

The Conjugal Debt and Medieval Canon Law

Elizabeth M. Makowski

[Citations to the text of the canon law are cited from *Corpus iuris canonici*, ed. E. Friedberg 2 vols (Leipzig, 1879-1881. The *Glos. ord.* is cited from the 1605 of the *Corpus iuris canonici una cum glossis*, 4 vols (Venezia, 1605). Notes are here presented within the body of the text, separated by \\ \.]

Legalism permeated the medieval Christian church and the impact of that legalism on medieval institutions is an uncontested, if somewhat under-explored phenomenon. The institution of matrimony received a definition and character at the hands of the canon lawyers which it would continue to possess for centuries to come. If their efforts to regulate medieval marital practice were less than completely successful, the canonists did not fail to influence Western attitudes towards marriage and human sexuality.

This essay deals with canonical doctrine about sexual relations in marriage in the period between the twelfth and the mid-fourteenth centuries - the era in which scientific jurisprudence came of age. Its specific focus is the concept of conjugal debt, that is, the notion that both husband and wife had a duty to perform sexually at the request of their mate. Originally derived from Paul, 1 Corinthians 7.3-6, this equal opportunity concept formed a cornerstone for canonical discussions of marital sex. The lawyers attempted to assimilate this ideal along with other more restrictive but no less authoritative pronouncements, into the developing laws of the Church. An ingenious and eclectic doctrine resulted in which the canonists relied frequently, though not exclusively, on two distinguished authorities, Paul and Augustine.

The apostle Paul was the earliest influential spokesman for a Christian view of marriage and sexuality. Marital sex was, for Paul, a safeguard against human weakness (1 Cor. 7.1-2). Even allowing for the apocalyptic and epistolary nature of his writing, it betrays a kinship with Hellenistic rather than with older Hebraic interpretations of man's sexuality.\\ Cole, *Sex in Christianity and Psychoanalysis* (New York: 1955), pp. 32-42.\\ Nevertheless, Paul was no thoroughgoing ascetic. The passage which most clearly illustrates this fact also guided medieval discussions of conjugal relations (I Cor, 7.3-6):

Let the husband render to his wife what is her due, and likewise the wife to her husband. A wife has no authority over her body, but her husband; likewise the husband has no authority over his body, but his wife. You must not refuse each other, except perhaps by consent, for a time, that you may give yourself to prayer, and return

together again lest Satan tempt you because you lack self-control. But I say this by way of concession, not command.

The outstanding point in Paul's formulation, and one which would distinguish the Christian viewpoint from that of later dualist heresies, is that marital intercourse is, at the very least, lawful for Christians. It is also significant that Paul's purpose for marital union was not specifically procreative. He emphasized instead a conjugal obligation, binding both husband and wife, for the maintenance of conjugal chastity - an emphasis wholly in accord with Rabbinical prescriptions.\\ S Belkin, *Philo and the Moral Law*, Harvard Semitic Series 11 (Cambridge, Mass: Harvard University Press, 1940), p. 219; *The Code of Jewish Law*, ed. S. Ganzfried (New York: 1927), pp. 15-16; *The Babylonian Talmud*, trans. I. Epstein (London: Kethuboth, 1935-52), 61b.\\ Paul's legitimation of and provision for man's sexual energies set him apart from many of the early church fathers whose extreme asceticism was rivaled only by that of the heretics with whom they competed.\\ *Select Letters of St. Jerome*, trans. F.A. Wright (Loeb Classical Library: 1933), p. 233; V. L. Bullough, *The Subordinate Sex: A History of Attitudes towards Women* (Urbana, Illinois: University of Illinois Press, 1973), pp. 114 f; H.C. Lea, *History of Sacerdotal Celibacy in the Christian Church* (London: 1966), pp. 25f. *Dictionnaire de droit canonique*, ed. R. Naz (Paris: 1935-65), pp. 2078-2115; *Early Christian Fathers*, ed. C. Richardson (London: 1953), pp. 260, 337.\\ Although the importance of these early fathers for the development of medieval doctrine cannot be denied, most of their comments on marriage and sex were little more than asides. It was St. Augustine's discursive thought on these subjects that served as a touchstone for medieval writers.\\ D.S. Bailey, *Sexual Relations in Christian Thought* (New York: 1959), p. 102; J. Gaudement, "L'apport de la patristique latine au Decret de Gratian en matière de mariage," *Studia Gratiana*, 2 (1954), 51-81.\\

