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# THE CANONISTIC CONTRIBUTION TO THE WESTERN RIGHTS TRADITION: AN HISTORICAL INQUIRY†

CHARLES J. REID, JR.\*

## INTRODUCTION

This is an article about rights in thirteenth century canon law. Such a premise is not uncontroversial, at least among historians and theorists of rights. Historians of the concept of rights have traditionally asserted that the western rights tradition originated in either the seventeenth century or the fourteenth century. The thirteenth century, with one notable exception,<sup>1</sup> has not been seriously considered as a source for the western rights tradition.

Those who argue for a seventeenth century origin associate the rise of the western rights tradition with the individualist philosophers of early modern England, preeminently John Locke and Thomas Hobbes. This school of thought typically ties the articulation of rights to the rise of a market economy and the emergence of an unprecedented atomized individualism.<sup>2</sup> This view of the

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<sup>1</sup> The exception is Richard Tuck. See *infra* notes 86–95 and accompanying text for a discussion of Tuck's historiography.

Harold J. Berman has discussed the emergence of individual rights and the proliferation of rights-based claims beginning at the close of the eleventh century. See *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). Urban charters, for example, contain recurrent mention of liberties and rights. See *id.* at 364–67. Berman, however, does not explore the development of the concept of individual rights and the function of that concept in the legal systems of the high middle ages.

The present article builds on Brian Tierney's investigations of the concept of rights and the role rights played in European jurisprudence from the twelfth century on. See *infra* notes 53–56, 88 and accompanying text.

<sup>2</sup> Two scholars central to the development of this view are C.B. MacPherson and Leo Strauss. See *infra* notes 39–54 and accompanying text for a discussion of MacPherson and Strauss.

origin of rights, which sees rights, free market economics and individualism as intricately intertwined, has come to shape many of the expectations and presuppositions of both the defenders<sup>3</sup> and critics<sup>4</sup> of modern liberalism.

Those who assert a fourteenth century origin for the western rights tradition, on the other hand, tend to be continental and conservative.<sup>5</sup> According to this school of thought, Thomas Aquinas created a harmonious philosophical order that had at its heart an objectively just division of goods, not discordant assertions of subjective rights. Suspicious of modern and early modern forms of individualism, this school of thought nominates William of Ockham as the creator of the western rights tradition and the destroyer of the prior Thomistic harmony. In this school of thought, a line can

<sup>3</sup> See, e.g., LOREN F. LOMASKY, *PERSONS, RIGHTS AND THE MORAL COMMUNITY* 49-50 (1987); WALTER BERNS, *IN DEFENSE OF LIBERAL DEMOCRACY* 37-46 (1984); Robert E. Lane, *Individualism and the Market Society*, in 25 *NOMOS: LIBERAL DEMOCRACY* 374 (J. Roland Pennock and John W. Chapman eds., 1983). Relying on a single Victorian-era caricature, Lane asserts that medieval society was "traditional" in the sense that notions of individuality were not well developed. Lane seems to assume that the Age of Enlightenment represents a decisive turning point in the development of modern forms of individualism. Of course, such a term as "individualism" is inherently difficult to define or confine. For a cogent argument that the middle ages were of decisive importance in the emergence of modern individualism, see COLIN MORRIS, *THE DISCOVERY OF THE INDIVIDUAL 1050-1200* (1972).

This is not to assert that the medieval canonists were proto-liberals. Locke's notion of religious tolerance and Mill's distinction between self-regarding and other-regarding acts, for example, would have been quite alien to medieval canonistic thought. Rather, the point is that the association between liberalism and rights is a historically contingent one, and the western rights tradition substantially predates the advent of modern or early modern forms of liberalism. The early history of the association between rights and liberalism remains inadequately studied, if only because the pre-seventeenth century history of the western rights tradition has yet to receive sufficient scholarly attention.

<sup>4</sup> The critical legal studies ("CLS") movement has provided perhaps the most sustained critique of liberalism and rights. A good introduction to the CLS arguments is found in *Symposium: A Critique of Rights*, 62 *TEX. L. REV.* 1363 (1984). Morton Horwitz's essay, *Rights*, typifies the historiographical assumptions that undergird much of the CLS critique. See 23 *HARV. C.R.-C.L. L. REV.* 393 (1988). Like his liberal interlocutors, Horwitz simply assumes that the concept of rights emerged as part of seventeenth century liberalism, and that it developed in opposition to a prior "discredited" natural law tradition. As this article will demonstrate, the historiography is considerably more complex. The "left," however, is far from univocal on the subject of rights. See, for example, the compelling defense of rights by Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401 (1987). Williams has recently developed her argument further in *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 148-65 (1991).

<sup>5</sup> Michel Villey is probably the leading exponent of this viewpoint. See *infra* notes 56-85 and accompanying text for a discussion of Villey's position. A second example of this school of thought is LOUIS LACHANCE, *LE DROIT ET LES DROITS DE L'HOMME* (1959).

be drawn from Ockham's rights-based polemics to the excesses of the French Revolution and eventually to modern "excesses."<sup>6</sup>

The chief difficulty with these two schools of thought, from the standpoint of a working medievalist, is that rights are readily identifiable in the legal systems of thirteenth century Europe. Confining the inquiry to medieval canon law, one encounters recurrent mention of the rights of bishops,<sup>7</sup> metropolitans (archbishops),<sup>8</sup> cardinals,<sup>9</sup> popes,<sup>10</sup> and even perpetual vicars.<sup>11</sup> Monastic exemption was put in terms of rights,<sup>12</sup> patrons exercised the right of patronage,<sup>13</sup> and spouses had the right to demand the conjugal debt.<sup>14</sup> Nor was canon law alone. Other medieval European legal systems, such as English common law, also made recurrent references to rights.<sup>15</sup>

How has this anomaly arisen? Are medievalists unreflectively transposing a modern rights vocabulary onto resistant sources? In some cases they are,<sup>16</sup> but in most instances the sources permit such a translation. Have historians of rights overlooked a significant body of materials? This latter alternative is the correct answer. It appears that historians of rights, conditioned to expect that the most significant debates over rights will be found in philosophical treatises of scholars like Aquinas, Scotus and Ockham, simply have not sufficiently considered juristic sources. In fact, a close scrutiny of juristic

<sup>6</sup> See *infra* notes 56–85 and accompanying text for a discussion of Villey's arguments on behalf of a fourteenth century origin for the western rights tradition.

<sup>7</sup> See generally KENNETH PENNINGTON, *POPE AND BISHOPS: THE PAPAL MONARCHY IN THE TWELFTH AND THIRTEENTH CENTURIES* (1984).

<sup>8</sup> See generally ROBERT BRENTANO, *YORK METROPOLITAN JURISDICTION* (1959); ALPHONSE POPER, *THE RIGHTS AND OBLIGATIONS OF METROPOLITANS* (1948).

<sup>9</sup> Tierney, *Hostiensis and Collegiality*, in *FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW* 401 (1972).

<sup>10</sup> Othmar Hagender, *Das päpstliche Recht der Fürstenabsetzung*, 1 *ARCHIVUM HISTORIAE PONTIFICIAE* 53 (1963).

<sup>11</sup> CARL GROSS, *DAS RECHT AN DER PFRÜNDE* (1887).

<sup>12</sup> David Knowles, *The Growth of Monastic Exemption*, 50 *Downside Rev.* 201 (1932).

<sup>13</sup> PETER LANDAU, *JUS PATRONATUS: STUDIEN ZUR ENTWICKLUNG DES PATRONATS IM DEKRETALENRECHT UND DER KANONISTIK DES 12 UND 13 JAHRHUNDERTS* (1975).

<sup>14</sup> JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 358–60* (1987).

<sup>15</sup> See generally PAUL R. HYAMS, *KING, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES* (1980). This work contains recurrent mention of rights in medieval English common law.

<sup>16</sup> Clarence Gallagher, for example, imposes a modern rights vocabulary where the original sources do not permit it. See CLARENCE GALLAGHER, *CANON LAW AND THE CHRISTIAN COMMUNITY: THE ROLE OF LAW IN THE CHURCH ACCORDING TO THE SUMMA AUREA OF HOSTIENSIS* (1978). Gallagher's error is a common one. He frames modern moral and jurisprudential aspirations in terms of rights and then imposes this framework on his sources.

materials reveals a sophisticated understanding of rights already operative in the legal systems of twelfth and thirteenth century Europe. This understanding of rights would become part of the medieval *jus commune*, the common law of Europe,<sup>17</sup> that would in turn inform the polemical works of William of Ockham and the writings of early modern philosophers and theologians—figures as diverse and seminal in their own right as John Locke and John Calvin.<sup>18</sup>

To make such a claim on behalf of the canonists raises further difficulties. The canonists never wrote any treatises on rights. Although the notion of individual rights played a significant role in the system of law the canonists developed, it was also a concept that went largely, but not entirely, without formal analysis. This, then, raises the question of how we are to know whether the canonists actually made use of the concept of individual rights. What words, if any, carried the meaning of individual right in thirteenth century canon law and what were their limitations?

These difficulties might be resolved through recourse to analytical philosophy. Since the time of Jeremy Bentham, a large body of analysis has been produced probing the scope, meaning and function of the term "right." This article employs this body of literature to elucidate the canonistic usage of "right." The canonists had a well-refined rights vocabulary that they employed in a sophisticated and "modern" fashion.<sup>19</sup> By applying the insights of modern rights analysis to canonistic sources, this article hopes to establish the existence of a system of rights at a time earlier than commonly supposed and to sketch out some of the larger features of the canonistic rights theory.

This article, however, does not engage in a philosophical defense either of the canonists' concept of individual rights or of the analytical philosophers whose works are applied to canon law. The article assumes the essential accuracy of the analytical philosophy it

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<sup>17</sup> See MANLIO BELLOMO, *L'EUROPA DEL DIRITTO COMUNE* (3d ed. 1989) for a discussion of medieval European common law, the "learned" Roman and canon law taught in the universities of western Europe. The Roman and canon law, while sharing substantial similarities, also differed in some significant respects. The canon law, for example, continued to grow through the legislative activities of the popes, while Roman law was generally considered subject to reinterpretation but not legislative amendments. For a discussion of the similarities and differences, see BERMAN, *supra* note 1, at 204-05.

<sup>18</sup> A helpful study of the twelfth century origins of western constitutionalism and the transmission of constitutional ideas to the seventeenth century may be found in BRIAN TIERNEY, *RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650* (1982).

<sup>19</sup> See *infra* notes 121-60.

employs. Chiefly a working medievalist myself, my purpose in this paper is essentially descriptive. This article's main function is to make visible the basic contours of the canonistic rights theory.<sup>20</sup>

This paper is divided into three major sections. Section I acquaints readers with the major canonistic sources of the twelfth and thirteenth centuries. Section II reviews the major schools of historiography on the question of the origin of the western rights tradition. The reason for including such a review in this paper is to make clear both the presuppositions that have informed this historiography and the deficiencies that have flawed it. Section III "sketches out" some of the major components of the canonistic rights theory. This section begins with an application of Hohfeldian jural categories to the canonistic rights vocabulary. The canon law of marriage is then utilized as a vehicle for reviewing other elements of canonistic usages of rights. The article concludes that canon law possessed a sophisticated system of rights at a time earlier than commonly supposed by historians of rights and suggests that the western rights tradition is a far deeper historical phenomenon than previously thought.

## I. THE CANONISTS

### A. *Gratian*

This paper focuses on the developed canon law of the thirteenth century. Nonetheless, one ought to consider the period

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<sup>20</sup> Other disclaimers are in order. This paper is not comprehensive. A thorough discussion of canonistic rights theory would be a very large undertaking, and so the use of both medieval and modern sources has necessarily been selective. Although a certain subjectivity is unavoidable in any exercise of selectivity, the examples chosen here—from canonistic election law, medieval poor law and marriage law, among other topics—demonstrate the wide variety of legal issues influenced by the canonistic concern for rights.

This article does not claim that the western rights tradition originated with the canonists of the twelfth and thirteenth centuries. It is quite possible, indeed likely, that the western rights tradition has a variety of sources. Some of the possible sources are reviewed at the conclusion of this paper. It suffices for the purposes of this article, however, to assert that the canon law of the twelfth and thirteenth centuries is a major and hitherto neglected source of the western rights tradition.

Finally, this article does not attempt to use historical research as a means of claiming a particularly ancient lineage for a given approach to rights, thereby asserting some alleged superiority of one approach over alternative approaches. Similarly, this article will not argue that the canonistic sources, simply because they antedate Locke or Hobbes or Ockham, are somehow better than their successors. Rather, the hope is that a conversation may be stimulated between medievalists and modern theorists of rights. In some small way, we may thus come to an enriched understanding of the western rights tradition—a tradition dating back at least to the twelfth and thirteenth centuries.

1140–1348 as a unit. The probable publication date of Gratian's *Decretum* was 1140, while 1348 is the year in which Johannes Andreae, one of the leading canonists of the fourteenth century, died of bubonic plague.<sup>21</sup> These two centuries witnessed the emergence of canon law as a systematized and autonomous discipline, with a theoretical framework that occasionally overlapped with, but was also distinct from, other disciplines such as theology and philosophy.<sup>22</sup>

Gratian, an obscure figure about whom very little is known,<sup>23</sup> was the medieval lawyer who first gave a coherent shape to canon law. Canon law, at the time Gratian worked, was a tangled mass of sources. Excerpts from patristic authors such as Augustine and Jerome, canons from a variety of church councils, penitential texts and papal decretal letters were all considered more or less normative in the early twelfth century, prior to the issuance of the *Decretum*. Much of this material, the output of nearly one thousand years of church history, was hopelessly contradictory.

Gratian set for himself the task of organizing these sources. The end product of Gratian's labor, the *Concordia Discordantium Canonum* (known as the *Decretum*), is a massive work in three parts. Part I, consisting of 101 *distinctiones*, is concerned chiefly with internal ecclesiastical order. Part II, comprising 36 *causae* or cases, covers a wide variety of topics ranging from marriage to the law of warfare. Each of these *causae* opens with a hypothetical fact pattern followed by a series of questions probing the legal issues implicated by the fact pattern—a method not unfamiliar to law professors today. Part III, the *Treatise on Consecration*, briefly treats issues in liturgical and sacramental law.

Common to most of the *Decretum* is an emphasis on dialectical reasoning. Contradictory texts are arranged in patterns that make

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<sup>21</sup> The period 1140–1348 is frequently referred to as the "classic age of canon law." This is, for example, the title and theme of GABRIEL LEBRAS, *L'ÂGE CLASSIQUE, 1140–1348*, 7 *HISTOIRE DU DROIT ET DES INSTITUTIONS DE L'ÉGLISE EN OCCIDENT* (1965). For the death of Johannes Andreae, see S. Stellung-Michaud, *Jean D'André*, 6 *DICTIONNAIRE DE DROIT CANONIQUE* 89–90 (1957).

<sup>22</sup> See BERMAN, *supra* note 1.

<sup>23</sup> See John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 *TRADITIO* 145 (1979). Noonan provides an incisive review of most of the available biographical data. See also STANLEY CHODOROW, *CHRISTIAN POLITICAL THEORY AND CHURCH POLITICS IN THE MID-TWELFTH CENTURY: THE ECCLESIOLOGY OF GRATIAN'S DECRETUM* (1972). Brundage also provides helpful biographical detail. See *supra* note 14, at 229–33. Brundage represents the most recent synthesis of the growing historiography on the canonists themselves and the following summary is indebted to that synthesis.

obvious their contradictions. Gratian then attempted, through systematic analysis, to find solutions to the problems these texts posed. His reasoning is set out in dicta that follow or precede particular textual excerpts. Although Gratian's answers are not invariably brilliant, they provided a valuable starting point for subsequent discussion.<sup>24</sup>

### B. *The Decretists*

Gratian's *Decretum* proved to be wildly popular. Its publication coincided with the emergence of a learned legal culture in a number of parts of western Europe.<sup>25</sup> It was utilized quickly by law professors at Bologna, Paris, the Rhineland, Oxford and elsewhere<sup>26</sup> as a leading text as well as a focus for commentaries.

Those legal commentators who worked on the *Decretum* became known as the decretists. Although commentaries on the *Decretum* continued to be produced into the thirteenth century, decretist commentary flourished between about 1140 and 1190. The decretists had two chief concerns: to resolve inconsistencies either left unresolved by Gratian or implicit within his commentary, and to fill in the gaps left open by Gratian.<sup>27</sup> Although they are barely known today, a number of these scholars were enormously creative, influential figures. An author like Huguccio of Pisa, for example, had a profoundly important role in shaping the western constitutional tradition. He is rarely noticed today, however, as his work remains in manuscript.<sup>28</sup>

### C. *Decretal Collections*

Popes began to issue increasing numbers of decretal letters in the mid-twelfth century. These decretal letters had features one might associate with both case law and statutory law. Often, decretals were issued to resolve particular cases or controversies and were thus quite fact-dependent. At the same time, they also frequently contained rather detailed legislative prescriptions. Some of the more

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<sup>24</sup> See BRUNDAGE, *supra* note 14, at 229-33.

