TOWARD AN UNDERSTANDING OF MEDIEVAL UNIVERSAL RIGHTS: THE MARITAL RIGHTS OF NON-CHRISTIANS IN EARLY SCHOLASTIC AND CANONISTIC WRITINGS

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INTRODUCTION

This paper is intended as a short study on the early development of medieval theories of universal rights. It is now well established that the canon lawyers of the twelfth and thirteenth centuries were among the first to articulate a theory of specifically natural rights. Brian Tierney's scholarship on this subject in the 1980s and 1990s refuted a large body of previous work that sought to locate the origin of natural rights either in the fourteenth-century nominalism and voluntarism of William of Ockham, or in the "possessive individualism" of seventeenth-century English political thinkers.[1] In rejecting the hypotheses of this earlier body of work, Tierney effectively demonstrated that such claims first arose in the matrix of the Christian humanism and natural-law-based jurisprudence that characterized the emerging legal culture of the twelfth century.

This article seeks to build on Professor Tierney's insights in its own brief exploration of some of the ways in which early scholastic and canonistic writers thought about the marital rights of both

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1. *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES IN NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150-1625 (1997) (summarizing and developing Tierney's earlier scholarship on the origin of natural rights). For a useful review of Tierney's book, see Charles J. Reid, Jr., *The Medieval Origins of the Western Rights Tradition: The Achievement of Brian Tierney*, 83 CORNELL L. REV. 437 (1998).

Christians and non-Christians.[2] Marriage is an almost ideal venue for exploring the sources of a distinctively western conception of universal rights. Marriage, after all, was considered by all Christian writers of the time to have been the product of natural law.[3] It served to fulfill certain basic social needs and it conferred rights and responsibilities on those who undertook to fulfill its promises.[4]

The early twelfth century also holds out special promise for those interested in the history of concepts of universal rights. It is precisely at this time that Western Christian writers began to turn their attention to the existence of the larger non-Christian world in a serious and systematic manner. To be sure, since at least the days of Charlemagne and the *Song of Roland*, Western Christians were aware in some sense of the larger non-Christian world.[5] But the Crusades and the steady expansion of European frontiers ignited scholarly interest in the non-Christian world and its peoples in a way that was entirely different from what had gone before.[6] In exploring the marital rights of unbelievers, Christian writers were forced to distinguish between universally applicable claims and obligations, and to set them off from the rules that bound only Christians. It is in this matrix that much productive reasoning about natural rights occurred.

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2.   The words "marital rights" require some explanation. The canonistic term of art used for "marital rights" was the singular *ius coniugale*. This term principally embraced the concept of sexual relations—parties to a marriage were understood as having a "claim right" to sexual relations with their spouses. This was a right that parties were obliged to satisfy when asked to do so; it was also a right that could not ordinarily be interfered with by outsiders. I use the plural "conjugal rights" in this paper because the concept also embraced the companionship, care, and support that parties might expect in marriage. The range of meanings associated with the term "conjugal rights" is explored in CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW 110-26 (2004).

3.   *See* DIG. 1.1.1.3 (Alan Watson ed., rev. ed. 1998). The first text of Justinian's *Digest* declared in part that marriage and the procreation of children were features of the natural law; this emphasis on the naturalistic foundation of marriage was commonly taught by medieval theologians and canonists alike. For an important analysis of the sorts of natural law reasoning one encounters in medieval texts, see JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 238-43 (1965).

4.   *See generally* REID, *supra* note 2 (exploring the many rights and obligations attached to the marital relationship).

5.   *See* SONG OF ROLAND, *in* 49 HARVARD CLASSICS 132 (Charles William Eliot ed., John O'Hagan trans., P.F. Collier & Son 1910) (1909).

6.   For a different perspective on this period of time, one that stresses not the recognition of rights, but the development of definitions and categories that had the effect of differentiating non-Christian groups from the Christian community, see DOMINIQUE IOGNA-PRAT, ORDER AND EXCLUSION: CLUNY AND CHRISTENDOM FACE HERESY, JUDAISM, AND ISLAM, 1000-1150, at 21-22 (Graham Robert Edwards trans., Cornell Univ. Press 2002) (1998).

I.   THE AUGUSTINIAN BACKGROUND

The twelfth and thirteenth centuries were decisive in the formation of Western marital theory. It was during these two centuries that the theology of marriage proposed by St. Augustine in the fourth century was adopted as the orthodox restatement of the fundamental goods and goals of the marital relationship and enforced as a matter of law by the tribunals of the Catholic Church.[7]