Augustine's analysis was based on the distinction between man's condition before and after his fall from grace.\\ For a thorough analysis of Augustine's teaching about marital sex, see Augustine, *Doctrina de bonis matrimonii quam colligit et exposuit Amandus Reuter* (Roma: 1942), pp. 41-62, 172-180.\\ Marital intercourse, had it occurred in Paradise (it had not according to Augustine), would have been accomplished without guilt or shame since in that uncorrupted state coitus would have been passionless and controlled by reason. After the sin of our first parents, however, man was burdened with concupiscence and therefore was no longer in full control of his passions. Concupiscence was most strikingly displayed in the sexual impulses. No sexual activity could take place without its corrupting effect, without passion and unruly desire. Sex in marriage could be fully blameless only when concupiscence was mitigated by a marital good, that is, when desires were tempered by procreative intent or by the intention of "rendering the debt" exacted by one's spouse. Marital intercourse motivated by lust or merely to avoid the greater evil of fornication was a

venial sin.\ \ *The Fathers of the Church*, trans. R.J. Deferrari (Washington: 1955), 27:25.\

Augustine did accept the Pauline injunction but his belief in the ongoing and debilitating effects of concupiscence led him to interpret the apostle's "concession" to the married as a pardon (*veniam*) for intemperance.\ \ Pp. 16-17.\ Hence it was necessary to redeem an otherwise tainted process either through procreative intent or by paying a just demand. Augustine's artificial distinction between the blameless act of rendering the debt, and the venially sinful act of exacting it, would hamper the development of a more positive view of conjugal sex for generations to come.

When, in the mid-twelfth century, canonical jurisprudence began to emerge as a discipline distinct from theology, the lawyers looked to Augustine as the preeminent authority on questions relating to conjugal sex. Gratian, the "father of canon law," drew heavily upon Augustine as his leading authority for marriage law.\ \ See Walter Ullman, *Law and Politics in the Middle Ages* (London: 1975), pp. 119 f, for an account of early canon law development and the importance of Gratian and his successors. For an indication of the extent to which Gratian relied on Augustine see J. Gaudemet.\

Gratian was well aware of the stringent asceticism of the early church fathers, an asceticism which branded anything beyond dutiful procreative intercourse as sinful. He was also mindful of Paul's more positive evaluation of coitus. True to his goal of erasing "apparent" contradictions and producing a rational statement of Christian teaching, Gratian chose a middle ground. Citing Paul, he declared that rendering the debt was a recognized purpose of marital intercourse and just as worthy as procreative coitus.\ \ C 32 q 2 d p c 2.\ With Augustine, however, he differentiated rendering the debt, which was blameless, from exacting the debt because of lust or incontinence, which was venially sinful.\ \ C 32 q 2 c 3 and d p c 5.\

Gratian's distinction between the initiating and complying spouses involved a differentiation that Paul had never made. Gratian, however, did emphasize the continuing and obligatory nature of the conjugal duty. Payment of the debt, he maintained, could be evaded only by the mutual consent of the spouses. Although spouses were allowed to take a vow of continence, they could never do so if their actions jeopardized the conjugal rights of their partners.\ \ C 27 q 2 d p c 26 and d p c 28; C 33 q 5 c 2.\ Mutual consent, free and unextorted, was as necessary a precondition for a private vow as it was for entrance into the religious life; monastic officials were warned that they must determine whether that condition had been met before admitting a married candidate. If, despite these warnings, one party entered a monastery without the other's consent he could be forced to return to the defrauded spouse.\ \ C 27 q 2 c 20-5.\ Even when the departure from marital relations was only

temporary, mutual consent was still required.\\ C 33 q 4 d p c 9.\\ In all these regulations, the intention is obvious. Both husband and wife were to be protected from any unilateral action that might extinguish or diminish their marital rights. The early decretist commentators patterned their analysis of conjugal relations on that of the master. In unison, they echoed Gratian's sentiments that conjugal relations were necessary not only for the procreation of children, but also as a remedy for man's sinful nature.\\ *Die Summa des Paucapalea über das Decretum Gratiani*, ed. J.F.V. Schulte (Giessen: 1890), to C 27 pr, pp. 110-11; *Die Summa magistri Rolandi nachmals Papstes Alexander III*, ed. F. Thaner (Innsbruck: 1874), to C 27 q 2, p. 128; *Die Summa magistri Rufini zum Decretum Gratiani* (Paderborn: 1902), pp. 480-1; *Summa Parisiensis on the Decretum Gratiani*, ed. T.P. McLaughlin (Toronto: 1952), pp. 232-3; J. Roman, "Summa d'Huguccio sur le Decret de Gratien d'après le manuscrit 3891 de la Bibliothèque Nationale, Causa XXVII, Questio II," *Revue historique de droit français et étranger*, 27 (1903), to C 27 q 2, pp. 771, 775; *Glos. ord.* to C 33 q 4 c 20 *ad v. conditione*, and to C 33 q 5 c 1 *ad v. quod autem*, and to C 33 q 5 c 11 *ad v. nisi auctor*.\\ Rufinus of Bologna (died 1192), for instance, was even more sophisticated than his mentor in his treatment of continence vows. He differentiated between implicit and explicit vows, the latter referring to pilgrimage commitments which by their very nature would involve separation of spouses for an extended period of time. since both types of vow involved neglect of the conjugal duty, Rufinus concluded that neither could be undertaken unilaterally.\\ Rufinus, *Summa* to C 33 q 5, ed. Singer, pp. 504-5.\\