<sup>25</sup> BERMAN, *supra* note 1.

<sup>26</sup> See BRUNDAGE, *supra* note 14, at 256-60 for a recent helpful review of these schools together with a thorough bibliography.

<sup>27</sup> On the chief characteristics and concerns of the decretists, see R. NAZ, 4 DICTIONNAIRE DE DROIT CANONIQUE 1065-67 (1949).

<sup>28</sup> See TIERNEY, *supra* note 18, at 15-19 for a brief review of some of Huguccio's contributions to constitutional thought.



elaborate decretals of popes like Alexander III or Innocent III nearly parallel in structure judicial opinions such as *Miranda v. Arizona* and *Henningsen v. Bloomfield Motors*.<sup>29</sup>

By the latter years of the twelfth century, however, a problem had become readily apparent. Decretals issued to resolve particular controversies were scattered throughout Europe. No effort had been made to draw these decretals together into larger collections. This problem was addressed in the latter years of the twelfth century as legal scholars and practitioners began to assemble collections. The first decretal collections were private endeavors by individual lawyers. Innocent III, however, published an official collection of his decretal letters, as did Honorius III. Altogether five collections, known as the *Quinque Compilationes Antiquae*, gained wide circulation prior to 1234.

The *Liber Extra*, the most important canonistic text since Gratian's *Decretum*, was promulgated in 1234. Pope Gregory IX commissioned *Liber Extra* as a comprehensive, definitive law text to take the place of the five older compilations. The decretal letters included in *Liber Extra* were those issued in the more than ninety years that had elapsed since the appearance of Gratian's work, as well as some earlier material. The letters included in *Liber Extra* were edited carefully and extraneous material was deleted. *Liber Extra* was meant to be binding law; it remained in effect as binding ecclesiastical law until 1917.<sup>30</sup>

The *Liber Extra* was followed in 1298 by Boniface VIII's publication of the *Liber Sextus*. *Liber Sextus* was a selected compilation of decretal letters bridging the period 1234–1298. In turn, *Liber Sextus* was followed by the publication of two smaller fourteenth century collections, the *Clementinae* and the *Extravagantes Johannis XXII*. The body of canon law that would emerge from the middle ages, the *Corpus Juris Canonici*, was completed in 1501 with the publication of the *Extravagantes Communes*.<sup>31</sup>

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<sup>29</sup> See Charles Donahue, Jr., *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Reexamined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 680–99 (1974) for a discussion of the structure of papal decretals and their similarities both to case law and legislation. Cf. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

<sup>30</sup> For *Liber Extra*'s continued authority within the Roman Catholic Church, see BRUNDAGE, *supra* note 14, at 327.

<sup>31</sup> See AMLETO G. CICOGNANI, CANON LAW 273–321 (1935) for a helpful thumbnail sketch of the major phases in the development of the *Corpus Juris Canonici*.

#### D. *The Decretalists*

From around the turn of the thirteenth century, commentators had been at work analyzing the contents of the various decretal letters. These commentaries reached a new sophistication with the promulgation of *Liber Extra*. The commentators' method was the close analysis of texts; they would look for inconsistencies within particular letters or between different letters. They also attempted to reconcile prior material found in the *Decretum* with the *Liber Extra*.<sup>32</sup> Three commentators especially stand out and will be the focus of this paper.

The first of these, Bernard of Parma, was born around 1200. Bernard spent most of his legal career in the academy. A professor of law at Bologna, Bernard was the author of the *Ordinary Gloss*—the standard commentary to the decretals of Gregory IX. This commentary was typically copied together with the *Liber Extra* and was used as the standard teaching text in the schools. Bernard of Parma died in 1266.<sup>33</sup>

Innocent IV (Sinibaldo Fieschi) was a well-trained and active canonist, although he apparently never taught. Instead, he made a career for himself in the papal bureaucracy. Innocent was named a cardinal as a young man in 1227, and was elected pope in 1243. He wrote his *Commentaria* to *Liber Extra* in his spare moments while serving as pope. He died in 1254.<sup>34</sup>

Finally, Hostiensis (Henry of Susa), like Innocent IV, made a career largely in ecclesiastical administration, teaching only briefly at the University of Paris. He was elected successively Bishop of Sisteron, Archbishop of Embrun, and Cardinal-Bishop of Ostia, and also served on a number of important papal diplomatic missions. He composed both a *Summa*, published in 1253, and a *Lectura* to the *Liber Extra*, completed in 1271, while engaged in the practical affairs of church management. He died in 1271.<sup>35</sup>

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<sup>32</sup> See BRUNDAGE, *supra* note 14, at 326–29.

<sup>33</sup> See J.A. CLARENCE SMITH, *MEDIEVAL LAW TEACHERS AND WRITERS* 46 (1975) for biographical details on Bernard. See Stephan Kuttner and Beryl Smalley, *The Glossa Ordinaria to the Gregorian Decretals*, 60 *ENG. HIST. REV.* 97–101 (1945), and Stephan Kuttner, *Notes on the Glossa Ordinaria of Bernard of Parma*, 11 *BULL. MEDIEVAL CANON L.* 86 (1981) for a review of textual issues in the *Glossa Ordinaria*.

<sup>34</sup> For Innocent's biography, see CLARENCE SMITH, *supra* note 33, at 45–46, and J.A. Cantini and Charles Lefebvre, *Sinibalde dei Fieschi (Innocent IV)*, 7 *DICIONNAIRE DE DROIT CANONIQUE* 1029 (1965).

<sup>35</sup> For Hostiensis's biography, see CLARENCE SMITH, *supra* note 33, at 46–47. The follow-

The thirteenth and early fourteenth centuries were rich in canonistic commentaries. As noted above, the classic age came to an end only in 1348 with the death of Johannes Andreae.<sup>36</sup> By selecting Innocent, Bernard and Hostiensis, this article, rather than tracing developments over a number of years, provides a sort of "snapshot" of rights at work in the canonistic system. In terms of the thoroughness and subtlety of their commentaries as well as their subsequent influence, Hostiensis, Bernard of Parma and Innocent IV can be termed the most important of the thirteenth century decretalists. By examining the role of rights in their juristic thought, this article will delineate the main features of the decretalist analysis of rights.

## II. THE HISTORIOGRAPHY OF RIGHTS

It is a rather novel idea to suggest that thirteenth century canon law had a well developed understanding of individual rights. After all, an earlier generation of historians argued that canon law was largely a justification for papal despotism.<sup>37</sup> As noted at the outset, two major schools have traditionally held sway, one maintaining that individual rights originated in the seventeenth century, the other that individual rights first emerged in the fourteenth.

More recently it has been argued that the Roman lawyers of the twelfth century developed the first modern rights theory, but that this theory centered around passive rights. Canon law subsequently adopted this system of passive rights. According to this school, it required the development of the distinction between *dominium directum* and *dominium utile*<sup>38</sup> to develop an active and possessory theory of rights.

This section reviews the main lines of these historiographical controversies. It attempts to make clear the presuppositions that have shaped and conditioned the conclusions traditionally asserted

ing articles by Noel Didier are also invaluable to an understanding of the life and career of Hostiensis. See Noel Didier, *Henri de Suse en Angleterre (1236?-1244)*, in 2 STUDI IN ONORE DI VINCENZO ARANGIO-RUIZ 333 (1953); Noel Didier, *Henri de Suse, évêque de Sisteron (1244-1250)*, 31 REVUE HISTORIQUE DE DROIT FRANCAIS ET ÉTRANGER 244, 409 (4th series, 1953); Noel Didier, *Henri de Suse, prieur d'Antibes, prévôt de Grasse (1235?-1245)*, 2 STUDIA GRATIANA 595 (1954).

<sup>36</sup> See *supra* note 21 and accompanying text.

<sup>37</sup> See R.W. CARLYLE & A.J. CARLYLE, 5 A HISTORY OF MEDIEVAL POLITICAL THEORY 318-38 (1928).

<sup>38</sup> See *infra* note 93 for a discussion of the distinction between *dominium directum* and *dominium utile*.

regarding the origins of the western rights tradition. In fact, arguments that the western rights tradition originated in either the seventeenth or the fourteenth centuries rest on flawed presuppositions. Those who argue for a seventeenth century origin tend either to rely upon a faulty connection between seventeenth century economic developments and rights discourse or to utilize historical sources in an overly selective fashion. Those who argue for a fourteenth century origin, on the other hand, have not considered the possible influence of canon law on fourteenth century philosophical disputes. This section argues that canon law in the thirteenth century clearly distinguished between active and passive rights and that important elements of thirteenth century canon law were "possessory" in character.

#### A. *Seventeenth Century Origins*

It is taken as almost commonplace by some scholars that the western rights tradition originated in seventeenth century England. Two sharply contrasting schools of thought, one associated with C.B. MacPherson, the other with Leo Strauss, make the case that seventeenth century England gave birth to individual rights. MacPherson argued that the emergence of rights was predicated upon seventeenth century economic developments, while Strauss asserted that concern for individual rights first arose with the abandonment of the central tenets of prior philosophical tradition. Both of these approaches are flawed.

##### 1. C.B. MacPherson

C.B. MacPherson began his book, *The Political Theory of Possessive Individualism*, with the bold assertion that the seventeenth century witnessed the "emergence of a new belief in the value and rights of the individual."<sup>39</sup> This belief found its expression in the natural rights philosophers of the seventeenth century. MacPherson set for himself the task of explaining why Thomas Hobbes and the other natural rights thinkers of the time, such as the Leveller polemicists and John Locke, should root their political philosophies in a theory of individual rights. The explanation MacPherson offered is that the natural rights philosophers were really projecting their view of contemporary economic relations onto a hypothetical state

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<sup>39</sup> CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1 (1962).

of nature and then deriving political philosophies congruent with their class interests.<sup>40</sup>

There is no need to explore the intricate readings that MacPherson attempted of Hobbes, Locke and the other natural rights thinkers. Rather, this article is concerned with the presumptions of MacPherson's historiography. How did he come to believe that Hobbes was the first rights theorist? It appears that MacPherson simply assumed the correctness of the traditional Marxist historiography of rights. This assumption is most clearly evident in MacPherson's attempt to connect seventeenth century rights theories to the economic conditions of the seventeenth century. To accomplish this task, MacPherson postulated three basic economic models that he acknowledges are "not sufficient or appropriate for general sociological or historical analysis."<sup>41</sup> Two of these models are important for MacPherson's analysis: the customary or status society and the possessive market society.<sup>42</sup>

The customary or status society, in MacPherson's estimation, typified feudal society. Productive work in the customary society was allocated authoritatively to particular groups or classes. Each group or class was confined to a particular type of work. Unconditional private property in land did not exist and, because of a variety of conditions imposed on the individual use of land, there was no meaningful market in real property. Finally, the labor force was tied to the land, or at least to the performance of allotted functions on the land.<sup>43</sup>

MacPherson contrasted this customary model with that of a "possessive market society." Such a society lacks an authoritative allocation of work. Contracts are authoritatively defined and enforced, individuals can alienate their own capacity to labor and are permitted to maximize their own utility. Further, land is freely alienable. Some individuals will have or want more material goods and will employ the labor of others to maximize their holdings or desires.<sup>44</sup> MacPherson argued that England in the seventeenth century closely approximated this possessive model and that the natural rights philosophers were sensitive to these new economic conditions.

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<sup>40</sup> See *id.* at 37-40, 78-81.

<sup>41</sup> *Id.* at 47.

<sup>42</sup> See *id.* at 46-70. MacPherson introduced the third economic model, the simple market society, only for the sake of comparison; MacPherson did not claim that it represents any society that has actually existed.

<sup>43</sup> *Id.* at 51-53.

<sup>44</sup> *Id.* at 53-61.

Their political philosophies were taken to be projections of their class interests within a competitive, market economy.<sup>45</sup>

In advancing these arguments, MacPherson adopted an essentially Marxist historiography of rights. Marx understood feudal society to be economically tightly restrained. Economic competition was restricted by all sorts of traditional relationships. For example, serfs could not sell their labor, lords could not alienate their land, and guilds limited freedom of trade. These restraints were dissolved in the course of the sixteenth and seventeenth centuries. Egoistic man was now unconstrained and competitive. Rights, in this view, were the creation of egoistic man seeking to universalize and justify his own atomized existence.<sup>46</sup>

This historiography can be criticized on a number of grounds. England in the seventeenth century was not the "possessive market society" MacPherson assumed it was.<sup>47</sup> Furthermore, many of the "new economic attitudes" that Marx and MacPherson took as sixteenth and seventeenth century novelties actually originated in the high and late middle ages.<sup>48</sup> These criticisms, however, simply disturb the connection between seventeenth century economic conditions and seventeenth century rights theories. The most damaging objection is that already in the thirteenth century one can find a systematic theory of rights.<sup>49</sup>

## 2. Leo Strauss

A philosopher, Leo Strauss saw his vocation as the careful study and exposition of the leading philosophers of ancient Greece and

<sup>45</sup> *Id.* at 62-68.

<sup>46</sup> See NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 121-35 (Jeremy Waldron ed., 1987) for a brief explanation of Karl Marx's approach to rights. The chief source for Marx's criticism of rights is his essay *On the Jewish Question*. For an abridged translation of this essay, see *id.* at 137-50.

<sup>47</sup> See IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 69-72 (1986). Shapiro recognizes that arguments from economic models are "simplistic" and "historically inaccurate." *Id.* at 69. Nevertheless, Shapiro does not reconsider his starting point. Like MacPherson, Shapiro believes that the western rights tradition begins in the seventeenth century. At the outset of his study, Shapiro declares that he begins with Thomas Hobbes's work because it represents the "earliest recognizably modern" form of rights. *Id.* at 23.

<sup>48</sup> See JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (1954); John F. McGovern, *The Rise of New Economic Attitudes—Economic Humanism, Economic Nationalism—During the Later Middle Ages and the Renaissance A.D. 1200-1500*, 26 *TRADITIO* 217 (1970). See IRIS ORIGO, *THE MERCHANT OF PRATO: FRANCESCO DI MARCO DATINI* (1957) for an example of a late medieval "egoistic capitalist."

<sup>49</sup> The irony, of course, is that many of the groups and relationships that Marx thought to be so restrictive of rights—guilds and corporations, for example—were actually among those forces which helped to shape thinking in rights.

Rome. He constructed his historiography of rights out of his reading of these philosophical texts and his own powerful logic. Strauss's historiography rests on a fundamental distinction between classic natural right and modern natural rights. Strauss identified three types of classic natural right teachings, the first associated with Plato and Socrates, the second with Aristotle and the third with Thomas Aquinas. All three schools shared several common features. First, all three were grounded on an objective and knowable right order. All three schools of thought also emphasized duty; one was expected to know and perform one's responsibilities, not claim one's rights. Finally, Strauss argued that these schools held that reason unaided by divine revelation was essential for discerning truth.<sup>50</sup>

Strauss believed that this harmonious philosophical order was destroyed in the seventeenth century. The particular engine of destruction, in Strauss's opinion, was the philosophy of Thomas Hobbes. Hobbes dismissed teleology as impossible in his universe. He viewed the world in material terms as devoid of purpose. Human existence, at bottom, was asocial and apolitical. The war of all against all was the fundamental rule of human nature.<sup>51</sup>

It was in this context that Strauss witnessed a shift from duties to rights. In the continual conflict of human relations one right is paramount: the right to self-preservation. Self-preservation becomes the fundamental norm and all duties are derived from this right.<sup>52</sup>

From the viewpoint of historiography, Strauss can be criticized for his selection of sources. He wished to construct a grand theory of the history of rights from the works of a few dozen philosophers. In the process, Strauss ignored legal texts entirely. Contrary to Strauss's presuppositions, a term like *jus naturale* was already defined by canonists in the 1180s as a "zone of autonomy" or a "neutral sphere of personal choice."<sup>53</sup> Other rights, such as the right to self-defense and the right of the poor to sustenance (aspects of a larger right of self-preservation), were given legal recognition by the mid-thirteenth century.<sup>54</sup> There is no sharp break occurring in the sev-

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<sup>50</sup> See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 120-64 (1950). For this final reason, Strauss ultimately questioned whether Thomism has a valid claim to teach classic natural right.