In his *Treatise on the Goods of Marriage*,[8] St. Augustine proposed three great purposes to the marital relationship. His work was premised on certain attributes all persons share, regardless of their baptismal status. In the opening words of his treatise, St. Augustine wrote that every human being was a part of the human race (*Quoniam unusquisque homo humani generis pars est*).[9] Every person in the world has descended from a single man and a single woman who were themselves created by God not as strange and different beings (*alienigenas*), but as partners drawn from a common source and material.[10] All persons in the world are thus held together by a certain "bond of relationship" (*cognationis vinculo*).[11] Thus Augustine concluded that the first natural relationship in human society was that of man and wife.[12] On this universal basis, on this deposit of human experience that has grown steadily from the first days of creation and the fall from grace of our first parents, St. Augustine sought to construct a theory of marriage that might truly be said to reflect the natural law—law that all persons at all times and places should obey simply by virtue of their nature as created beings.[13]

St. Augustine proposed to use this starting point to consider why marriage was good. He premised his response on the procreative and

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7.   *See* REID, *supra* note 2, at 76-77 (discussing marriage and St. Augustine); NOONAN, *supra* note 3, at 172-75 (discussing the influence St. Augustine exerted on canonistic conceptions of marital sexual ethics).

8.   AUGUSTINE, DE BONO CONIUGALI [ON CONJUGAL GOOD] (P.G. Walsh trans., 2001).

9.   *Id.* at 2.

10.   *Id.* St. Augustine here is referring to the Genesis account of the creation of woman from the side of man.

11.   *Id.*

12.   *Id.* The word that I have chosen to translate as "relationship" is the Latin word *copula*. Used to signify the bonding that occurs in sexual intercourse, in classical Latin this word carries the significance of a deep and intimate relationship. *See* OXFORD LATIN DICTIONARY 443 (P. G. W. Glare ed., 1982).

13.   *See* AUGUSTINE, *supra* note 8.

affective dimensions of marriage. Marriage was good both because it was the appropriate means to bring children into the world, and also because it served the good of the spouses.[14]

According to St. Augustine, in light of our mortality, the procreation of children was the primary reason for the community of persons that is marriage to come into being.[15] Sexual intercourse, St. Augustine wrote, was blameless when engaged in for the purpose of bringing forth the next generation.[16] To be sure, however, it was better, for those constitutionally capable of it, to pursue a life of sexual abstinence even within marriage.[17]

This notion of marriage as a society of male and female reflecting our original physical and spiritual complementarity carried with it the additional responsibility of fidelity, which St. Augustine would come to describe as yet another good of marriage. Fidelity (*fides* or *fidelitas*), St. Augustine asserted, was required not only in sexual relations—parties should not seek out other companionship, nor should they refuse their partners—but also in the emotional and affective dimensions of the relationship.[18] Such fidelity should be evident even in older couples whose powers have disappeared and whose "members" might be close to death (*prope cadaverinis utrisque membris*).[19]

Marriage, St. Augustine concluded, thus created a "social bond" (*sociale vinculum*) between the partners that cannot be broken.[20] To demonstrate the strength and enduring nature of the marital bond, St. Augustine considered the case of a spouse who committed adultery.

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14. *Id.* at 6. St. Augustine posits, "It thus seems to me that [marriage is good] not only because of the procreation of children, but also because of the natural society of each distinct sex." ("Quod mihi non videtur propter solam filiorum procreationem, sed propter ipsam etiam naturalem in diverso sexu societatem."). *Id.*

15. *Id.* at 14.

16. *Id.*

17. *Id.* at 6. One partner, acting alone, however, must never make this choice, lest it drive the other partner into adultery and "damnation." *Id.*

18. *Id.* at 6-15.

19. *Id.* at 6-7. St. Augustine's use of the term *membris* here might refer to the disappearance of sexual powers, but, when used with the adjective *cadaverinis* ("deathlike"), also carries the sense of the death of all forms of physical vigor. In short, St. Augustine is speaking of the loyalty one partner owes the other in all things, even unto death.

20. *Id.* at 16. The word *sociale*, translated as "social" in the above text, might also be rendered as "companionship" and the term *sociale vinculum* could thus be rendered "bond of companionship." The word *sociale*, derived from the Latin *societas*, is a term that also conveys the technical legal meaning of partnership at Roman law, and here refers to the society—the partnership—of husband and wife. ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 708 (1953).

An innocent party in such circumstances certainly had the right to seek a divorce, but divorce obtained on the grounds of adultery did not thereby sever the spiritual bond that existed between the two parties.[21]   Thus, an innocent party was not free to marry another during the guilty party's lifetime.[22]   Similarly, although procreation within marriage was a great good, the fact that one might discover following the wedding that one's spouse was sterile could not justify moving to another party.[23]

These observations about the strength of the marital bond led St. Augustine to consider the final good of marriage—its sacramental quality.   The marital bond possesses such strength, he reasoned, because it is symbolic of even more profound matters.[24]   Indeed, the marital bond points to something that lies beyond and above our frail mortal existence.[25] St. Augustine acknowledged that marriage did not carry the same force among the "gentiles"—pagans who are ignorant of the demands of the Gospel.[26] Similarly, Moses permitted Jews the right of divorce because of the "Israelites' hardness of heart."[27]   But among Christians, marriage became a sign of "the unity of all of us who will be made subject to God in the coming heavenly city."[28] St. Augustine concluded,

> Thus the good of marriage among all nations and all peoples consists in the purpose of procreation and the faithfulness of chastity; but insofar as it pertains to the people of God, it also includes the holiness of a sacrament, by which it is wrong for a woman, even one repudiated by her husband, to marry another while he remains alive, even for the sake of bearing a child.[29]

Thus, St. Augustine connected the idea of sacramentality with the unbreakable bond that prevails among married Christians. But while

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21.   AUGUSTINE, *supra* note 8, at 14-16.