The decretists, then, agreed on the essentials. Payment of the debt was a principal purpose for marital intercourse, and one which could not be lightly abandoned. One element in Gratian's analysis, however, was subject to considerable reinterpretation. The decretists differed about the degree of guilt involved in intercourse. Gratian had considered marital sex for lustful ends venially sinful - some of his successors took a far sterner view of the evil inherent in sensual pleasure.

The decretists' treatment of sexual pleasure and guilt centered around their interpretation of the *Responsa Gregorii* - a succinct summary of Pope Gregory the Great's feelings about the morality of intercourse. For Gregory the evil of marital coitus did not consist in the act itself, or in the concupiscence which impelled men to act irrationally. Instead it was sensual pleasure, even when only experienced incidentally, that tainted intercourse. Thus every instance of marital intercourse, despite motive, was at least slightly sinful.\\ J.T. Noonan, *Contraception: A History of its Treatment by the Catholic Theologians and Canonists* (Cambridge: 1965), p. 151.\\ Gratian cited Gregory's letter but failed to comment on it.\\ C 33 q 4 c 7.\\ The decretists, on the contrary, found Gregory's statement at odds with Gratian's. Some tried to deny that there was a discrepancy, while others capitalized on it.

Two early gloss apparatuses of the French school, the *Summa Parisiensis* (1160), and the *Summa* of Stephen of Tournai (1150), cited Gregory's argument that coitus could never be without sin because the pleasure inherent in the act was never without fault. Disdaining the conclusion which a literal interpretation required, both glossators preferred an analysis more consistent with Gratian's thought. When Gregory spoke of sinful pleasure, they surmised, he meant only the pleasure involved in lustful intercourse. Coitus for "good ends," procreation or payment of the debt, was free from sin. A union motivated solely by lust was indeed sinful, but only venially so.\\ *Summa Parisiensis* to D 5 c 2 and C 33 q 4 c 7, ed. McLaughlin, 5, 252; Stephen of Tournai, *Summa* to D 5 c 2, ed. Schulte, p. 15.\\ The highly influential Bolognese commentator, Rolandus Bandinelli, later Pope Alexander III (died 1181) came to a similar conclusion, adding that "even union for the satisfaction of lust is not fornication, but licit due to the good of marriage."\\ *Summa* to C 32 q 2 c 3, ed. Thaner, p. 164.\\ Rufinus, on the other hand, was not content with an already encumbered doctrine of marital relations, nor did he feel that lustful pleasure could be lightly condoned. Unlike Gratian, Rufinus differentiated between the motives of incontinence and lust.\\ *Summa* to C 32 q 2, ed. Singer, p. 480.\\

He who renders the debt to an exacting wife commits no sin, not even venial. . . if a union takes place because of incontinence sin, albeit a venial one, is committed . . . when, however, two unite for the satisfaction of lust, mortal sin is committed.

Rufinus was obviously struck by Gregory's notions about the evil of sensual pleasure. He reasoned that the pleasure derived from a lustful union was so far outside the bounds of a passionless, dutiful and "proper" kind of marital intercourse, that even the good of marriage was not sufficient to mitigate it. Rufinus took a stricter view of sex. He exchanged the already less than liberal Augustinian paradigm adopted by Gratian for one more easily reconciled with Gregory's rigorism.

Huguccio adopted a still harsher stance - one that was in complete accord with a literal reading of the *Responsa*. Huguccio (died 1210) was an important Bolognese canonist and an influential spokesman for the rigorist position. His distrust of sexual pleasure was uncompromising. Huguccio maintained that carnal union could never take place without sin. He linked coitus to concupiscence, and concupiscence to pleasure.\\ R. Wiegand, "Die Lehre der Kanonisten des 12, und 13 Jahrhunderts von den Ehezwecken," *Studia Gratiana*, 12 (1967), 471: *Summa* to C32 q 2 *ad v. quod enim*.\\ Admitting that it was better to unite with one's spouse than to fornicate, he still contended that sexual relations could never be fully sinless. This included intercourse motivated by such recognized purposes as procreation, or rendering the debt - purposes which had not been considered culpable even by Huguccio's least indulgent predecessors. Defending his position against the charge of heresy leveled by some of his detractors, Huguccio claimed that his view was not at odds with orthodox tenets.