<sup>51</sup> See *id.* at 165-202.

<sup>52</sup> See *id.*

<sup>53</sup> Brian Tierney, *Origins of Natural Rights Language: Texts and Contexts, 1150-1250*, 10 *HIST. POL. THOUGHT* 615, 635-37 (1989).

<sup>54</sup> See BERNARD OF PARMA, *ORDINARY GLOSS X* 1.20.1 *s.v. suscepit* for a discussion of the

enteenth century, at least in legal texts, between the linguistic use of duties and of rights. Legal debates typically were framed in terms of rights from the end of the twelfth century onward.<sup>55</sup>

Thus, one can conclude that the case for a seventeenth century origin of the western rights tradition rests on certain questionable presuppositions made by the chief advocates of this position. C.B. MacPherson, following Marx, argued that changing economic conditions in the seventeenth century facilitated the growth of rights theories. Leo Strauss, confining himself to a select group of philosophical texts, maintained that a changed philosophical climate led to a shift from duties to rights. In making these assertions, however, neither scholar advanced conclusive arguments against an earlier origin for the western rights tradition. Rather, their prior assumptions prevented them from exploring other sources.

### B. Fourteenth Century Origins

Michel Villey wrote on the history of rights for nearly forty years. Over that time he produced a powerfully argued synthesis with two major components. First, the western legal tradition prior to the fourteenth century (Villey meant Roman law primarily, but canon law was included by implication) lacked an explicit, systematic theory of rights. Second, such a theory was possible only with the introduction of William of Ockham's theories of voluntarism and nominalism.<sup>56</sup> Villey's arguments have attracted wide support. Both elements of this synthesis shall be reviewed here.

#### 1. Roman Law and Rights

Michel Villey argued that Roman law lacked an explicit rights vocabulary in a series of four articles published in the 1940s and 1950s.<sup>57</sup> In his early work, Villey's chief targets were the Romanists of the early modern period. These scholars reorganized Roman law on individualist premises. The seventeenth century Romanist Ger-

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right of self defense. On the right of the poor to sustenance, see COUVREUR, *LES PAUVRES ONT-ILS DES DROITS?* 100-19 (1961); BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* 38, 126-27 (1959).

<sup>55</sup> See Tierney, *supra* note 53, at 626-38.

<sup>56</sup> See Brian Tierney, *Villey, Ockham and the Origin of Individual Rights*, in *WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* 1, 2 n.5 (J. Witte, Jr., & F.S. Alexander eds., 1988).

<sup>57</sup> Villey's seminal article is Michel Villey, *L'idée du droit subjectif et les systèmes juridiques*, 24 *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 201 (1946). See Tierney, *supra* note 56, for a helpful critical review of some of Villey's arguments.



hard Feltmann, for example, arranged his handbook of Roman law on the basis of rights: *jura in persona* (rights in persons), *jura in rebus* (rights in things) and *jura ad res* (rights to things).<sup>58</sup> But, Villey noted, such an organization is foreign to Roman law. Villey demonstrated that classical Roman law actually was organized on very different premises.<sup>59</sup>

Villey took as his starting point Gaius's *Institutes*. A didactic work, the *Institutes* was meant to explain the basic elements of Roman law, not advance a particular viewpoint. Written in the mid-second century, the text is sufficiently close to classical sources to reflect their outlook. What Villey found remarkable about the *Institutes* is the absence of any developed notion of subjective right. Unlike the early modern treatises, the *Institutes* is organized around persons, things and actions, not rights. *Jus*, which preeminently meant a right to the early modern lawyers, was never defined as a right by Gaius.<sup>60</sup>

Villey was not satisfied, however, with remaining at the level of general organization or definition. He was aware that *jus* was sometimes used by Gaius in ways that would suggest to a modern reader some concern with individual rights. For example, the *jus utendi fruendi*, the *jus* of enjoyment and use, or the *jus altius tollendi*, the *jus* of building higher, would seem to refer to a right of usufruct or the right to build higher. Villey, however, argued that to translate these *jura* as rights would be inappropriate. Villey illustrated how inappropriate such a translation would be by looking at the *jus altius tollendi*. This phrase is followed by the phrase *aut non extollendi*, the *jus* of not building higher. Gaius could not have meant a "right" of not building higher. He must have meant something else altogether when he employed the term *jus* in this context.<sup>61</sup>

Villey proposed a different way of viewing these *jura*. They are not individual rights but incorporeal things. The Roman jurists distinguished between *res corporales*, physical objects which might be touched, and *res incorporales*, which are pure abstractions. A particular *jus* will accompany a particular *res corporalis*. The *jus* that accompanies a given piece of property is simply the aggregate of the legal advantages and disadvantages inherent in the property. It is

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<sup>58</sup> Villey, *supra* note 57, at 202.

<sup>59</sup> *Id.* at 203.

<sup>60</sup> *Id.* at 204-06.

<sup>61</sup> *Id.* at 216-17.

an objectively existing abstract thing, not a power inhering in the owner.<sup>62</sup>

Villey went on to make the case that *jus* understood as a *res incorporalis* is radically different from *jus* understood as a right. Villey was fond of defining a right as a power exercisable by the individual.<sup>63</sup> A right can never be a *res incorporalis* in Villey's view.<sup>64</sup> Gaius is concerned with *jura* that are incorporeal things, not rights.

In this early work, at least, Villey was not dogmatic in insisting that subjective rights were impossible in Roman law. He acknowledged that situations existed in ancient Rome where subjective rights were at least implicit. He also acknowledged that certain legal institutions, such as usufruct, came close to being subjective rights even in classical Roman law.<sup>65</sup> Villey's point is the narrow one that, if subjective rights were articulated at all in classical Roman law, such rights formed a vague and quite subordinate concept. Roman law was organized along different principles.<sup>66</sup>

Villey developed these arguments in two subsequent articles on the expression *jus in re*.<sup>67</sup> These articles are marked by a willingness to acknowledge that an explicit notion of subjective rights came to be articulated by the Roman lawyers of the late empire, and even more so by the medieval glossators. Villey even appended to one of his articles a list of definitions culled from late imperial and medieval sources that suggests that *jus* was often understood as a subjective right.<sup>68</sup>

<sup>62</sup> *Id.* at 210-11, 212-15.

<sup>63</sup> *Id.* at 214. Villey offered a definition of subjective right that remained largely unchanged through his subsequent work: "J'emploierai à dessein, dans toutes cette discussion, le mot droit subjectif: pouvoir appartenant, selon l'analyse moderne, à un sujet actif contre sujets passifs." *Id.* at 214 n.1.

<sup>64</sup> *Id.* at 214. "Quant à nous ne pensons pas que des choses (*res*) fussent-elles incorporales, puissent être du droits subjectifs, res derniers étant pouvoirs de l'homme sur les res." *Id.*

<sup>65</sup> *Id.* at 218.

<sup>66</sup> *Id.* at 221. Villey described the idea of subjective rights in classical Roman law as "vague, informe, indifférenciée, exprimée par un vocabulaire pauvre et imprecis." *Id.*

<sup>67</sup> The expression *jus in re* was not a common one in classical Roman law. Where used at all it signified a *res incorporalis*, not a right. Expressions like *suum jus*, in classical texts, meant the entire complex of advantages and disadvantages that an individual possesses. It is everything that makes up his juridic situation. See Michel Villey, *Du sens de l'expression jus in re en droit roman classique*, 3 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ (Mélanges Fernand de Visscher II) 417, 424-27 (1949); Michel Villey, *Le jus in re du droit romain classique au droit moderne*, in CONFÉRENCES FAITES À L'INSTITUT DE DROIT ROMAIN EN 1947, 193-95 (1950) [hereinafter *Le jus in re*].

<sup>68</sup> See *Le jus in re*, *supra* note 67, at 209-25.

In Villey's final article on Roman law, "*Suum Jus Cuique Tribuens*,"<sup>69</sup> both a new thesis and a new intransigence are evident. Villey argued that the expression "to give to each his *jus*" did not mean, as a modern would be tempted to read it, "give to each his right." Villey, however, was no longer content to rest his argument solely on the distinction between *res incorporales* and rights; he introduced a philosophical explanation for his assertion. Plato, Aristotle and the Stoics all held that an objectively just social order is knowable and achievable. These classical philosophies, especially Stoicism, shaped the thinking of the Roman lawyers. When Roman lawyers employed the term *suum jus cuique tribuens*, they meant that each person should receive a just division of goods in an objectively just social order. According to Villey, subjective rights were not even possible until late medieval and early modern philosophers moved jurisprudence away from these Aristotelian and Stoic foundations.<sup>70</sup>

Regarding Villey's treatment of Roman law, a number of criticisms might be made. It is possible that the Roman lawyers employed a word other than *jus* to signify a subjective right.<sup>71</sup> It is also possible that Villey selected his sources too narrowly. He frequently employed classical and early post-classical texts like Gaius, but a study of later Roman texts would reveal a different state of affairs.<sup>72</sup> Finally, Villey's sharp distinction between *jus* as a *res incorporalis* and *jus* as a right was not always observed, even in Gaius.<sup>73</sup>

To Villey, as noted, *jus* understood as a *res incorporalis* is an aggregate of legal advantages and disadvantages adhering to a given physical object. A particular piece of land, for example, could have attached to it a whole variety of *jura*. As the example of the *jus altius non extollendi* demonstrates, the landowner might not necessarily be advantaged by the possession of these *jura*.

<sup>69</sup> Michel Villey, *Suum Jus Cuique Tribuens*, 2 STUDI IN ONORE DI PIETRO DE FRANCISCI 261 (1956).

<sup>70</sup> *Id.*

<sup>71</sup> See Giovanni Pugliese, *Res corporales, res incorporales e il problema del diritto soggettivo*, 3 STUDI IN ONORE DI VINCENZO ARANGIO-RUIZ 223 (1954).

<sup>72</sup> See ERNST LEVY, *WEST ROMAN VULGAR LAW: THE LAW OF PROPERTY* (1951). Levy provides a number of examples from late imperial Roman law suggesting that *jus* had come to signify a right.

<sup>73</sup> According to Brian Tierney:

[E]ven in Gaius himself, the concepts of *potestas*, *dominium*, and *jus* all seem to be interwoven in a passage like this: slaves are in the power (*potestate*) of their masters (*dominorum*) . . . if the cruelty of their masters seems intolerable they are to be compelled to sell their slaves . . . for we ought not to use our right (*jure*) badly.

See Tierney, *supra* note 56, at 5.

By the thirteenth century, however, a *jus*, while continuing to be termed a *res incorporalis*, ceased to be associated with particular tangible objects. Rather, *jura* at this point were typically conceived of as powers or claims possessed by individuals, or juridic entities like corporations.<sup>74</sup> Thus, for example, the *jus conjugale*, which is discussed more fully below, was conceived of as an enforceable claim by one marital partner upon the other.<sup>75</sup> Similarly, the *jus eligendi*, the right to vote, became conceptualized as a power belonging to individual electors.<sup>76</sup> *Jus* was transformed unequivocally into an individual power or claim; it signified an individual's legal advantage, not the advantages and disadvantages inhering in a tangible object.

By the thirteenth century this shift in the meaning of *jus* was complete. Whether this was the product of twelfth century canonistic theorizing, the work of the medieval Roman glossators or the accomplishment of the Roman lawyers of the late antique world<sup>77</sup> is another question altogether. It is clear that this "new" meaning of the word *jus* became an integral feature of the decretalist rights analysis.

## 2. Ockham and Rights

In the 1950s, Villey shifted his research from a close study of legal texts to a study of the philosophy of law. Once again, Villey's research was prompted by his reading of early modern legal writers. Grotius, Hobbes and others all saw *jus* chiefly as a *facultas*, or power of the individual. Villey's concern was with identifying the moment when this "monstrous infant" first flexed its limbs. Villey eventually determined that the fourteenth century papal-Franciscan dispute over property was that moment, and that William of Ockham, the philosopher turned polemicist, was its inventor.<sup>78</sup>

To Villey, Ockham represents a "copernican moment." Thomas Aquinas had recently reconstructed the Aristotelian synthesis. To

<sup>74</sup> The *jus eligendi*, for example, is conceptualized simultaneously as a power and as a *res incorporalis*. See BERNARD OF PARMA, ORDINARY GLOSS, X. 2.12.3 s.v. *quasi-possessionem*.

<sup>75</sup> See *infra* notes 199–251 and accompanying text.

<sup>76</sup> See *infra* note 149 and accompanying text.

<sup>77</sup> This shift in meaning remains unexplored historical territory. I hope to return to this issue in a later study.

<sup>78</sup> See Michel Villey, *La genèse du droit subjectif chez Guillaume d'Occam*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 97 (1964), reprinted in MICHEL VILLEY, SEIZE ESSAYS DE PHILOSOPHIE DU DROIT 140, 178 (1969) ("Nous nous sommes longuement attardés sur cette heure privilégiée de l'histoire du droit subjectif, où cet enfant monstrueux semble sortir des limbes."). Villey's view of subjective rights is an unrelievedly bleak one.

Thomas, there was an objectively just order to the universe. Within this framework of ordered justice everyone possessed, or ought to possess, his or her just share. In a just world there would be no clamor over egoistic interests and harmony would prevail. In Villey's view, this synthesis was further supported by Thomas's proposed metaphysics, consisting of elements of both universality and singularity. Again, what one sees is harmony.<sup>79</sup>

According to Villey, Ockham shattered this order in two ways. He did so by emphasizing both voluntarism and nominalism in his philosophy. As a voluntarist, Ockham stressed power as the guiding element of creation, not an objectively knowable just order. At the highest level, God Himself possesses an absolute subjective right, the *divina potestas*. That is, God can do anything He wishes. This conception of power is reflected in the social order. In the Thomistic system, legislation mirrored the naturally just order of the universe. In Ockham's, legislation was the product of power, the subjective right of the legislator. To Thomas, jurists were "priests of justice." To Ockham, they were simply servants of individual interests.<sup>80</sup>

The second element to Ockham's thought that, in Villey's view, contributed to the formation of the western rights tradition was nominalism. Only the individual had real existence; hence, the only logical starting point for legal development was the individual person. Thus, the protection and advancement of individual claims and powers, not an objectively just distribution of goods, became the starting point of legal development.<sup>81</sup>

In conclusion, two points should be made about Villey's historiography. First, Villey recognized in his early work an independent role for lawyers. Gaius, for example, was taken as an intellect on his own terms. Villey's later work, however, was characterized by a desire to subordinate legal scholarship to a given philosophical school of thought. Where legal scholarship cannot conveniently be

<sup>79</sup> *Id.* at 147-49, 164-69, 170-78.

<sup>80</sup> *Id.* at 170-71.

<sup>81</sup> *Id.* at 126. Villey states:

Occam ne peut imaginer, à partir du nominalism, qu'un art tendu non vers la recherche d'une harmonie dans la cité prise comme fin en soi, mais seulement vers le service des individus, orienté vers l'utilité particulière, ce qui présage l'utilitarisme de la pensée juridique moderne, mais revient à dénier au droit toute frontière précise. Le but recherché paraît être d'assurer à l'individu les conditions d'une vie libre et pleinement individuelle ; bien que cela nous semble le contraire de l'office du droit, de lui garantir autant que possible les libertés et les pouvoirs auxquels il aspire.

*Id.*

labeled as "stoic" or "Thomist" or "nominalist" it is dismissed as "disordered" or "vulgar."<sup>82</sup>

This approach ignores the professional boundaries between law and philosophy that existed in the middle ages. Lawyers and philosophers received distinctly different educations.<sup>83</sup> Their professional interests differed as well. Canon lawyers tended to be men of affairs as well as academicians; they were chiefly concerned with the practical problems of ecclesiastical order and governance. A philosopher or logician like Ockham, until he was drawn into polemics, would not have shared these interests. Finally, canon lawyers worked from a different set of sources. They did not expound upon Thomas's *Summa*, but rather plumbed the depths of Gratian's *Decretum* or Gregory IX's *Liber Extra*.<sup>84</sup> There is no reason to believe that the canon lawyers were incapable of inventing their own conceptual framework without some learned philosopher taking them by the hand.

In fact, thirteenth century decretalist commentaries reveal that a consistent conceptual framework was already in place. This framework included a large role for individual rights. It must be kept in mind, however, that much of this framework only existed in a half-articulated form. The decretalists never wrote a treatise on rights. Nevertheless, a concern for rights percolated through their treatments of a variety of legal institutions. The absence of a treatise on individual rights might be explained by the decretalists' own sense of practicality; they might not have seen it as serving any useful purpose. But one should not mistake the absence of theoretical speculation for the lack of a consistently deployed concept.

