 12 valid without parental consent, as Alexander's rules did.

In another sense, however, it was Alexander and not the Roman law that prevailed. In effect, Alexander's rules support the freedom of the individual at the expense of the interest of the family, support, if this is not too romantic, marriages of love in preference to those of convenience. Surely, if we look at marriage today, we would see that it is Alexander's view and not that of the Roman law which has prevailed.

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quique falso affirmant, matrimonia, a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse: nihilominus sancta Dei ecclesia ex iustissimis causis illa semper detestata est atque prohibuit."