Heretics, he countered, believed that all coitus was mortally sinful, while he regarded intercourse for "good ends" (payment of the debt or generation) as only venially sinful.\\ *Summa* to C 32 q 2 c 4 *ad v. set et alia*, ed. Weigand, p. 472.\\ Huguccio equated coitus with pleasure and venereal pleasure with sin. Given this nexus, the obvious question arose: could a spouse ever perform his marital duty (Huguccio had never denied that Paul's admonition still held), without sinning? Perversely, Huguccio answered in the affirmative.\\ *Summa* to D 13 pr, ed. Weigand, p. 472.\\

Returning the debt to one's wife is nothing more than making your body available to her. Hence, one often renders the debt to his wife in such a way that he does not satisfy his pleasure, and conversely. Therefore, in the aforesaid case, I can so render the debt to my wife and wait in such a way until she satisfies her pleasure I can, if I wish, withdraw, not satisfying my pleasure, free of all sin, and not emitting my seed of propagation.

For Huguccio as for Gregory, the evil of intercourse lay in the pleasure resulting from that act. If pleasure were avoided sin was eliminated. Huguccio's particular solution, as later canonists would note, thwarted procreation since a husband need not emit his "seed of propagation." Because he considered sexual pleasure so grave a threat to morality, Huguccio was even willing to tolerate an obvious departure from orthodox teaching.

The rigorist stance had its appeal. A number of other canonists, among them Pope Innocent III, embraced its allures. Writing as a private theologian, Innocent declared "who does not know that conjugal intercourse is never committed without itching of the flesh, and heat, and foul concupiscence, whence the conceived seeds are befouled and corrupted.\\ Noonan, p. 197.\\ The extreme rigorism of Huguccio threatened to undermine the orthodox tradition that upheld the essential goodness of marital sex, properly motivated. Such a position was bound to be challenged. By the early thirteenth century, Huguccio's reasoning was considered suspect in some circles. The ordinary gloss on the Decretum, first written between 1215 and 1217, evidenced this scepticism. Joannes Teutonicus, author of the gloss, challenged Huguccio's teaching in no uncertain terms.\\ *Glos. ord.* to C 33 q 4 c 7 *ad v. voluptate*.\\

Huguccio says that no coitus is possible without sin, hence even he who renders the debt sins venially because there is always pleasure in the emission of sperm. Huguccio holds others to sin because they are bound to render the debt . . . following this reasoning a man sins because of the need to follow a command.

Needless to say, Joannes did not subscribe to this faulty reasoning. He asserted that rendering the debt was meritorious since it satisfied a just demand.\\ *Glos. ord.* to C 33 q 4 c 1 *ad v. debeamus*, and to C 33 q 5 c 1 *ad v. pro satisfactione*.\\ The gloss upheld the Augustinian notion that intercourse for procreation or for the return of the

debt was lawful and blameless. Exacting the debt either through incontinence or lust, might be a mortal sin, but it was punished as a venial one, thanks to the mitigating effects of the good of marriage.\\ *Glos. ord. to C 32 q 2 c 3 ad v. ab adulterio.*\\

Nor did Huguccio's rigorism find much support among the subsequent generation of canonists (the decretalists). Two influential thirteenth-century jurists, Raymond of Peñafort and Hostienses, preferred a slightly less trenchant model: intercourse for the purposes of procreation or return of the debt was sinless; union prompted by incontinence was venially sinful; only coitus motivated by lust was a mortal sin.\\ Raymond of Peñafort, *Summa sancti Raymundi de Peniafort de poenitentia et matrimonia, una cum glossa Joannis de Friburgo* (Roma, 1603), p. 519; Hostiensis, *In quinque Decretalium libri commentaria (=Lectura)*, 5 vols in 2 (Venezia, 1537), pp. 196 vb-197 to X4.1.\\ With the exception of these two writers, however, the decretalists had little interest in continuing an examination of marital sex along decretalist lines. They avoided discussing the relationship between marital coitus and sin, choosing to treat the subject of conjugal relations in a juristic instead of a moralistic framework. But if their approach differed, their commitment to the ideal of sexual reciprocity in marriage remained as firm as that of their predecessors.