Second, Villey assumes that philosophical systems that postulate the existence of a higher order principle are essentially incompatible with individual rights. Such an assumption is fundamentally flawed. For example, the commandment to honor one's mother and father is a statement of a higher order principle. This statement may be cast in terms of a duty; that is, children must honor their parents. It may also be recast in terms of a right; parents have the right to be honored by their children. This point is important for under-

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<sup>82</sup> See, e.g., Michel Villey, *Les origines de la notion de droit subjectif*, 2 ARCHIVES DE PHILOSOPHIE DU DROIT 103 (1953), reprinted in *LECONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT* 271 n.52 (1957). In this article, Villey refers to Henry de Bracton as writing in a vulgar language.

<sup>83</sup> See BRUNDAGE, *supra* note 14, at 346-48 for a helpful quick review of the emergence of canon law as a distinct discipline.

<sup>84</sup> On the relationship of philosophy and law as well as their professional boundaries, see LEBRAS, *supra* note 21, at 23-45.

standing the canonists. The canonists had a clear conception of right order. For example, they believed that marriage has a certain "natural" structure to it. At the same time, however, they understood that marriage gives rise to rights.<sup>85</sup>

### C. Richard Tuck

Recently, Richard Tuck has written an important book about individual rights theories in the early modern period.<sup>86</sup> In his opening two chapters he purports to trace the origin of these natural rights theories to medieval sources.<sup>87</sup> These chapters already have been criticized for their inconsistent terminology and chronology.<sup>88</sup> Two additional observations need to be made.

First, Tuck proposes that the Romanists of the twelfth century developed the "first modern rights theory." This was a theory "built round the notion of a passive right."<sup>89</sup> Tuck subsequently asserts that this "passive rights theory" characterized medieval canon law.<sup>90</sup>

In employing a distinction between active and passive rights Tuck borrows from the language of analytical philosophy. When David Lyons, upon whom Tuck relies, employed these terms, he meant that an active right is the right to do something. A passive right, in contrast, is the right to receive something from someone else.<sup>91</sup> The canonists, however, knew perfectly well how to distinguish between an active right and a passive right. Bernard of Parma, for example, distinguished between the *jus eligendi active*, the active right to cast a ballot, and the *jus eligendi passive*, the passive right of being elected.<sup>92</sup> Voting is the act of doing something, while being elected is the receipt of something, namely an office. Bernard's

<sup>85</sup> Modern examples of philosophical systems that derive rights from preexistent principles of right order include JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); JACQUES MARITAIN, *CHRISTIANITY AND DEMOCRACY AND THE RIGHTS OF MAN AND NATURAL LAW* (Doris C. Anson trans., 1986).

<sup>86</sup> RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGINS AND DEVELOPMENT* (1979).

<sup>87</sup> *Id.* at 5-31.

<sup>88</sup> See Brian Tierney, *Tuck on Rights: Some Medieval Problems*, 4 *HIST. POL. THOUGHT* 429, 431-44 (1983).

<sup>89</sup> TUCK, *supra* note 86, at 13.

<sup>90</sup> *Id.* at 15.

<sup>91</sup> David Lyons, *The Correlativity of Rights and Duties*, 4 *NOUS* 45 (1970).

<sup>92</sup> BERNARD OF PARMA, *ORDINARY GLOSS X 1.6.41 s.v. ipsius*: "Sed quare dicitur hic, quod metropolitanus eliget de eadem ecclesia cum ipsi perdiderunt jus eligendi? Responsum, ipsi perdiderunt jus eligendi active, i.e., quia ipsi non possunt eligere; sed non passive, quia bene possunt eligi."

terms fit Lyons's categories unambiguously. Tuck's thesis that canon law knew only passive rights is simply untenable in the light of this evidence.

Secondly, Tuck argues that the distinction made by the mid-thirteenth century Romanists between *dominium directum* and *dominium utile* was crucial to the evolution of a possessive theory of rights.<sup>93</sup> It seems, however, that this distinction is unimportant for the development of rights theories. A rights theory already was well-established in canon law by the mid-thirteenth century, and the invention of *dominium utile* appears to have had no discernible effect upon it. Rights in canon law definitely had a certain possessive character.<sup>94</sup> This character, however, is most likely derived from the shift in the meaning of *jus* and *res incorporalis* discussed above. *Jus* was in canon law both a *res incorporalis* and a power or claim belonging to the individual. This shift, however, predates the Romanist distinction between *dominium directum* and *dominium utile* and is independent of it.<sup>95</sup>

### III. RIGHTS IN MEDIEVAL CANON LAW

#### A. The Hohfeldian Analysis of Rights

Alan Gewirth has asserted that every society, at least implicitly, has some set of subjective rights.<sup>96</sup> The point here, however, is not that canon law had a set of subjective rights implicit within its legal structure. Rather, the contention is that the decretalists possessed a well-developed explicit understanding of subjective rights. To make this case it is necessary to examine the decretalist rights vocabulary.

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<sup>93</sup> TUCK, *supra* note 86, at 15-17. *Dominium*, or *dominium directum*, was understood as full ownership rights in property, while *dominium utile* was a subordinate interest such as usufruct. Tuck argues that in the thirteenth century *dominium utile* came to be understood as a right defensible against third party interference and freely alienable or transferable. Tuck makes much of this development. He asserts that from this time forward rights came to be seen peculiarly as a person's property. Canonistic rights theories, however, developed quite independently of this distinction.

<sup>94</sup> Because rights were conceptualized as *res incorporales*, they were intangible things that were possessed by individuals. It was this dual character of rights that in all likelihood gave the western rights tradition its possessive nature.

<sup>95</sup> The right to vote provides a helpful example of the conflation that took place between the notions of *jus* as faculty or power and *jus* as *res incorporalis*. The right to vote was often termed a liberty, see X 3.9.3, a faculty, see X 1.6.31 or a power, see X 1.6.52. At the same time, the decretalists also conceptualized the right to vote as a *res incorporalis* and therefore a possession, or quasi possession, of the individual. See, e.g., BERNARD OF PARMA, X 2.12.3 *s.v. quasi-possessionem*.

<sup>96</sup> ALAN GEWIRTH, REASON AND MORALITY 98-101 (1978).



A helpful starting point in this examination might be our own rights vocabulary here in the late twentieth century United States. It is an exceedingly rich vocabulary. Claim, power, privilege, immunity, liberty, authorization, interest and prerogative can all be understood to be equivalent to the word "right" depending on the context. How might we begin to sort our way through this vocabulary? Our understanding of individual rights has been aided immeasurably by the attention analytical philosophers have given this term. Wesley Hohfeld was one such philosopher.<sup>97</sup>

Hohfeld wrote with the avowed purpose of identifying and distinguishing the cluster of meanings that had congregated around the terms "right" and "duty."<sup>98</sup> He found especially regrettable the efforts of his colleagues and predecessors to reduce all jural relationships to rights and duties. Displeased with these attempts, Hohfeld identified a series of eight fundamental legal relations: four "jural opposites" and four "jural correlatives."<sup>99</sup>

Hohfeld's attempt to reform the rights vocabulary ultimately did not prevail. Nevertheless, his work remains an enormously useful analytical device for understanding the meanings that attach to the terms "right" and "duty" in ordinary legal writing. In this section, Hohfeld's jural correlatives will be applied to the decretalist rights vocabulary. First, however, Hohfeld's understanding of the jural correlatives will be summarized.

### 1. Rights and Duties

Hohfeld began his analysis with the relationship of rights and duties. Hohfeld assumed that all those who use the term right, even in its broadest sense, mean to have it correlate with the term duty. Thus, Hohfeld concluded that rights in their strict sense must correlate with duties, because apparently this is the meaning that would command universal assent. He further concluded that "claim rights" constitute the one class of rights that correlates with duties.<sup>100</sup>

Hohfeld provided an example to illustrate what he meant by claim right. Property owner X has a right—or, equivalently, a claim—against Y that Y stay off X's land. The correlative expression

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<sup>97</sup> See WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (W.W. Cook ed., 1923).

<sup>98</sup> *Id.* at 35-36.

<sup>99</sup> *Id.* at 36. For additional background on Hohfeld's project, see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975.

<sup>100</sup> See HOHFELD, *supra* note 97, at 36-38.

is that *Y* has a duty to stay off *X*'s property.<sup>101</sup> It is through this correlation alone that, in Hohfeld's estimation, a right is properly understood.<sup>102</sup>

## 2. Privileges and No-Rights

Hohfeld next identified privileges as a conceptual category distinct from rights. Privileges correlate with "no-rights." Hohfeld illustrated the operation of this correlation by utilizing a variation on the example concerning claim rights: Property owner *X* has the privilege of entering his property and, equivalently, has no duty not to enter the property. Correlatively, *Y* has "no-right" that *X* shall not enter.<sup>103</sup>

Hohfeld gave a second example, perhaps sensing that his assertion that privilege should be understood as conceptually distinct from claim was in need of further justification. Quoting John Chipman Gray, Hohfeld stated:

The eating of shrimp salad is an interest of mine and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me colic.<sup>104</sup>

Hohfeld identified two distinct sets of relations in this example. First, the speaker has a privilege to eat the salad and *A*, *B*, *C* and *D* have no right that the speaker not eat the salad. Second, the speaker has claims against *A*, *B*, *C* and *D* that they not interfere with the eating of the salad and, correlatively, *A*, *B*, *C* and *D* have a duty not to disrupt the speaker's eating of the salad.<sup>105</sup> But these two concepts are separable; *A*, *B*, *C* and *D* might be the owners of the salad and might have told the speaker to "eat the salad if you can, but we don't agree not to interfere with you." In this case, the speaker would have the privilege of eating the salad but would lack a claim against *A*, *B*, *C* and *D* not to interfere.<sup>106</sup>

Hohfeld also attempted to fit the notion of legal liberty within his understanding of privilege. By legal liberty Hohfeld apparently

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<sup>101</sup> *Id.* at 38.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 38-50.

<sup>104</sup> *Id.* at 41.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 42.

meant a legally protected range of personal choice. Thus, Hohfeld cited as an example of liberty the "freedom . . . to fire off a gun."<sup>107</sup>

Hohfeld's effort to fit legal liberties within the concept of privilege is probably the most unsatisfying part of his analysis. As Hohfeld's own example, the firing of a gun, would suggest, he has collapsed together the two ideas he distinguished in his treatment of John Chipman Gray's hypothetical. The legal liberty to fire a gun in fact includes both a privilege of firing or not firing the gun and a claim against others who would prohibit or require the firing.<sup>108</sup>

While this is a paper on legal history and not a philosophical analysis of Hohfeldian categories, it would be permissible to add at this point, following Carl Wellman, that most rights seem to be clusters of Hohfeldian elements.<sup>109</sup> Thus, for example, as noted below,<sup>110</sup> the *jus eligendi* can be seen either as a privilege, or a power, depending on the perspective adopted.

### 3. Powers and Liabilities

In explaining powers, Hohfeld distinguishes between two means by which a given legal relation might be changed. A legal relation might be changed by "some superadded fact or group of facts not under the volitional control of a human being" or "from some superadded fact or group of facts which are under the volitional control of one or more human beings."<sup>111</sup> Hohfeld denominated the latter situation a legal power. Hohfeld adduced a number of examples of legal powers. One such is that a person might extinguish his or her legal interest in a given piece of property by abandoning it or by selling it. Similarly, agents might possess certain legal powers by which to bind their principals, and public officials

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<sup>107</sup> See HOHFELD, *supra* note 97, at 42-43.

<sup>108</sup> Judith Jarvis Thomson, in developing this point, has persuasively argued that legal liberties are much stronger than Hohfeld's notion of legal privilege. In Thomson's estimation, most legal liberties carry claims against others not to interfere in their exercise "in a certain range of ways." See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 53-55 (1990). In line with Thomson's criticism it must be noted that, taken alone, not all of Hohfeld's categories can be termed "rights." It is probably safer to see rights, as Carl Wellman does, as clusters of Hohfeldian categories. See *A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS* (1985). Depending on the precise analysis chosen, the claim aspect of a right might be prominent or its aspect as a privilege or immunity, or power.

<sup>109</sup> See CARL WELLMAN, *A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS* (1985).

<sup>110</sup> See *supra* notes 138-49 and accompanying text.

<sup>111</sup> HOHFELD, *supra* note 97, at 50-51.

might possess powers by which to carry out the responsibilities of office.<sup>112</sup>

Hohfeld illustrated the correlation between powers and liabilities with an example drawn from contracts law. "Suppose A mails a letter to B offering to sell the former's land Whiteacre to the latter for \$10,000." These facts have created a legal power in B. By responding affirmatively to A's offer, B changes his own and A's legal relationship with respect to Whiteacre. Similarly, A is under a liability to follow through on the offer should B respond favorably, although only after B has actually accepted A's offer would a specific duty be created.<sup>113</sup>

#### 4. Immunities and Disabilities

The final correlative Hohfeld examined is that between an immunity and a disability. He defined immunity by comparing it to the other terms discussed above. An immunity bears the same relationship to a power as a privilege does to a right. "A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another."<sup>114</sup> In the same way, "a power is one's affirmative control over a given legal relation as against another" while "an immunity is one's freedom from the legal power, or control of another as regards some legal relation."<sup>115</sup>

Once again Hohfeld illustrated his point with an example. Property owner X has the power to alienate the property to Y or to other parties. At the same time, X has "various immunities as against Y and all other ordinary parties."<sup>116</sup> This is because "Y is under a disability (i.e., has no power) so far as shifting the legal interest either to himself or to a third party . . . and what is true of Y applies similarly to everyone else who has not" acquired a power to alienate X's property.<sup>117</sup>

Hohfeld noted that the concept of immunity possesses special significance in the area of exemptions from the power of taxation.<sup>118</sup>

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<sup>112</sup> *Id.* at 52-53.

<sup>113</sup> *Id.* at 55.

<sup>114</sup> *Id.* at 60.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Hohfeld does not draw the extension, but the concept of immunity seems equally important in the case of other exemptions from governmental powers.

This situation satisfies Hohfeld's definition neatly. The government possesses the power to tax, but the individual, or other entity, is free from that "power" or "control" in a given instance.<sup>119</sup>

B. *The Hohfeldian Analysis Applied to the Decretalist Rights Vocabulary*

The purpose underlying the inclusion of the foregoing discussion is not to propose a philosophical defense of Hohfeld's approach to rights. Rather, the point is that, assuming the essential accuracy of Hohfeld's analysis, the canonistic rights vocabulary corresponds closely to Hohfeld's categories. The canonistic rights vocabulary, like our own, is a rich one. *Libertas, potestas, facultas, immunitas, dominium, justitia, interesse* and *actio* can all, in the appropriate circumstances, be translated as "right." This article, however, focuses its analysis on two terms, *jus* and *facultas*.

*Jus*, as should be already evident, was a term capable of multiple meanings. It might mean law in the sense of a particular statute or even an entire legal system. *Jus* also could mean, at least in classical Roman law, a *res incorporalis* understood as an aggregate of advantages and disadvantages inhering in a given physical object. It also seems commonly agreed that early modern authors such as Hobbes and Suarez frequently used the term to mean an individual right.<sup>120</sup>

*Facultas*, as well, frequently could mean an individual right. The meanings of *jus* and *facultas* overlapped to a substantial degree: both terms could mean an individual right. When used to convey the sense of individual right, *jus* was frequently defined as a *facultas*.<sup>121</sup> But *facultas* also had a range of meanings independent of *jus*. It seems that the canonists frequently used this term to convey the sense of Hohfeldian liberty or privilege. Thus, individuals possessed a number of basic *facultates*: the faculties of renouncing a right,<sup>122</sup> of conducting a trial,<sup>123</sup> of introducing evidence at trial,<sup>124</sup> of re-

<sup>119</sup> *Id.* at 61.

<sup>120</sup> See for example, TUCK, *supra* note 86, at 54-55 for a discussion of Suarez and TUCK, *supra* note 86, at 119-42 for a discussion of Hobbes.

<sup>121</sup> Innocent III, for example, described in the decretal *Cum Ecclesia Vulturana* the individual right to vote held by cathedral chapter members as *libera facultas*, a free faculty. See X 1.6.31.

<sup>122</sup> See, e.g., X 5.20.9.

<sup>123</sup> See, e.g., X 2.14.7 (the *facultas* of defending oneself at trial); X 3.9.1 (the *facultas* of prosecuting one's right).

<sup>124</sup> HOSTIENSIS, *SUMMA*, Bk. I, *De consuetudine* § 6.

taining a proctor,<sup>125</sup> and of making a vow.<sup>126</sup> One *facultas*, the faculty of contracting marriage, is discussed in greater depth below.

This paper, however, first compares canonistic usages of the term *jus* to Hohfeld's categories by looking briefly at the role played by rights in particular legal structures such as canonistic poor law and election law. The following discussion will establish that the term *jus* fits the full range of Hohfeld's analysis of the concept "right."

### 1. Rights and Duties

A number of examples may be adduced to illustrate the correlation that existed in canon law between a right, understood strictly, and a duty. One such example might be the bishop's *cathedraticum*. The *cathedraticum* was a fixed sum payable to the bishop by the churches of a diocese. The *cathedraticum* formed one part of the *jus episcopale*, the bishop's right. The bishop thus had a claim upon the churches of his diocese corresponding exactly with the churches' duty to make the payment.<sup>127</sup>

A more complex, but perhaps more instructive, example of the correlation of rights and duties can be found in canonistic poor law. Early on, Christian authors recognized an obligation to the poor on the part of Christians. The patristic tradition, for example, admonished wealthy Christians to provide for the needs of the poor.<sup>128</sup> This tradition of an obligation toward the poor was incorporated in Gratian's *Decretum*.<sup>129</sup> At least in 1140, however, the obligation of wealthy Christians remained at the level of a general duty, without corresponding rights on the part of the poor to claim sustenance.<sup>130</sup>

An important move toward the creation of a right of the poor to sustenance was suggested by Huguccio. Huguccio argued that, while property might be held privately in ordinary times, superfluous goods were to be shared with the poor in times of necessity. Huguccio, however, did not connect this doctrine with a corre-

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<sup>125</sup> X 1.38.7.

<sup>126</sup> HOSTIENSIS, SUMMA, Bk. III, *De voto* § 15.

<sup>127</sup> X 1.31.16. On the *cathedraticum*, see T.F. DONOVAN, THE DEVELOPMENT OF THE INSTITUTE OF THE CATHEDRATICUM: AN HISTORICAL SYNOPSIS (1964); M. LALMONT, *Cathedraticum*, 2 DICTIONNAIRE DE DROIT CANONIQUE 1436 (1937).

<sup>128</sup> MICHEL MOLLAT, THE POOR IN THE MIDDLE AGES: AN ESSAY IN SOCIAL HISTORY 20-23 (1986); TIERNEY, *supra* note 54, at 9-12.

<sup>129</sup> TIERNEY, *supra* note 54, at 9-12.

<sup>130</sup> See COUVREUR, *supra* note 54, at 80-81.

sponding claim right that the poor might assert to superfluous goods.<sup>131</sup>

Huguccio's successors responded to this gap by acknowledging that the poor possessed such a claim right to the superfluous goods of the wealthy. Around 1200, Alanus Anglicus argued that a poor man was not stealing from the wealthy when he took their property because he was really taking what was his by natural right.<sup>132</sup> Another commentator, an anonymous contemporary of Alanus, stated that a poor man was entitled to take property on his own authority and thus to declare a right for himself.<sup>133</sup> Hostiensis represented the furthest extension of this development when he asserted that a person suffering from the necessity of hunger, rather than plotting a theft, seemed to be using his right.<sup>134</sup> Although the commentators did not develop the point, this right clearly seems to correlate with the duty, recognized by earlier authors, of the wealthy to provide for the poor.

Some of Huguccio's immediate successors also attempted to develop a judicial mechanism for processing the claims of the poor. They asserted that an individual poor person might, by utilizing the equitable doctrine known as evangelical denunciation, appear before the bishop and assert a claim for sustenance. The bishop then might compel a wealthy man to provide support for that person, and could even use excommunication as a sanction for noncompliance.<sup>135</sup>

Unfortunately, this particular judicial sanction did not fare well among the decretalists. Although Bernard of Parma continued to support this particular remedy, Innocent IV sharply narrowed its application.<sup>136</sup> Hostiensis ultimately agreed with Innocent.<sup>137</sup>

What is significant, however, is not whether a particular coercive mechanism survived in the canon law but that a correlation

<sup>131</sup> *Id.* at 100. Brian Tierney has recently documented the emergence of the natural right of the poor to sustenance. See *supra*, note 53, at 641-43.

<sup>132</sup> Gloss ad comp. I 5.26.5, quoted in COUVREUR, *supra* note 54, at 161 n.280 ("quod accipit suum jure naturali efficitur").

<sup>133</sup> Apparatus Militant siquidem ad comp. I 5.26.5, quoted in COUVREUR, *supra* note 54, 118 n.349 ("Nota: potest abici quod per judicem debet petere quia in tali articulo non potest judicem expectare, unde in tali articulo potest sibi jus dicere, sicut et creditor si videat debitorem suum a civitate fugere, potest res ipsius auctoritate propria occupare.").

<sup>134</sup> HOSTIENSIS, LECTURA X 5.18.3 s.v. *necessitatem*: "Unde potius videtur is qui necessitatem patitur uti jure quam furtum consilium inire."

<sup>135</sup> See COUVREUR, *supra* note 54, at 108-15; TIERNEY, *supra* note 54, at 37-39.

<sup>136</sup> INNOCENT IV, COMMENTARIA X 3.17.1 s.v. *admoneant* (limiting the application of excommunication to cases of scandal).

<sup>137</sup> HOSTIENSIS, LECTURA X 3.17.1 s.v. *moneant*.

between rights and duties had been worked out by the canonists in this basic area of law. Where earlier commentators had recognized a vague and general duty that the wealthy owed the poor, the canonists who followed Huguccio developed the concept into a right. Hohfeld's categories are satisfied in this development.

## 2. Privileges and No-Rights

The operation of the *jus eligendi*, the right to vote, is a useful illustration of the privilege/no-right correlation in medieval canon law. The governance of a medieval diocese was a matter of shared responsibilities.<sup>138</sup> The bishop was recognized as the head of the diocese and his authority was never formally called into question. But the cathedral chapter, that body of clerics either resident at the cathedral chapter or who derived economic support by virtue of membership in the chapter, represented a powerful counterweight to monolithic episcopal governance.<sup>139</sup> One of the most cherished privileges held by individual chapter members was the right to vote for chapter officers, including, when the office became vacant, the right to vote for bishop.

In many respects the *jus eligendi* operated as a Hohfeldian privilege or liberty might operate. Individual chapter members were free to renounce their right and thus decline to participate in a particular election. If they chose to vote, the law granted them a legally protected range of personal choice.

The decretalists attempted to secure the free exercise of the *jus eligendi* in two separate ways. The decretalists first argued that any coercion of the voting decisions of the electors was impermissible. The election was invalid if coercion had been used to obtain a particular result.<sup>140</sup> Other rules were corollaries to this basic principle. For example, members of a cathedral chapter who had been treated contemptuously and excluded from an election subsequently could not be compelled to ratify the chapter's choice.<sup>141</sup> Furthermore, voting had to be done secretly in order to preserve

<sup>138</sup> See JEAN GAUDEMET, *LE GOUVERNEMENT DE L'ÉGLISE À L'ÉPOQUE CLASSIQUE, II<sup>e</sup> PARTIE, LE GOUVERNEMENT LOCAL* 104–215 (Gabriel LeBras and Jean Gaudemet eds. 1979).

<sup>139</sup> *Id.* at 184–215; see also LAWRENCE G. DUGGAN, *BISHOP AND CHAPTER: THE GOVERNANCE OF THE BISHOPRIC OF SPEYER TO 1552* (1978); KATHLEEN EDWARDS, *ENGLISH SECULAR CATHEDRALS IN THE MIDDLE AGES* (1949); ADAM VETULANI, *LE GRAND CHAPITRE DES STRASBOURG DES ORIGINES À LA FIN DU FIN DU XIII<sup>e</sup> SIÈCLE* (1927).

<sup>140</sup> See, e.g., BERNARD OF PARMA, *ORDINARY GLOSS X 1.6.23 s.v. metuebant*.

<sup>141</sup> *Id.* at X 1.6.28 s.v. *consentire*.



the free consent of each individual canon.<sup>142</sup> Finally, an election was invalid where a just fear of violence existed at the time of the voting, even if no violence actually took place.<sup>143</sup>

The free choice that electors possessed was fortified in a second way as well. *Cum in cunctis*, a decretal of Alexander III, established the qualifications necessary for election to office. Alexander's rules have a remarkably subjective quality. Election to the office of bishop required that a candidate be at least thirty years of age and possess a certain maturity, moral gravity and appropriate learning.<sup>144</sup> Candidates for other diocesan offices had to be at least twenty-five years of age and possess suitable morals and learning.<sup>145</sup>

Although the decretalists offered some guidance on minimum standards of maturity, learning and morals, the range of discretion left to individual electors was rather large.<sup>146</sup> Electors were not required to vote for the candidate judged best under some set of objective criteria. Electors were accorded a sphere of autonomy within which they could exercise independent judgment in assessing the candidates' suitability for office.

Thus, it should be evident that the *jus eligendi* operated much like a Hohfeldian privilege. Furthermore, it correlated with a set of no-rights. Those outside the chapter, who lacked the *jus eligendi*, could not participate in elections. This correlation was perhaps most explicit in the case of laypersons, who had no right to participate in ecclesiastical elections. Lay participation in an ecclesiastical election would render the election void.<sup>147</sup> Innocent IV took what may

<sup>142</sup> *Id.* at X 1.6.42 *s.v. secreta*. The decree *Quia propter*, issued by IV Lateran, was a systematic attempt at electoral reform. Among other issues, the drafters of *Quia propter* were concerned with how to balance the need for secrecy with the need to weigh ballots properly, since elections were won by the side that was both *major et sanior*. In mid-thirteenth century canon law, one would win an election if one received the votes of both the *major*—the larger—and the *sanior*—sounder—portion of the electing body. Those who occupied more prestigious positions within the electing body were judged the "sounder" portion. So that ballots might be properly weighted, the Council declared that a chapter should appoint three men to enquire secretly and diligently into this matter. Lawrence of Somercote's treatise on election law, published in 1254, suggests that *Quia propter's* requirements remained a lively part of the law. See TRAKTATUS DES LAURENTIUS DE SOMERCOTE KANONIKUS VON CHICHESTER ÜBER DIE VORNAHME VON BISCHOFSWAHLEN 40–41 (A. von Wretschko ed., 1907).

<sup>143</sup> INNOCENT IV, COMMENTARIA X 1.6.23 *s.v. vi*.

<sup>144</sup> X 1.6.7.

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., X 1.6.17 (stating that those elected to the episcopacy must possess suitable knowledge, *conueniens scientia*, for this position). Even so, Bernard of Parma noted suitable knowledge need not be outstanding knowledge. See X 1.6.17 *s.v. conueniens* ("Bene dicit conueniens, quia sufficit quod sit conuenientis scientiae licet non eminentis.").

<sup>147</sup> X 1.6.56.

have been the most extreme view on this subject. By natural law, Innocent argued, laypersons were incapable of holding *jura spiritualia*—spiritual rights, or the category of rights that included the *jus eligendi*. Hence, Innocent concluded, natural law demanded that laypersons not have a right to participate in capitular, or chapter, elections.<sup>148</sup>

### 3. Powers and Liabilities

The operation of the *jus eligendi*, the canonistic right to vote, also furnishes a clear example of the Hohfeldian correlative of power and liability. Election by compromise, as the name suggests, was usually utilized where the electing body was sharply divided. A small group of electors, the *compromissarii*, would be designated by the larger body. This smaller group was then empowered to elect someone to fill the contested vacancy. The larger body was correspondingly obliged to accept whomever the smaller group selected.<sup>149</sup>

This method of election closely corresponds to Hohfeld's categories of power and liability. The *compromissarii* were exercising a power. They were changing their legal relationship with the other electors by "some superadded fact or group of facts which are under the volitional control of one or more human beings." The "superadded fact or group of facts" is the mandate the *compromissarii* have been given by the larger body. The legal change they work is the filling of the vacancy. This power on the part of the *compromissarii* correlates with a liability on the part of the electors to accept whomever the *compromissarii* select.

A second example of this correlation at work can be found in the operation of proctorial mandates. It is this area of law that gave rise to modern agency theory.<sup>150</sup> A particular individual, typically called by the canonists *dominus* or lord, would cede certain powers to a proctor, who would then undertake to represent the lord. This grant might be for a specific matter or it might be a more general

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<sup>148</sup> INNOCENT IV, COMMENTARIA X 1.6.28 *s.v. in ecclesia* ("Jura enim spiritualia in non spirituales et non consecratas personas non omnino honeste cadunt et hoc statuere jus naturale suadet.")

<sup>149</sup> On election by compromise, see A. DESPRAIRIES, L'ÉLECTION DES EVÊQUES PAR LES CHAPITRES AU XIII<sup>e</sup> SIÈCLE (THÉORIE CONONIQUE) 25–29 (1922); ANSCAR PARSONS, CANONICAL ELECTIONS: AN HISTORICAL SYNOPSIS AND COMMENTARY 61–62 (1939).

<sup>150</sup> GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100–1322, at 91–92 (1964).

grant of authority. It was known typically as a grant of *potestas* or *plena potestas*, power or full power.<sup>151</sup>

This relationship first emerged in the judicial context. A person unable to be physically present in court would empower a representative to act for him. This theory's greatest impact, however, was not felt in the courtroom but in the development of medieval political thought. By the end of the thirteenth century, for example, the writ calling upon communities to send representatives to the English Parliament would instruct the localities to grant the representatives full power, *plena potestas*, to transact business in the communities' name.<sup>152</sup>

The correlation between power and liability found in the law on proctorial agency fits Hohfeld's own example. On the one hand, there is a grant of power to certain agents to undertake certain acts in the name of their lords—their principals. At the same time, the principals are placed under a correlative liability to be bound by their representatives' acts.

#### 4. Immunities and Disabilities

The operation of the immunity/disability correlation might be seen best by examining the complex legal position of monasteries within a diocese. It is important to note that a monastery was an independently governed entity under the direction of its abbot. A monastery owned its own lands, conducted its own financial affairs and maintained its own liturgical life.<sup>153</sup>

At the same time, however, a monastery was under the general strict supervision of the diocesan bishop. The level of supervision depended upon whether the monastery had received a grant of exemption from episcopal authority. Exemptions could be issued either by the diocesan bishop himself or the pope. The degree of the monastery's exemption depended upon which person had granted the exemption. By the mid-thirteenth century, a papal grant of exemption was understood to remove fully a monastery from episcopal jurisdiction. A bishop would not be able to conduct visitations of the monastery nor collect fees from it. Rather, the

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<sup>151</sup> *Id.* at 91-162.

<sup>152</sup> *Id.* at 160-62.

<sup>153</sup> C.H. LAWRENCE, *MEDIAEVAL MONASTICISM: FORMS OF RELIGIOUS LIFE IN WESTERN EUROPE IN THE MIDDLE AGES 111-24* (1984).

monastery was placed directly under papal jurisdiction in all respects.<sup>154</sup>

A bishop might grant an exemption to a monastery located within his diocese, but there were limitations on the subject matter covered by the exemption. The basic rule was established in Innocent III's decretal *Cum olim*: a bishop could not grant an exemption that would result in enormous damage (*enorme detrimentum*) to the diocese.<sup>155</sup> Determining the level of damage that would be considered enormous was a complex matter. A bishop could not entirely alienate his jurisdictional powers, but he could, and quite often did, grant exemptions to monasteries and their chapels from certain obligatory tithes.<sup>156</sup>

The entire issue of exemption was put in terms of *jus*. Where no exemption had been granted, a bishop might exercise his full *jus episcopale* over a monastery or its chapels and churches.<sup>157</sup> A bishop would lack *jus* over a monastery that was fully exempt.<sup>158</sup> Innocent IV even defined exemption as the loss of all rights in a particular church.<sup>159</sup>

Again, the canonistic structure satisfies Hohfeld's categories. Monasteries might have either a full or partial immunity from episcopal governance and taxation. This immunity correlates closely with a full or partial disability on the part of episcopal authority. The bishop was disabled from exercising certain jurisdictional prerogatives or claiming certain fees from the monastery.

In sum, it has been maintained that the received historiography of rights has taken no notice of canon law as a possible source for the western rights tradition. This historiography, however, rests on questionable presuppositions. The foregoing discussion has served essentially as a refutation of this historiography. Canon law did indeed possess the concept of an individual right. Further, individual rights in canon law were an explicit part of the legal system. Like our own system, medieval canon law had a rich rights vocab-

<sup>154</sup> *Id.* at 119-23; see also PENNINGTON, *supra* note 7, at 154-86; CHRISTOPHER CHENEY, *EPISCOPAL VISITATION OF MONASTERIES IN THE THIRTEENTH CENTURY* 36-47 (1931).