When discussing the formation of marriage, the decretalists devoted considerable time and space to reaffirming the necessity of sexual ability in prospective marriage partners. If one party was not capable of returning the debt, he could not marry. This line of reasoning pervaded the lawyers' discussion of physical immaturity and bodily defects which would make sexual relations impossible. The immature, Innocent IV reasoned, could be promised to one another but could not marry before they reached the canonically approved age of majority (corresponding to puberty). If, despite this regulation, they did contract marriage, the bond would be indissoluble only if the parties had consummated the union.\\ Innocent IV (Sinibaldis dei Fieschi), *Apparatus in V libros decretalium* (Frankfurt, 1570), p. 468 to X 4.2.6).\\ Although the ability to procreate is mentioned, the canonists prohibited marriage below the age of puberty primarily because they were concerned that spouses be able to render the debt - a recognized duty stemming from the exchange of consent.\\ X. 4.15.2; Raymond de Peñafort, p. 514; J. Andreae, *In quinque decretalium libros novella commentaria*, 5 vols in 4 (Venezia, 1531), p. 16 to X. 4.2.3; Hostiensis, p. 195vb to X 4.1.9.\\

The decretalists also stressed the fact that impotence or frigidity, at any age, was an impediment to matrimony.\\ The decretalists followed Gratian's reasoning outlined in C 33 q 1 and C 32 q 7 c 25. See for example: Raymond of Peñafort, pp. 558-62; Hostiensis, pp. 213-13 to X 4.15.1; Andreae, p. 46 to X 4.15.11; Panormitanus, *Commentaria Decretalium*, 9 vols (Venezia, 1588), p. 58 to X 4.15.3; Innocent IV, p. 476 to X 4.15.1.\\ Such an impediment was grounds for forbidding the parties in question to marry, but insufficient reason to annul an already consummated union.

The lawyers catalogued the kinds of defects that might impede marital union. Aside from natural infirmity (frigidity or impotence), such inability might stem from accident (castration), from the use of magical arts (*maleficium*). We see this in the book and the film, Natalie Zemon Davis, *The Return of Martin Guerre* (Cambridge, Ma.: Harvard University Press, 1983) or even from mental imbalance. These defects were further sub-divided into those considered permanent and those which were remediable by medical or other means. When the inability to unite was obvious and could not be remedied without grave physical danger, the marriage might be annulled immediately. In cases when the impediment was less clearly ascertainable, a three-year waiting period, involving cohabitation and culminating in physical inspection, was prescribed. The consequences of separation in these cases varied as well. A permanent impediment barred the afflicted party from ever marrying. A hexed spouse, on the other hand, might be unable to perform only with his present mate. In *maleficium* cases then, remarriage to different parties was commonly permitted. annulment on grounds of sexual inability was, of course, predicated on the fact that consummation had never occurred and that the deprived spouse had not known of the impediment before marriage. Consent to marry one who was known to be incapable of performing sexually, excluded the possibility of separation and subsequent remarriage. Innocent IX, p. 477 to X 4.15.4.

The teaching of the canonists concerning sexual impediments served to safeguard the conjugal rights of spouses who had not consented to do without marital relations. It is significant that neither sterility nor old age was considered an impediment in this context. Sterility, whether known at the time of marriage or discovered subsequent to consummation, was not grounds for annulment. So too, the aged could marry even if there was little hope that they could ever produce children. C 32 q 7 c 27; Noonan, pp. 289-292. The distinction between the consequences of sterility and those of impotence underscores the importance which the canonists attached to the conjugal duty: "Both impotence and sterility made generation impossible but only impotence made marriage impossible." Noonan, p. 292.

If the decretalists were concerned that prospective spouses be able to carry out their moral obligations, they were no less interested in preserving spousely rights after the conjugal knot was tied.

In some instances, conjugal rights could be revoked or temporarily suspended. An infraction of the marriage contract might result in such a loss. In adultery cases, for example, the guilty party lost his right to seek the debt. Consequently, the innocent spouse did not have to return the debt since "where there is no petition there is no obligation." Joannes Teutonicus, Apparatus to Compilia Tertia, appended to K.J. Pennington, *A Study of Johannes Teutonicus' theories of Church Government and the Relationship between Church and State* (New York: 1972), p. 629 to X 5.8.2;

Raymond of Peñafort, p. 517; Hostiensis, pp. 120-121, to X 3.32.15; *Glos. ord.* to X 3.23.16 *ad v. veniens*, and to 5.16.7 *ad v. fornicationis*.\ So too if a spouse entered religion without the consent of his mate, he would be compelled to return to his partner in order to render but not to exact the debt.\ *Glos. ord.* to X 3.32.12 *ad v. placet*.\ The same ruling held true in cases of presumption of death. If a wife presumed her missing husband dead but had no substantial proof of his demise, she ought not remarry. If she did so and it was subsequently discovered that her first husband was alive, she was required to return to him and render but not exact the debt as penalty.\ X 4.21.2; X 3.32.12; *Glos. ord.* to X 4.1.19 *ad v. viris*.\ Prohibitions against demanding payment of the debt were applied in a number of other cases as well; for instance, to those who through false testimony sought to dissolve a valid marriage.\ X 4.13.1; Raymond of Peñafort, p. 568.\ In all these cases, the intent of the canonists is apparent. They strove to formulate suitable penalties for delinquent spouses without infringing on the conjugal rights of the innocent party.

Aside from prohibitions against the exercise of one's conjugal rights due to sin, the lawyers supported an ecclesiastical tradition that counseled abstinence from sexual relations on holy days, in sacred places and during a wife's purification or menses. Despite these regulations, the overriding sentiment was that in such cases as well, the duty to render the debt, even if unjustly demanded, was still binding.\ *The Wife of Bath* clearly seeks sex at the forbidden times; Abelard and Heloise have intercourse in the cloister.\ Although the party who exacted the debt at a forbidden time sinned, the compliant partner did not.\ *Glos. ord.* to C 33 q 4 c 1 *ad v. debeamus*; Hostiensis, p. 196vb to X 4.1.20.\ Even those canonists who conceded that under some circumstances, such as during a woman's menses, spouses might refuse to pay the debt, added that this concession was never absolute. If there was a genuine suspicion that the defrauded party would lapse into sin, payment of the debt was necessary.\ *Glos. ord.* to D 5 c 4 *ad v. ablactetur*.\

The way in which the canonists treated vows and their consequences also indicates their interest in preserving mutual rights to conjugal relations. The decretalists reaffirmed the earlier canonical opinion that after consummation, mutual consent was necessary for the assumption of a continence vow.\ *Glos. ord.* to X 3.32.1.\ Consent could not be extorted but had to be given freely.\ X 3.32.17; Innocent IV, p. 426 to X 3.32.3.\ Once given, mutual consent could not be rescinded.\ It was admitted that if one spouse was obviously not living up to his vow, the Church might intervene *ex officio* and reunite the parties. In this instance the innocent spouse would have to render the debt but could elect not to exact it: *Glos. ord.* to C 33 q 5 c 4 *ad v. persevera*; A. Esmein, *Le mariage en droit canonique: Etudes sur l'histoire de droit canonique privé* (Paris: 1891), 2.23.\ Innocent IV went so far as to declare that if a husband and a wife mutually vowed continence and if after the death of the first

spouse one of them remarried, the children of the second union would be illegitimate.\\ P. 428 to X 3.32.20.\\

The decretalists seemed even more concerned than their predecessors with the practical problems involved in mutual continence vows. If a husband consented to his wife's vow but did not take one himself, had he implicitly bound himself to remain continent? The decretalists thought he had.\\ Hostiensis, p. 116 to X 3.32.1.\\ What if such a vow involved entrance into religion and not only a private commitment - could one spouse then become a religious while the other, observing continence, remained in secular society? The lawyers feared that if they permitted such a course of action, spouses might not only separate, but might also remain single without the benefit of supervision under a monastic rule. Such persons, they supposed, were liable to sin. To avoid such an occasion of sin, the canonists taught that "after two had become one flesh" one partner could not dedicate himself to God while the other remained in the world. Only when a spouse was deemed above suspicion, due to advanced age, could he or she be exempt from following his mate into the cloister.\\ X 3.32.1-4; *Glos. ord.* to X 3.32.1 *ad v. praeterea.*\\ In all cases, the canonists taught, judgement must be exercised, since the moral welfare of married persons was a primary consideration.\\ Andraea, p. 163 to X 3.32.13.\\ Throughout their treatment of continence vows, an area of the law which had direct bearing on the conjugal rights of spouses, the decretalists were careful to protect these rights. In this area as in others, they expanded and refined Gratian's teaching on the conjugal debt. Whether referring to vows, sexual impediments, or ecclesiastical penalties for a breach of marriage contract, the canonists stressed the importance of sexual reciprocity.\\ The one notable exception to this teaching was Pope Innocent III's concession regarding the crusading vow. Because of the importance of the crusading mission, Innocent allowed a husband to make a crusading vow even without the consent of his wife (X 3.34.9). Although this legislation undermined the traditional teaching concerning conjugal parity, the canonists who commented on the decree consistently attempted to minimize its implications by isolating it firmly within its historical context. See James A. Brundage, "The Crusader's Wife: A Canonistic Quandary," *Studia Gratiana*, 12 (1967), pp. 425-41; *Medieval Canon Law and the Crusader* (Madison: Wisconsin: 1969).\\ Obviously, the faithful did not always obey the teaching of the Church. Desertion and remarriage in a different locality and even abandonment of a spouse in order to enter the religious life, were far from infrequent occurrences in the Middle Ages.\\ R.H. Helmholz, *Marriage Litigation in Medieval England* (New York: 1974), 28-31; M.M. Sheehan, "The Formation and Stability of Marriage in Fourteenth-Century England: Evidence of an Ely Register," *Mediaeval Studies*, 33 (1971), 229-263; J. Turlan, "Recherches sur le mariage dans la pratique coutumière (XII-XVI)," *Revue historique de droit français et étranger*, 35 (1957), 477-528.\\ Few would have been better aware of these transgressions than the lawyers and judges who not only