<sup>155</sup> X 5.33.12.

<sup>156</sup> PENNINGTON, *supra* note 7, at 162-77.

<sup>157</sup> The decretal *Conquerente oeconomus* of Honorius III included visitation among the contents of the *jus episcopale*. See X 1.31.16.

<sup>158</sup> See, e.g., BERNARD OF PARMA, *ORDINARY GLOSS* X 5.33.12 *s.v. dioecetani* ("Et ideo nullum jus reservavit ipsi episcopo in monasterio illo, ex quo verba plenae exemptionis continebantur in privilegio illo . . .").

<sup>159</sup> See, e.g., INNOCENT IV, *COMMENTARIA* X 5.33.7 *s.v. specialiter* ("Item nota quod si ecclesia est exempta non solum perdit jus in ecclesia episcopus sed in clericis ecclesiae . . .").

ulary. The term *jus* was selected for study because, historians have maintained that it signifies an individual right in the works of later writers such as Ockham and Hobbes. Various twelfth and thirteenth century usages of the term *jus* correspond to all of the jural correlatives postulated by Hohfeld.

Additionally, it should be noted that the use of Hohfeld's categories is not meant to pigeonhole various canonistic rights into one or another of these categories. A particular canonistic right can often be made to fit two or more of Hohfeld's categories at the same time, depending on the precise analysis one takes of the right in question. For example, this can be seen in our discussion of the right to vote. The *jus eligendi* has some of the aspects of a Hohfeldian privilege but it also has some of the aspects of a Hohfeldian power.<sup>160</sup>

Thus it is established that, contrary to the received historiography, canon law possessed explicitly articulated individual rights. But were these rights, to use Villey's language, a vague and subordinate concept in medieval canon law? Or were areas of medieval canon law organized around notions of individual rights? The law of marriage will be examined to establish that in marriage law, at least, individual rights played a fundamental role.

### C. *The Function of Rights in Canonistic Matrimonial Law*

This section explores in a more systematic way the operation of rights in one area of canon law—the law of marriage. It will demonstrate that individual rights played a fundamental role both in the decretalist understanding of how a marriage came into being, and how, once created, it was maintained. The freedom to contract marriage was first recognized by Gratian and the decretists who followed him. This right was expanded and strengthened by the decretalists. Another right, fundamental to the maintenance of marriage, was the right to demand, and the tightly correlating duty to render, the conjugal debt. Both of these rights will be explored below.

This article further contends that large areas of medieval canon law in fact consisted of structures of rights. This contention will be illustrated by showing that one central area of canonistic jurisprudence—the law of marriage—consisted of a structure of rights. This

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<sup>160</sup> See *supra* note 107.

discussion should begin to elucidate the role rights played in thirteenth century canon law.

### 1. The *Facultas Contrahendi Matrimonium*

The canonists used several technical terms, apart from the word *jus*, to designate what we call a right. As noted above, one such term is *facultas*. *Facultas* was most frequently used by the canonists to refer to what could be called a Hohfeldian liberty or privilege. Individuals, by virtue of operating within canon law, enjoyed a number of basic *facultates*.<sup>161</sup> This section will focus on the development of one such *facultas*—the *facultas contrahendi matrimonium*, the faculty of contracting marriage.<sup>162</sup>

Gratian confronted a tradition that gave considerable weight to the wishes of parents in the marriage plans of their children. Roman law, for example, made the consent of the parties fundamental to the formation of marriage but at the same time gave parents wide latitude to dictate or to approve of the selection of spouses for their offspring. Thus, a son compelled by his father to marry a woman he would otherwise not have chosen was nevertheless deemed to have married validly; he was irrebuttably presumed to have consented to his father's wishes.<sup>163</sup> A daughter's freedom was even more sharply limited. Although a son might presumably object in advance to any potential arranged marriage, a daughter might object only where the man was "morally unworthy and foul."<sup>164</sup>

The Justinianic texts also contain a detailed set of regulations governing the parental permission required for marriage. Sons and daughters under parental power were required to obtain parental consent in order to contract marriage.<sup>165</sup> Additionally, daughters *sui*

<sup>161</sup> See *supra* notes 122–26 and accompanying text.

<sup>162</sup> The use of the word *facultas* to describe the freedom to contract marriage occurs occasionally in Roman law. Thus, a rescript of Diocletian, CODE J. 5.4.14, states: "neque ab initio matrimonium contrahere neque dissociatum reconciliare quisquam cogi protest. Unde intelligis liberam facultatem contrahendi atque distrahendi matrimonii transferri ad necessitatem non oportere." See also CODE J. 5.4.21. The expression *facultas contrahendi matrimonium*, or variations on it, became standard in thirteenth century decretal law. See, e.g., X 4.15.1; X 4.15.3.

<sup>163</sup> See generally P.E. CORBETT, THE ROMAN LAW OF MARRIAGE (1930) (discussing the role consent played in Roman matrimonial law). *Si patre cogente* created an irrebuttable presumption in favor of consent where the son did not object to paternal arrangements prior to the wedding. See DIG. 23.2.22.

<sup>164</sup> DIG. 23.1.12.

<sup>165</sup> J. INST. 1.10.

*juris* under the age of twenty-five were required to obtain fatherly approval prior to marriage.<sup>166</sup> Where a father was unable to consent because of absence, mental illness or other impediment, the law provided for other family members or the courts to assume this responsibility.<sup>167</sup> What emerges from a reading of the Justinianic texts on marriage is a complex regulatory scheme that considerably circumscribed the principle of free consent of the parties. This scheme ascribed a legally significant role in marital decision-making to both the father and the larger family unit.

Gratian addressed both of these issues. He emphatically rejected the possibility that coerced consent could validate a marriage.<sup>168</sup> He began his analysis by asking whether a daughter could be given in marriage against her will.<sup>169</sup> The sources Gratian relied on were few in number and not the strongest supports for the conclusion he desired to reach. Relying on two letters of Pope Urban II, a letter of Pope Nicholas I and an excerpt from a commentary on *Corinthians* attributed, probably incorrectly, to Ambrose, Gratian decisively and without analysis asserted, "by these authorities it is clearly shown that there is to be no joining to another except by free will."<sup>170</sup> The Roman law tradition that equated filial submission to paternal arrangements with free consent was thereby implicitly rejected; hence forward, a daughter or son compelled to marry someone not of her or his choosing could subsequently challenge the arrangement.

Gratian's treatment of parental consent was less straightforward. What is possibly Gratian's most direct statement on the subject occurs in a dictum in *Causa* 32, but the dictum does not lend itself to easy interpretation. Commenting on a statement of Pope Leo I that referred in passing to marriages arranged by "paternal judgment," Gratian stated:

When it is said by paternal judgment women [are] joined to men it is given to understand that paternal consent is desirable in marriage, nor should legitimate marriage take place without it, as is said by Pope Evaristus: "It is other-

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<sup>166</sup> CODE J. 5.4.20.

<sup>167</sup> See, e.g., CODE J. 5.4.1.

<sup>168</sup> Gratian treated the issue of coerced consent at *Causa* 31 *questio* 2. My discussion of the issue of coerced consent in Gratian relies heavily on John Noonan's *Power to Choose*, 4 *VIATOR* 419 (1973).

<sup>169</sup> Gratian seemed to assume that a son could not legally be compelled into an unwanted marriage.

<sup>170</sup> C.31 q.2 d.p.c.4.

wise not a legitimate marriage unless she is handed over by the parents."<sup>171</sup>

The difficulty with this passage lies in the term "legitimate marriage." A requirement for a legitimate marriage need not be a requirement for a valid marriage. The canonists distinguished between licit acts and valid acts. According to canonistic reasoning an act might be illicit, that is, illegally done, but nevertheless be valid and binding on the person who committed the act. By adopting a term like "legitimate" Gratian avoided committing himself on the question of the validity of such marriages. The best that can be said, perhaps, is that Gratian was irresolvably ambiguous on the topic.<sup>172</sup>

Although Gratian was studiously vague on the matter of parental permission, the decretists resolved this ambiguity in favor of the freedom to contract marriage without first obtaining parental approval. Rolandus engaged in fairly tortured reasoning to undercut the impact of Gratian's apparent approval of the "legitimacy" of parental consent. Rolandus argued that Gratian's requirement of parental approval applied only in the case of minors under the age of twelve, who, in any event, could not validly marry but could become betrothed. But, Rolandus continued, even in this situation marriage must be chosen *propria voluntate*, by the minor's own will.<sup>173</sup> Rufinus dispensed with such juristic subtleties. Parental consent, in Rufinus's estimation, was needed for a "more respectable and honest marriage," *ad verecundio rem honestatem conjugii*, but was not needed for validity.<sup>174</sup> By the thirteenth century the rule was settled that parental consent was unnecessary to a marriage's validity.<sup>175</sup>

The canon lawyers also accepted Gratian's repudiation of the validity of coerced marriages. Popes quickly built a structure of law around Gratian's recognition that coerced consent was no consent at all. Three papal decretals were especially significant. Alexander III issued *Cum locum* to resolve a dispute between two men of

<sup>171</sup> C.32 q.2 d.p.c.12.

<sup>172</sup> See Michael Sheehan, *Choice of Marriage Partner in the Middle Ages: Development and Theory of Marriage*, 1 *STUD. IN MEDIEVAL AND RENAISSANCE HIST.*, 1, 12-13 (n.s. 1978) (arguing that Gratian may have had in mind the distinction between validity and licitness when he asserted that parental consent was necessary for "legitimate" marriages). Sheehan nevertheless goes on to argue that other passages in Gratian make it likely that he believed parental consent was needed for a valid marriage. *Id.* It is probably safer to agree with Brundage that the question was simply "left open" by Gratian. See BRUNDAGE, *supra* note 14, at 238.

<sup>173</sup> C.32 q.2 d.p.c.12.

<sup>174</sup> C.32 q.2 d.p.c.12. *s.v.* *cum dicitur paterno arbitrio*.

<sup>175</sup> The Ordinary Gloss to the *Decretum*, C.32 q.2 d.p.c.12. *s.v.* *legitime*, explains "legitimate" as the common legal solemnity associated with marriage.



Pavia.<sup>176</sup> Each man had sought to marry a certain *puella* (girl) and apparently had brought pressure to bear upon her. Alexander opened his decretal with the broad statement of principle that "since consent has no place where fear or compulsion intervenes it is necessary that where someone's assent is required the stuff of compulsion be repelled."<sup>177</sup> To protect the girl's freedom, Alexander ordered that she be placed in a secure house until she should decide on a spouse. *Cum locum* can thus be seen as crystallizing the principle articulated by Gratian. It recognized that true consent can only be voluntary and that coercion has no place where consent is a requirement. What is missing from *Cum locum*, however, is a corresponding legal protection.

A second decretal of Alexander III, *Veniens ad nos* responded to this concern.<sup>178</sup> *Veniens ad nos* legislated the remedy for coerced marriages by declaring that such marriages were invalid. The decretal also articulated the legal standard to be used in judging whether a particular marriage was brought about through impermissible coercion. This was the steady man (*constans vir*) test. Concerning this standard, John Noonan has stated that "a 'steady man' was a fictional man of average fortitude who served in fear cases much as a 'prudent man' is used to measure negligence in modern tort law."<sup>179</sup> Where a steady man would have been overwhelmed by fear or unable to resist the force brought to bear against him, the marriage was to be declared invalid.

Gregory IX's decretal *Gemma* is the third significant decretal.<sup>180</sup> Gregory IX responded to a betrothal agreement that contained a penalty clause requiring the party breaching the agreement to forfeit a fixed sum. Gregory labelled the clause "attempted extortion" and invalidated it in the name of the principle *libera matrimonia esse debeant*, marriages ought to be free.<sup>181</sup> This decretal recognizes that fear need not only be the product of physical threats. Financial and other concerns might also give rise to an impermissible fear.<sup>182</sup>

<sup>176</sup> X 4.1.14.

<sup>177</sup> *Id.* "Cum locum non habeat consensus ubi metus vel coactio intercedit, necesse est ubi assensus cujusdam requiritur coactionis materia repellitur."

<sup>178</sup> X 4.1.15.

<sup>179</sup> John T. Noonan, Jr., *The Steady Man: Process and Policy in the Courts of the Roman Curia*, 58 CAL. L. REV. 628, 654 (1970). The "steady man" test was extended explicitly to women in Honorius III's decretal *Consultationi tuae*, X 4.1.28.

<sup>180</sup> X 4.1.29.

<sup>181</sup> *Id.* "Libera matrimonia esse debeant."

<sup>182</sup> Whether *Gemma* had much practical effect is difficult to judge. One can certainly identify situations in the middle ages where parents exerted financial pressure on their

The decretalists accepted the basic premise of this legislation. They believed that marriages ought to be freely contracted. The "steady man" test was unanimously adopted as the means by which to measure coercion. Commenting on Alexander III's choice of the term *virum constantem* (steady man), Bernard of Parma explicitly connected the steady man doctrine with the liberty necessary to contract marriage by stating that "he who consents ought to be free."<sup>183</sup> In explaining Alexander III's decision to allow even the plaintiff in *Veniens ad nos*, who must have been guilty either of adultery or fornication, to take advantage of the steady man doctrine, Bernard stated that a person's fault is irrelevant in determining whether the level of fear invalidates the marriage.<sup>184</sup> Bernard also agreed with the outcome in *Gemma*, noting that financial compulsion is sufficient to invalidate consent.<sup>185</sup>

The other decretalists essentially echoed Bernard's commentary. Innocent IV largely restated Bernard's analysis, although with occasional elaboration. Thus, Innocent observed that fear exerted against third parties might sometimes invalidate consent. He illustrated this point with the example of a father who, facing death or captivity, arranges a marriage for his daughter. The daughter, to relieve her father's fear, follows through with the wedding. Such a marriage is invalid, Innocent reasoned, unless the daughter consented freely.<sup>186</sup> Hostiensis also reiterated this accepted position with little in the way of original commentary.<sup>187</sup>

Gratian's *dicta*, the teaching of decretists and decretalists, and the legislation of popes all combined to create a zone of freedom. This zone of freedom was not to be intruded upon by those not a party to a marriage. It came to be called a *facultas*—the *facultas contrahendi matrimonium*, the faculty of contracting marriage. It should be evident that the faculty of contracting marriage was considered by the decretalists to have been a right. Analytically, this *facultas* possesses elements of Hohfeld's notion of privilege and

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offspring to marry in accord with parental wishes. Parents could and did, for example, disinherit recalcitrant children who resisted parental marriage plans. See Juliette Turlan, *Recherches sur le mariage dans la pratique contumière XII–XVI.*, 35 *REVUE D'HISTOIRE DE DROIT FRANÇAIS ET ÉTRANGER* 477, 487–89 (1957). At the same time, a writer such as Pierre de La Palude cautioned fathers that they would commit a wrong by disinheriting children who married clandestinely. See BRUNDAGE, *supra* note 14, at 443.

<sup>183</sup> X 4.1.15 *s.v. in virum constantem*.

<sup>184</sup> X 4.1.15 *s.v. ut uxorem*.

<sup>185</sup> BERNARD OF PARMA, ORDINARY GLOSS X 4.1.29 *casus*.

<sup>186</sup> INNOCENT IV, COMMENTARIA X 4.1.14 *s.v. coactio*.

<sup>187</sup> See, e.g., HOSTIENSIS, LECTURA X 4.1.15 *s.v. in constantem*.

claim. It was a privilege because a person was free to exercise the faculty or not exercise it as he or she saw fit. It was a claim because of the correlative duty it placed on third parties not to bring coercion to bear on the party contracting marriage.

Modern analyses of rights are concerned especially with emphasizing the role rights play as a limitation on state action. Richard Flathman, for example, states that "[v]ery prominent in the modern tradition of rights is the notion that rights should protect not freedom in general but specifically freedom from excessive interference on the part of the state."<sup>188</sup> The thirteenth century presented a different situation. Governments were not yet seen as potentially all-pervasive mechanisms of coercion. Rather, many persons saw government as a source of stability and order. This is not to say, however, that rights were not successfully asserted against governmental entities, as sometimes this occurred.<sup>189</sup>

Of great importance to thirteenth century life, though, was the potentially coercive role of the family. Dynastic considerations, including arranged marriages, were a large part of family life, especially among the aristocratic and moneyed elements of society.<sup>190</sup> The free faculty to contract marriages, supported by the ultimate sanction of invalidity, was an important "trump" to play in this context. Matters of dynastic policy could be frustrated by the free assertion of the individual right to contract marriage.