helped to form the law but were frequently responsible for its enforcement in the church courts as well. Along with their doctrinal writing on the substantive issues, the decretalists outlined a procedural formula designed to redress a spouse whose conjugal rights had been unilaterally denied.

Relying on Roman law categories, canon law distinguished between possessory and petitory actions. The most common matrimonial cause, a suit to enforce a marriage contract, was a petitory one. This petition asserted the existence of a marriage contract and asked the court to declare it valid. Even if the plaintiff could establish that present tense consent had been exchanged - an action that made for a valid marriage - he would still have to use the petitory action to claim the defendant as his legitimate spouse. In this instance, the suit would not specifically be for restitution of conjugal rights. Although the right to exact the debt was commonly thought to begin when consent *de presenti* was exchanged (Esmein, pp. 10-11) the fact of possession did not exist until after consummation. The court could force spouses to consummate their marriage if a reasonable time had elapsed and they had not done so (*Glos. ord. to Extrav. 6.1 ad v. consummare*) but this *ex officio* action was differentiated from a suit for restitution. If however, a plaintiff could allege that the union had been consummated as well as merely consented to, he had access to a special remedy - the suit for restitution of conjugal rights. *Glos. ord. to X 2.13.8 ad v. et ab ea cognita*; Hostiensis, p. 50 to X 2.13.101 Andraea, pp. 77, 84 to X 2.13.8 and 2.13.14; Panormitanus, p. 263 to X 2.13.18. The consequences of a successful suit for restitution were essentially the same as those in a petitory action since, if the court found for the plaintiff, it would order the defendant to return to his legitimate spouse and to treat the spouse with "marital affection" Helmholz, pp. 67 ff. As its name implies, however, the intent of the suit for restitution was to restore the rights to sexual relations conceded by Paul. The decretalists then did more than uphold the Pauline dictum in theory. They provided legal remedies for spouses who had been defrauded of their marital right. Furthermore, their teachings were applicable and their remedies available to more than a select, privileged few. In an age when social equality was neither a fact of life nor a guiding canonical principle, that last observation is significant. One indication of the degree of importance that the canonists attached to the notion of conjugal rights is their willingness to concede these rights even to the "naturally" disadvantaged members of society.

Women, traditional inferiors in both canon and civil law, were, surprisingly, at no disadvantage with reference to the conjugal duty. For an overview of attitudes toward women in the Western Christian experience see: Bullough; Julia O'Faolain, *Not in God's Image* (New York, 1973); Ruether. For specifically canonical sentiments see: J. Backeljauw, "De uxoris statu sociali iniure canonici medii aevi," *Divus Thomas*, 89 (1968), 27-296; R. Metz, "Recherches sur la condition de la femme

syealon Gratien," *Studia Gratiana*, 12 (1967), 380-396; and C 33 q 5 c 5-20; *Summa Parisiensis* to C 33 q 5 d p c ll, ed. McLaughlin, p. 254; Rufinus, *Summa* to C 27 pr. and C 33 q 5, ed. Singer, pp. 431, 505; *Glos. ord.* to C 33 q 5 c 4-15; X 2.20.3; Innocent IV, 12.565 to X 1.3.13 and 5.41.9; Joannes Teutonis, *Apparatus* to X 2.12.6, ed. Pennington, p. 294. The consent of the wife as well as the husband was a necessary precondition for any vow that might prejudice their marital rights. *Summa Parisiensis* to C 33 q 5, ed. McLaughlin, p. 253. If a husband did enter religion, go on a pilgrimage, or simply desert his wife, without her free, uncoerced, consent, she was fully empowered to sue for his return in a church court. The specific guidelines set down by the canonists and a number of extant formularies and notarial records indicate that such actions were not only available to but were used by wives as well as husbands. Guillelmus Durandus, *Speculum iuris*, 4 vols in 2 (Torino, 1578), p. 400; R. Aubenas, *Recueil de lettres des officialités de Marseilles et d'Aix (XIV-XVs)*, 2 vols (Paris: 1938), pp. 72, 85; M.G. Dupont, "Registre de l'officialité de Cérisy, 1314, 1457," *Mémoires de la Société des Antiquaires de Normandie*, 3rd Ser, 10 (1880), pp. 350, 371.