The basic freedom to contract marriage was protected not only by the evolution of the force and fear doctrine, but also by the application of a rule of interpretation that allowed canonists to construe narrowly any legislation prohibiting individuals from marriage. Legislation prohibiting marriage would be considered *prohibitoria edicta*, prohibitory edicts, and all individuals not expressly forbidden to marry were permitted to marry.<sup>191</sup>

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<sup>188</sup> RICHARD E. FLATHMAN, *THE PRACTICE OF RIGHTS* 154 (1976).

<sup>189</sup> Gregory IX's decretal *Cum inferior*, X 1.33.16, is a helpful example of rights successfully claimed against a superior authority. The decretal involved a bishop who wished to erect his cathedral church in the territory of a particular archdeacon but who was impeded from doing so by the archdeacon's continued assertion of jurisdictional rights. Gregory IX excoriated the archdeacon for his "audacity" and "temerity" in violating the hierarchical structure of the Church but closed his decretal by instructing that the archdeacon receive appropriate compensation (*recompensationem . . . congruentem*) in the event his rights were injured (*si ex hoc archidiaconi . . . jura laeduntur*).

<sup>190</sup> BRUNDAGE, *supra* note 14, at 438. Diane Owen Hughes has studied, among other topics, some of the familial constraints that served to limit the free choice of marital partners. See Diane Owen Hughes, *Urban Growth and Family Structure in Medieval Genoa*, 66 *PAST AND PRESENT* 3 (T.H. Aston ed., 1975).

<sup>191</sup> What the decretalists meant by prohibitory edict is that, in certain areas of law, they

What this interpretative rule meant in practice was that all those not clearly unable to exchange the consent needed to contract marriage—for example, the insane—or to engage in sexual intercourse—the impotent or frigid—were not to have their right to marry denied. Invoking this principle, Innocent III recognized in two decretals that deaf-mutes did not need to use words and could marry by exchanging signs.<sup>192</sup> Alexander III permitted lepers to marry if they could find willing spouses.<sup>193</sup> Also, Raymond of Peñafort made sure to include in *Liber Extra* a decretal of Pope Hadrian IV permitting *servi* (slaves or serfs) to marry freely, even when their masters objected.<sup>194</sup>

The decretalists accepted and expanded upon these categories. In glossing *Cum apud*, Hostiensis acknowledged as correct the interpretive principle used by Innocent III and tested its limits by inquiring whether someone could still marry if he or she was not only deaf and mute but also blind. Hostiensis replied in the affirmative.<sup>195</sup> In glossing *Dignum*, Bernard of Parma noted that the decretal's holding, which literally applied only to marriages between *servi*, could be extended to marriages between *servi* and free persons provided the free parties were aware of their prospective spouse's servile status.<sup>196</sup> Bernard of Parma also narrowly construed at least one of the two categories of those unable to contract marriage. The

will narrowly construe any legislation restricting freedom of action. Thus, for example, Hostiensis notes that one may freely postulate a candidate to office unless clearly restricted by law just as one might make a will or marry. HOSTIENSIS, SUMMA Bk. 1, *De postulando* § 2. There is inherent in this type of reasoning a certain circularity, unless one already has in mind a prior conception of situations where freedom of action is to prevail and where it is to be restricted. The decretalists had such a prior conception in the case of marriage law.

<sup>192</sup> X 4.1.23; X 4.1.25.

<sup>193</sup> X 4.8.2.

<sup>194</sup> X 4.9.1. Hadrian IV's decretal and the commentary it generated on the marriages of serfs is the subject of an exhaustive study by Peter Landau. See Peter Landau, *Hadrians IV Dekretale "Dignum Est" (X 4.9.1) und die Eheschliessung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts*, 12 *STUDIA GRATIANA* (Collectanea Stephan Kuttner II) 511 (1967). Both decretalists and decretalists generally favored the freedom of serfs to contract marriage, even over the objections of the serfs' masters. The freedom of serfs to marry was grounded on a variety of principles, but at least one decretist, Sicard of Cremona, asserted a natural law foundation for the freedom:

Deinde queritur utrum nescientibus dominis vel etiam scientibus et contradicentibus matrimonium sit inter servum et ancillam. Quod fit in hunc modum. Omnes homines de naturali jure sunt liberi, quia et isti. Unde et ea que sunt juris naturalis possunt facere. Set conjunctio maris et femine est de jure naturali, ergo et isti possunt contrahere matrimonium.

*Id.* at 532 n.99 (quoting Sicard of Cremona at C.29 q.2 c.8).

<sup>195</sup> HOSTIENSIS, LECTURA X 4.1.23 *s.v. ad quod*.

<sup>196</sup> X 4.9.1 *s.v. inter servos*.

insane, Bernard argued, might contract marriage during a lucid interval.<sup>197</sup>

The doctrine on prohibitory edicts was directed against a potentially broader range of interference than the doctrine on force and fear. To be sure, the rule at least theoretically embraced families that might have forbidden their deaf-mute or blind children to marry.<sup>198</sup> But the rule also was directed against public authority of various sorts. Bishops and pastors were not to deny marriage to the protected classes of individuals. Feudal lords were not to prohibit their serfs from marriage. Cities and communes were not to legislate against the marriages of lepers. Comparable in its intended operation to the strict scrutiny standard of modern fundamental rights cases, the rule on prohibitory edicts imposed an exacting standard on legislation restricting the right to marriage. Legislation restricting this right was automatically suspect.

What is significant for the purposes of this discussion is the role this right played within the entire structure of the law of marriage. The basic right to contract marriage was not, to use Michel Villey's language, a "vague and subordinate" part of the law. Rather, it was fundamental to the operation of matrimonial law. A marriage had to be freely entered to be valid. This was a right assertable chiefly against familial authority, but it was also assertable in certain contexts against public authority. One could not be compelled unwillingly into marriage and legislation restricting the right to marry was suspect. Deaf-mutes, lepers, serfs and the blind were all free to marry. This principle led to the creation of a legally safeguarded zone of personal freedom.

## 2. The *Jus Conjugale*

The decretalists divided marriage juristically into two components, the *vinculum*, or matrimonial bond, and the *jus conjugale*, or the right of each party to claim sexual intercourse from the other. The *jus conjugale* was a right of which parties were ordinarily not

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<sup>197</sup> X 4.1.24 *s.v. furore*. The decretalists seem to have been untroubled by interracial marriages. Legislation in the crusading kingdom was directed against interreligious, not interracial, marriages. James A. Brundage, *Prostitution, Miscegenation, and Sexual Purity in the First Crusade*, in *CRUSADE AND SETTLEMENT: PAPERS READ AT THE FIRST CONFERENCE OF THE SOCIETY FOR THE STUDY OF THE CRUSADES AND THE LATIN EAST AND PRESENTED TO R.C. SMAIL* 57 (P.W. Edbury ed., 1985).

<sup>198</sup> Bernard de Montmirato recognized that children denied marriage by their parents might bring a cause of action against them. See BRUNDAGE, *supra* note 14, at 431.

to be deprived. This section will consider the "due process" safeguards that were erected around this right.

The *jus conjugale* had its origin in the Pauline notion of the conjugal debt. Paul wrote in his First Letter to the Corinthians:

Let the husband render to the 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 by consent, for a time, that you might 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.<sup>199</sup>

The term that is translated above as "due" is the Greek word *opheile*. *Opheile* unambiguously meant what was owing. It was a debt.<sup>200</sup> In the *Vulgate*, Jerome translated *opheile* as *debitum*.<sup>201</sup> The notion of what was owing or due was preserved by this translation.

The canonists transformed this *debitum* from a moral obligation founded on scriptural exhortation into a judicially enforceable right.<sup>202</sup> The operation of the *jus conjugale* can be compared to the

<sup>199</sup> 1 *Corinthians* 7:3-7.

<sup>200</sup> See HENRY G. LIDDELL & RUPERT SCOTT, *A GREEK-ENGLISH LEXICON* 1277 (1940).

<sup>201</sup> For Jerome's translation of *opheile*, see JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIAN AND CANONISTS* 42 (enlarged ed., 1986).

<sup>202</sup> Authors occasionally described the conjugal debt as a conjugal right well before the thirteenth-century. For example, Augustine in his treatise *de bono conjugali* stated "viros tamen suos plerumque etiam continere cupientes ad reddendum carnale debitum cogunt non desiderio prolis sed ardore concupiscentiae ipso suo jure intemperanter utentes in quarum tamen nuptiis bonum est hoc ipsum quod nuptae sunt." 41 *CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM* 194. What is missing in Augustine, however, is any sort of systematic legal analysis of this right. Further, no due process protection is accorded it. Analysis and protection of the *jus conjugale* as a legal right can first be found in the twelfth and thirteenth centuries. On the development of the conjugal debt in the legal thinking of the canonists of the twelfth and thirteenth centuries, see Elizabeth M. Makowski, *The Conjugal Debt and Medieval Canon Law*, 3 *J. MEDIEVAL HIST.* 99 (1977). The *jus conjugale* was one of the few areas of legal equality between men and women. See James A. Brundage, *Sexual Equality in Medieval Canon Law*, in *MEDIEVAL WOMEN AND THE SOURCES OF MEDIEVAL HISTORY* 66 (Joel T. Rosenthal ed., 1990).

Bernhard Bruns makes the point that the canonistic transformation of the conjugal debt into a set of correlative rights and duties was quite foreign to Pauline theology. See Bernhard Bruns, *Die Frau hat über ihren Lieb nicht die Verfügungsgewalt, sondern der Mann . . . Zur Herkunft und Bedeutung der Formulierung in 1 Kor 7:4*, 33 *MÜNCHENER THEOLOGISCHE ZEITSCHRIFT* 177, 194 (1982).

correlation of rights and duties described by David Lyons. Lyons identified a "familiar class of cases" where a tight correlation exists between right and duties. For example, *A* lends *B* ten dollars. A tight correlation exists between *A*'s right, or claim, to payment and *B*'s obligation to pay. *A* may assert his claim, defer it or renounce it altogether, but should *A* assert it, *B* is obliged to render his duty. Lyons proposed a formal definition for this type of correlation, stating that "[t]he rule is that the expression of the content of the right is related to the content of obligation as the passive is related to the active voice."<sup>203</sup> Thus, for example, *A*'s right to be obeyed correlates with *B*'s duty to obey.

The canonists' description of the *jus conjugale* satisfies Lyons' formal definition. The content of the *jus conjugale* is the expectation that each party will be obeyed when requesting sexual intercourse from the other. This right correlates with the spouse's duty to obey.

By the thirteenth century, the Catholic Church was generally recognized as possessing exclusive jurisdiction over marriage cases throughout western Europe.<sup>204</sup> The *jus conjugale* became the means by which the decretalists regulated relations between the parties to a marriage. A maxim of canon law held that no one was to be deprived of his or her right without fault.<sup>205</sup> The principle underlying this maxim—that unjust deprivations of rights should be avoided—was systematically applied to marriage cases by the canonists.<sup>206</sup> Thus, an examination of the decretalists' treatment of the *jus conjugale* is a particularly useful vehicle by which to explore decretalist conceptions of due process as applied to unjust deprivations of rights. The extent to which the decretalists protected parties from unjust deprivations of the *jus conjugale* can be seen in three distinct contexts: renunciations of rights, divorce actions and interference by public authority. Each of these areas will be examined in turn.

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<sup>203</sup> Lyons, *supra* note 91, at 46–49.

<sup>204</sup> See BRUNDAGE, *supra* note 14, at 223–25, 319–23, 404–14 (discussing the growth of exclusive ecclesiastical jurisdiction).

<sup>205</sup> The expression *nemo jure suo privari debet sine culpa* occurs regularly in both papal decretal letters and decretalist commentaries. It became a cornerstone of decretalist notions of due process.

<sup>206</sup> For applications of this maxim of law to marriage law see X 4.13.6; X 4.13.11 (where Gregory IX used the virtual equivalent "ne jure suo sine sua propria culpa fraudetur"); BERNARD OF PARMA, ORDINARY GLOSS X 4.13.1 *s.v. petere*; BERNARD OF PARMA, ORDINARY GLOSS X 2.27.10 *s.v. accedat*.

a. *Renunciations of Rights*

A series of decretals by Alexander III established the ground rules for the renunciation of the *jus conjugale*.<sup>207</sup> The typical case of renunciation was assumed to be the entry of one of the spouses into religious life. Because entry into religious life required a vow of continence, it had the effect of depriving the other spouse of his or her conjugal right. Therefore, the deprived party's permission had to be obtained before the departure of the other spouse would be allowed.

This rule was workable as long as both parties freely renounced the *jus conjugale* and were prepared for all that such a renunciation entailed. But title 32 of Book III of the *Liber Extra*, which dealt with the entry of married persons into religious life, stands as ample testimony to the fact that parties to a marriage sometimes objected strenuously to the departure of their spouses to the higher calling of a religious vocation. The decretals found in this title, and the commentary that grew up around them, can be described fairly as a practical elaboration of *nemo privari jure suo sine culpa debet*, the rule that no person was to be deprived of his or her rights without fault.

A number of circumstances might give rise to invalid renunciations. For example, the decretal *Veniens* illustrates that both force and fraud could render a renunciation invalid.<sup>208</sup> In *Veniens*, a certain husband L. pressured his wife by threatening that he would render himself useless both to himself and to the whole world if she did not agree to renounce her right.<sup>209</sup> Priests accompanying L. also failed to tell his wife that she would be expected to enter religious life after renouncing her right. Innocent III found *non modicum deliquisse*, "not a little fault," in L.'s conduct. Innocent, however, ultimately decided against ordering L. restored to his wife because she had had several adulterous relationships after renouncing her right. Her adultery prevented her from bringing a claim for restitution.<sup>210</sup>

The commentators immediately recognized that the wife would have been able to obtain restitution had she not engaged in adultery.

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<sup>207</sup> See X 3.32.1; X 3.32.2; X 3.32.3; X 3.32.4; X 3.32.6; X 3.32.7; X 3.32.8.

<sup>208</sup> X 3.32.16.

<sup>209</sup> Leaving nothing to the imagination, Hostiensis noted that L. meant by this threat self-castration. See HOSTIENSIS, LECTURA X 3.32.16 s.v. *inutilem*.

<sup>210</sup> X 3.32.16.



Bernard of Parma asserted that fraud would have been sufficient to void the agreement if the woman had remained continent.<sup>211</sup> He also stated that, had the wife not prejudiced herself, the permission she granted to L. would have been invalid because of L.'s threats.<sup>212</sup> Hostiensis noted that the woman only seemed to renounce her right.<sup>213</sup> He asserted that, had L.'s wife remained continent, L. could have been removed from the monastery and restored to the woman even after making a solemn religious profession.<sup>214</sup>

A second decretal of Innocent III, *Accedens*,<sup>215</sup> dealt with even more overt pressure. A husband beat and threatened his wife until she agreed to permit him to enter a monastery. After repeated blows and threats she acceded to his demands and entered a convent herself. With the passage of time, however, the man found that religious life was not to his liking and withdrew from the monastery. His wife then left the convent and sued to have her husband restored to her. Innocent III held that, if the facts were as alleged, the husband was to be restored to the wife.<sup>216</sup>

The commentators focused their energies on the question of whether the husband, given his prior action, was able to seek the conjugal debt. Bernard of Parma argued that the husband was unable to seek the conjugal debt because he had renounced this right by entering the monastery, but that he was able to render the conjugal debt when it was demanded of him.<sup>217</sup> Hostiensis agreed with Bernard, stating that the man had renounced his right and therefore was unable to seek the conjugal debt, but was to render it when it was sought.<sup>218</sup> The commentaries of Bernard and Hostiensis became the standard rule where one party withdrew from the marriage in order to enter religious life but subsequently returned to the world.<sup>219</sup>

This rule may seem like a bizarre way to regulate marital relations, but it illustrates the connection that the canonists perceived between due process and rights. As matters of principle, the decretalists recognized that a person was free to renounce his or her own

<sup>211</sup> BERNARD OF PARMA, ORDINARY GLOSS X 3.32.16 *casus*.

<sup>212</sup> BERNARD OF PARMA, ORDINARY GLOSS X 3.32.16 *s.v. captiose asseruit*.

<sup>213</sup> HOSTIENSIS, LECTURA X 3.32.16 *s.v. audienda*.

<sup>214</sup> *Id.*

<sup>215</sup> X 3.32.17.

<sup>216</sup> *Id.*

<sup>217</sup> BERNARD OF PARMA, ORDINARY GLOSS X 3.32.17 *s.v. processu vero temporis*.

<sup>218</sup> HOSTIENSIS, LECTURA X 3.32.17 *s.v. exhibeat*.

<sup>219</sup> ADHÉMAR ESMEIN, II LE MARIAGE EN DROIT CANONIQUE 28-29 (1895).

rights, but could not prejudice the rights of another person.<sup>220</sup> They also recognized as a basic principle that no one was to lose his or her rights through no fault of their own.

The rules on restoration in cases of coerced renunciation were simply an elaboration on these principles. L.'s wife had committed adultery; hence, she was no longer without fault and could not seek restitution. But the wife in *Accedens* was blameless, and so was able to seek restitution and claim the conjugal debt once her husband was restored to her. Furthermore, because a person was free to renounce his or her own right but unable to prejudice someone else's right, that person might lose the capacity to claim the conjugal debt, yet still remain under an obligation to render it.

#### b. *Divorce and the Termination of the Jus Conjugale*

In thirteenth century canon law, divorce was understood to result in the termination of the conjugal right, although the marriage bond itself would continue to endure. A party would be free of the obligations of marriage and could leave his or her spouse, although thereafter neither party would be free to marry. Only the death of one of the spouses or a declaration of nullity might free a party to marry again.<sup>221</sup>

The decretalists recognized three grounds for divorce: adultery, "spiritual fornication" and *saevitia* (violence).<sup>222</sup> Adultery was permitted as a ground for divorce on the basis of scriptural authority.<sup>223</sup> "Spiritual fornication," which was understood as a lapse into heresy, or conversion to Judaism or Islam, was treated analogously to carnal adultery. Like the non-offending spouse in an adultery case, the Catholic Christian spouse in cases of spiritual fornication was free to seek an ecclesiastical divorce.

The third ground, *saevitia*, developed over the course of the thirteenth century. Its foundation was built on a decretal of Alexander III,<sup>224</sup> and on a decretal of Innocent III.<sup>225</sup> Each decretal

<sup>220</sup> See, e.g., BERNARD OF PARMA, ORDINARY GLOSS X 3.30.31 *s.v. nullatenus derogetur* ("nunquam enim intelligitur derogari juris alterius"). As employed by Bernard of Parma, this maxim is applied to the interpretation of papal rescripts. Not even rescripts of the pope were to be understood as infringing the rights of third parties.

<sup>221</sup> See ESMEIN, *supra* note 219, at 85-95; R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 100-01 (1974) for a discussion of the development of the canon law of divorce.

<sup>222</sup> See ESMEIN, *supra* note 219, at 85-95.

<sup>223</sup> *Matthew* 19:9.

<sup>224</sup> X 2.13.8.

<sup>225</sup> X 2.12.13.

involved a husband who was seeking the restoration of his wife. The wife in each case objected to the restoration because of the husband's violence. Both Alexander and Innocent resolved the issue by ordering the judge not to restore the wife to her husband if his violence was obvious, and to provide instead for her safekeeping.

It seems that originally *saevitia* served simply as a means of blocking judicially-mandated restitution. This, at least, is how Bernard of Parma understood the two decretals.<sup>226</sup> Hostiensis, however, interpreted *saevitia* as providing grounds for divorce, and this is how the decretals were subsequently understood.<sup>227</sup>

In all other cases, the law was understood to forbid separation. Parties were required to live together and to render the conjugal debt when it was sought. To do otherwise would be to deprive one's spouse of his or her right.<sup>228</sup>

The limits of this desire to protect rights were tested in the case of a spouse who contracted leprosy. Leprosy was a dreaded and fearful disease in the thirteenth century. Lepers, who were without hope for cure and were thought to present the risk of deadly contagion, were ostracized socially and legally.<sup>229</sup> Lepers were segregated from the larger society.<sup>230</sup> This separation was often accomplished with considerable liturgical pomp, including a symbolic burial.<sup>231</sup> A comprehensive set of legal regulations governing this separation developed.<sup>232</sup> Some monarchs, however, dispensed with legal niceties and executed lepers in various grisly ways.<sup>233</sup> Throughout Europe, lepers were required to wear distinctive clothing, live in isolation and warn the healthy of their presence by rattles, bells or other instruments.<sup>234</sup>

Marriage, however, represented an exception to this rule of separation. Alexander III declared in two decretals that a healthy spouse was not to separate from a spouse who had contracted leprosy. In *Pervenit*, Alexander condemned a local custom that per-

<sup>226</sup> BERNARD OF PARMA, ORDINARY GLOSS X 2.13.8 *casus*; X 2.13.13 *casus*.

<sup>227</sup> HELMHOLZ, *supra* note 221, at 100-01, 105.

<sup>228</sup> BRUNDAGE, *supra* note 14, at 370-73; 453-56.

<sup>229</sup> SAUL N. BRODY, THE DISEASE OF THE SOUL: LEPROSY IN MEDIEVAL LITERATURE 60-86 (1974).

<sup>230</sup> *Id.* at 60-71.

<sup>231</sup> *Id.* at 65-66.

<sup>232</sup> Édouard Jeanselme, *Comment l'Europe, au Moyen Age, se protégea contre la lèpre*, 25 BULLETIN DE LA SOCIÉTÉ FRANÇAISE D'HISTOIRE DE LA MÉDECINE 1 (1931) (the most comprehensive survey of the legal regulation of leprosy in the middle ages).

<sup>233</sup> BRODY, *supra* note 229, at 69.

<sup>234</sup> *Id.* at 67-68.

mitted separation. Because husband and wife are made one flesh, Alexander reasoned, the healthy spouse was to remain with the leprous one and minister to him or her with conjugal affection.<sup>235</sup> In *Quoniam*, Alexander asserted that, as separation was permitted only on account of adultery, spouses may not separate because one of them had contracted leprosy. Furthermore, Alexander stated, if the leprous spouse requested the conjugal debt the healthy partner was obligated to render it. To Alexander's mind, Paul's exhortation did not admit of exceptions.<sup>236</sup>

Alexander, it seems, reached these conclusions through a certain rigid literalism. The Matthean divorce text recognized adultery by one of the spouses as the only ground for divorce, and the first letter to the Corinthians seemed to permit no exceptions to the rule that parties were obliged to render the conjugal debt. Alexander must have assumed that he was doing nothing more than applying clear scriptural texts to an obvious case. The decretalists, however, analyzed this problem in terms of rights. Might a leprous spouse continue to demand the conjugal right, and might the healthy one be compelled to render it?

Bernard of Parma asserted that the healthy spouse need not be compelled to share the same bed or same house with the leprous spouse. Furthermore, the leprous spouse should not be overly wicked in exacting his or her right. Bernard, however, concluded that if the healthy spouse refused the leprous spouse completely, he or she could be compelled to render the debt. This was because the leprous spouse was not to be defrauded of the conjugal debt.<sup>237</sup>

Hostiensis largely agreed with Bernard. By "minister," Hostiensis explained, Alexander III meant that the healthy spouse should provide the leprous spouse not only with the necessities of life but also with the conjugal debt. Echoing Bernard, he asserted that the healthy spouse was so obliged because the leprous spouse was not to be defrauded of the debt. Hostiensis further indicated that, where the healthy spouse refused to render the debt, he or she could be compelled to do so by ecclesiastical sanction.<sup>238</sup> Hostiensis was both more explicit and more nuanced than Bernard as to the level of compulsion that could be brought to bear on the healthy spouse. Hostiensis acknowledged that refusal to render the debt

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<sup>235</sup> X 4.8.1.

<sup>236</sup> X 4.8.2.

<sup>237</sup> BERNARD OF PARMA, ORDINARY GLOSS X 4.8.1 *s.v. ministrent.*

<sup>238</sup> HOSTIENSIS, LECTURA X 4.8.1 *s.v. ministrent.*

would amount to a mortal sin. Nonetheless, Hostiensis was reluctant to employ the sanction of excommunication against the healthy spouse. The healthy spouse simply might be incapable of rendering the debt because of the horror of the disease, and one should not be held to do the impossible under a sentence of excommunication.<sup>239</sup>

The decretalists' analysis appears to be a decided shift away from Alexander's literalism. The decretalists confronted the issue of the leprous spouse by reference to their understanding of due process and rights. The leprous spouse was not to be defrauded of his or her right. The leprous spouse should be restrained in seeking his or her right, but, where it was demanded, the healthy partner was obliged to render it. The coercive power of the church might be brought to bear upon a healthy spouse who refused to render the debt. The leprous spouse was not to be deprived of his or her right without fault.

### c. *The Jus Conjugale and Feudal Authority*

In the thirteenth century, a number of entities were capable of exercising coercive authority over individuals. As noted, familial authority was a powerful influence. Additionally, municipal governments were often a source of authority over their citizens, as were the newly consolidating monarchies over their subjects.<sup>240</sup> Various officers of the Church were also capable of exercising considerable coercive authority.<sup>241</sup>

But did those persons subject to a particular coercive authority possess any rights assertable against that authority? It seems that they did. This has been shown by the case of children desiring to marry against the wishes or arrangements of their parents. A second such example is the balance struck by the decretalists between the right of a serf, or his wife, to the conjugal debt and the authority of manor lords over their serfs.

The Latin word for serf was *servus*, which might also mean slave. This conflation of terminology creates confusion as to whether the decretalists, when discussing the status of *servi*, actually meant slaves or simply meant serfs. Although this is a complex question, some cursory observations are in order. Slavery, as it was understood

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<sup>239</sup> HOSTIENSIS, LECTURA X 4.8.2 s.v. *praecepto apostoli*.

<sup>240</sup> BERMAN, *supra* note 1, at 357-403, 404-81.

<sup>241</sup> *Id.* at 225-54.

in the classical Roman world, was a clearly diminished but not entirely extinct institution in the thirteenth century.<sup>242</sup> The practice of serfdom was itself a complex matter. The classical distinction between serfdom and slavery is that serfs were bound to the land while slaves were the chattels of particular owners. This distinction, however, was sometimes blurred in practice.<sup>243</sup> Buckland states that, at Roman law, the slave was largely "rightless."<sup>244</sup> At English common law, in contrast, the serf had certain rights assertable against his lord.<sup>245</sup> The same holds true for the *servus* under canon law. Whether understood ultimately as slaves or serfs, the *jus conjugale* was one such right assertable by *servi* under canon law.

The decretalists recognized that it was necessary to balance rights in the case of the *jus conjugale* of serfs. Lords had a *jus* in their serfs,<sup>246</sup> but so also did the wives of the serfs.<sup>247</sup> Echoing prior decretist commentaries,<sup>248</sup> Bernard of Parma, in balancing these two claims, was willing to give priority to the claims of wives, at least in most circumstances. Bernard discussed the conflicting priorities that existed when a lord demanded *servitium* of a serf and the man's wife demanded the conjugal debt at the same time. Some say the lord should be obeyed, Bernard began, unless it is feared that the wife will fornicate or otherwise be prejudiced greatly by her husband's service. Bernard, however, thought the priorities should be reversed. The serf-husband should ordinarily render the debt first, since his lord would only be slightly prejudiced by the modest delay this would cause. The only exception Bernard recognized was where the serf was obliged to render personal assistance to his lord.

Bernard's answer did not go unchallenged. Innocent IV flatly rejected Bernard's conclusion. Innocent began his analysis by stating that a lord seemed to be acting maliciously by not allowing his *servus* at least a little time to satisfy his wife. Nonetheless, Innocent concluded, a *servus* is unable to prejudice a prior obligation, namely his

<sup>242</sup> Sheehan, *Theory and Practice: Marriage of the Unfree and the Poor in Medieval Society*, 50 MEDIAEVAL STUD. 457, 463-65 (1988).

<sup>243</sup> HYAMS, *supra* note 15, at 126-51.

<sup>244</sup> W.W. BUCKLAND, *A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 62 (1921).

<sup>245</sup> HYAMS, *supra* note 15, at 126-51.

<sup>246</sup> HOSTIENSIS, *LECTURA X 4.9.1 s.v. a sacramentis*. The balance to be struck between the master's right in the serf and the serf's right to marriage and the conjugal debt was a recurrent one in both the decretist and decretalist literature. See Landau, *supra* note 194, at 535-46.

<sup>247</sup> BERNARD OF PARMA, *ORDINARY GLOSS X 4.9.1 s.v. servitia*.

<sup>248</sup> See Landau, *supra* note 194, at 535.

obligation to render service to his lord. Therefore, the man ought to obey his lord unless there is a significant possibility that his wife might commit adultery.<sup>249</sup>

In his *Summa*, Hostiensis generally agreed with Bernard. Where a lord will be greatly prejudiced by his *servus's* absence, as, for example, when he is under attack, the *servus* ought to render service first to his lord. Otherwise, the lord should be obligated to wait a little time for his *servus*, as there is no great loss in a short wait.<sup>250</sup> In his *Lectura*, however, Hostiensis reversed the presumption, declaring that unless great prejudice would result, or there is fear of fornication, the lord should be obeyed first.<sup>251</sup>

What is significant in this discussion is the balance the decretalists struck. Both lord and wife possessed certain *jura*. The decretalists did not automatically yield to the lord's claims simply because he occupied a more favorable position in the medieval hierarchy. Rather, the decretalists were quite willing to balance the lord's claim with the wife's claim in an attempt to ensure that the parties were not deprived of their rights through any fault of their own. Once again, the relationships generated by rights are clearly visible at work with an operative concept of due process of law.

This review of the role played by rights in the marriage law of the thirteenth century church is by no means comprehensive. Marriage law is saturated with a concern for rights, as are other areas of the canon law. This review, however, has demonstrated that rights did not occupy a vague and subordinate concept in thirteenth century decretal law, but formed an indispensable part of the law.

A marriage could only be brought into being by the free and uncoerced exercise of the right of each party. This right was protected by a sophisticated and comprehensive structure of law. Similarly, the ongoing functions of a marriage were analyzed in terms of tightly correlating rights and duties. In turn, these rights were protected by the canonists' evolving concept of due process. No one was to lose his or her right without fault, a principle that was operative in guiding the decretalists in analyzing when and how the *jus conjugale* might be lost. The canonists understood that conflicting rights had to be balanced. An example of this balancing was seen in the case of the marriage of serfs. Blameless parties, even in the

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<sup>249</sup> INNOCENT IV, COMMENTARIA, X 4.9.1 *s.v. servitia*.

<sup>250</sup> HOSTIENSIS, SUMMA, Bk. IV, *De conjugio servorum* § 4.

<sup>251</sup> HOSTIENSIS, LECTURA X 4.9.1 *s.v. exhiberi*.

extreme case of leprous spouses, were to be protected in the possession of their rights. Rights and right holders were to be respected.

### CONCLUSION

The two overarching goals of this paper have been to demonstrate that the concept of individual rights was present in western law at a time earlier than commonly supposed by historians of rights and that the concept of legal rights was essential to the functioning of medieval canon law. First, the received historiography of the concept and vocabulary of rights rests on questionable presuppositions and glaring omissions. Except for Brian Tierney's work, canon law has never been seriously considered as a possible source for the western rights tradition by those writing explicitly on the history of the concept of rights. When examined in light of the work of modern analytical philosophers such as Wesley Hohfeld, however, the existence of a sophisticated and thorough rights vocabulary in thirteenth century canon law is evident. For example, all of Hohfeld's jural categories can be identified as operative in the canon law's use of the term *jus*. The canonists also had an explicit awareness of the distinction between active and passive rights. The case against the received historiography is well established.

Further, it now should be evident that rights were not a vague and subordinate part of canon law. As has been shown, marriage itself came about through the free exercise of a right, the *facultas contrahendi matrimonium*. The relations of the two parties to a marriage were regulated by means of reference to the *jus conjugale*, the conjugal right. Moreover, an operative concept of due process—crystallized in the maxim *nemo jure suo privari debet sine culpa*—protected blameless parties in the exercise of this right. The concept of individual rights, as explored through the example of the law of marriage, played a significant role in many areas of thirteenth century canon law.

In closing, one might observe that the history of the western rights tradition remains to be written. William of Ockham, Thomas Hobbes and John Locke will, of course, continue to figure prominently in a new historiography of rights. But their relative positions will need to be altered in some crucial respects. No longer should it be possible to assert that the western rights tradition emerged entirely from the brow of any one of these thinkers. Ockham, Hobbes and Locke should each be seen as part of a larger tradition, a tradition to which each adapted and creatively responded.



The western rights tradition is a far larger and deeper phenomenon than the received historiography recognizes. Medieval canon law played an important role in this tradition. There are also a number of other sources that remain to be examined. The Roman lawyers of the late antique world, the medieval Roman glossators, the common lawyers of medieval England, the scholastic philosophers and the patristic and medieval scriptural commentators all may prove to be productive and rich sources of the western rights tradition. Thus, although this article is entitled "an historical inquiry," it might most appropriately be called a "preliminary inquiry." Much remains to be done.