Serfs constituted another group in society for whom the status of spouse carried with it certain "inalienable rights" which bore little correspondence to their otherwise restricted legal and social prerogatives. Hostiensis, p. 119. although careful not to seriously jeopardize the rights of a lord, the canonists not only conceded a serf's right to marry freely, but also sought to avoid the separation of spouses so joined. X 4.9.1; *Glos. ord.* to X 4.9.1 ad v. sacramentis; P. Landau, "Hadrians IV dekretale 'dignum est' (X 4.9.1)," *Studia Gratiana*, 12 (1967), pp. 514-533. While serfs had no legal capacity to initiate a suit for the restitution of a spouse sold by a lord, the lawyers did provide some recourse against such arbitrary actions. Hostiensis for one, allowed a judge to intervene *ex officio* in defense of the rights of a married serf. P. 206 to X 4.9.1.

Even that most notable pariah, the leper, was not rightless as a spouse. In direct contradiction to the customary law of many regions, the canonists stipulated that a spouse must not be deprived of the consolations of his mate even if afflicted with leprosy. Not only was leprosy regarded as insufficient grounds for desertion but the healthy partner was also obliged, in most cases, to render the debt if it was demanded. X 4.8.1; *Glos. ord.* to X 4.8.1 ad v. consuetudine; Andreae, p. 34a to X 4.8.2; Innocent IV, p. 473 to X 4.8.1.; Bernardus Papiensis, *Summe Decretalium*, ed. E.A.T. Laspeyres (Regensburg: 1860), p. 152). There was some flexibility in these cases. Actual cohabitation with a leprous spouse was not insisted upon and even payment of the debt might not be compelled if the healthy spouse literally could not bring himself to render it *propter horrorem*: Panormitanus, 41ra to X 4.8.2; *Glos. ord.* to X 4.8.1 ad v. ministrent; Hostiensis p. 21 to X 4.8.1.

With slight modification, the decretalists applied their teaching concerning the importance of sexual reciprocity in marriage to all Christians. Even when, through the exercise of these rights, the traditional distinction between superior and inferior was obscured, spouses were justified in their actions because of the independent value attached to conjugal fidelity.

By about 1250, the substantive law of the Church concerning marriage had crystallized. The decretalists had refined and supplemented the earlier law sufficiently to create a workable basis for ecclesiastical decision-making. Lengthy analysis of the morality of sexual relations - the kind of excursus of which the earlier canonists were so fond - found little place in their more pragmatic works. The elaboration of moral doctrine did, of course, continue, but it became the special preserve of theologians rather than canonists. Aquinas' reevaluation of pleasure, specifically the pleasure experience as a result of sexual intercourse served to undermine the rigorous notion that all fleshly pleasure was suspect.\\ Noonan, p. 293.\\ Nevertheless, the movement away from Augustinian pessimism was slow, and some would contend, incomplete. The belief that a Christian couple could properly seek and enjoy the pleasure of sexual union without specifically intending to procreate, render the debt or "avoid fornication," became the dominant view among intellectuals only in the twentieth century.\\ Pp. 491-5.\\

The law, as guardian of morality, does not respond quickly to changing social mores. Given the rather slow rate of legal change even in the modern era, it is not surprising that throughout the Middle Ages, canonical discussions of marriage continued to be inspired by the thought of the fathers. Gratian and his successors accepted and developed Paul's concept of a conjugal debt, and defended the right of spouses to exact their marriage due. Conjugal obligations could be evaded only by mutual consent. If a partner arbitrarily denied his mate, the defrauded party could sue for restitution in an ecclesiastical court. Nevertheless, as heirs to the patristic tradition, the canonists saw man's carnal nature as distinct and lower than his rational one, and viewed the pleasures of the flesh as inherently evil. They expressed their distrust of sensual pleasure most vehemently in the Gregorian rigorism of the twelfth century which equated all sexual pleasure with sin.

Canonical ambivalence to sexuality and fleshly pleasure created a peculiar doctrine of marital relations. The canonists preserved the legalism of the Pauline injunction while they all but stripped it of its positive intent. Instead of being used to support the idea of marital relations as a legitimate outlet for sexual energies, Paul's dictum was encumbered with abstract distinctions between initiating and complying spouses. The fact that such distinctions made one spouse a sinner while the other fulfilled his marital due, did not seem problematic to the canonists.

Undoubtedly, most laymen were blithely oblivious to the fine distinctions and subtle arguments of theologians and canonists. But there can be little question that the general uneasiness about human sexuality evident in canonical writing pervaded the consciousness of medieval people. It is still a part of their legacy to us.

Columbia University