22.   *Id.*

23.   *Id.* at 16. St. Augustine wrote, "In light of all this, the social bond of the spouses is so powerful that, even if it is understood that they married for the sake of procreation, they may not dissolve the marriage in order to procreate." ("Quae si ita sunt, tantum valet illud sociale vinculum coniugum ut, cum causa procreandi colligetur, nec ipsa causa procreandi solvatur."). *Id.*

24.   *Id.*

25.   *Id.*

26.   *Id.*

27.   *Id.*

28.   *Id.* at 40.

29.   *Id.* at 56.

St. Augustine spoke here of the sacramental quality of Christian marriages, at other points, he acknowledged that Adam and Eve and even the ancient Hebrew patriarchs, with their multiple wives, enjoyed marriages that possessed a sacramental quality.[30] Patriarchs like Abraham practiced a devotion so severe, a chastity so profound, in fulfilling the divine command to bring into being the people of God, that their marriages must also be counted as holy in some respect.[31]

In so speaking of marriage, St. Augustine did not seek to identify or to compare the relative rights and duties of Christians and non-Christians. He did not seek either to condemn or to praise the marriages of non-Christians; he sought only to note that they differed from the marriages of those who belonged to the City of God. Non-Christian marriages stood on a different footing because of the possibility of divorce and remarriage. St. Augustine's argument was a theological one, not a juridical one; his interest was in explaining God's relationship to His people as signified in the fundamental human institution of marriage.

II. THE SCHOLASTIC SYNTHESIS OF THE EARLY TWELFTH CENTURY

A. *Introduction*

Marital practice in the early Middle Ages largely failed to conform to Augustinian ideals. Regarding divorce in the early Middle Ages, James Brundage has written, "Divorce by mutual consent remained common in seventh and eighth century Gaul and probably elsewhere, too."[32] Proof of adultery was generally sufficient to obtain a divorce, and the right of remarriage was often granted "as a concession to human frailty."[33] So decreed church councils, and even Pope Gregory II, who in 726 permitted a husband to move to a second marriage because of his wife's sexual dysfunction, provided the husband could show his capacity to support both his first and second spouses.[34]

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30. *See* SEAMUS P. HEANEY, THE DEVELOPMENT OF THE SACRAMENTALITY OF MARRIAGE FROM ANSELM OF LAON TO THOMAS AQUINAS xi-xii (1963).

31. AUGUSTINE, *supra* note 8, at 40-45.

32. JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 143 (1987).

33. *Id.*

34. *See id*; *see also* Jo-Ann McNamara & Suzanne F. Wemple, *Marriage and Divorce in the Frankish Kingdom, in* WOMEN IN MEDIEVAL SOCIETY 95, 102-03 (Susan Mosher Stuard ed., 1976) (discussing Pope Gregory II and the rules established by Frankish church councils governing the right of remarriage following divorce).

This is not to say that the churchmen failed entirely in their task of exhorting Christians to lead lives in accordance with the demands of the Gospel and Christian teaching. Documents like the Irish penitentials, which had a large impact not only in Ireland, but, eventually, on much of the European Continent, stand in testimony to the energetic attempts by Christian teachers and preachers to change the sexual conduct of Western Europeans.[35] At the same time, the historical record shows that success was haphazard at best for the half-millennium between the traditional fall of Rome (476) and the emergence of a reformed Christian clergy in the early years of the twelfth century.[36]

The end of the eleventh century marked a fundamental change in the relationship of the Church to society. A reformed clergy, under the direction of a series of activist popes who took seriously their mission to remake the Church and the world, succeeded in putting into place the building-blocks of a sophisticated legal culture—from the establishment of new law schools to the creation of a network of diocesan and local ecclesiastical tribunals empowered to hear a wide range of cases, including matrimonial disputes.[37] The new universities, which housed faculties of theology as well as law, became hotbeds of systematic investigation into the first truths of Christianity and the legal order best suited to governing a well-organized Christian society.[38]

B. *Hugh of St. Victor*

Hugh of St. Victor was a theologian, not a lawyer, who wrote and flourished in the early years of this reform period, in the first half of the twelfth century.[39] Rebecca Moore's recent study of Hugh's biblical commentary insofar as it pertains to Judaism also provides a helpful summary of what is known—and not known—about Hugh's life and scholarly career.[40]

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35. *See* BRUNDAGE, *supra* note 32, at 152-69.

36. *See id.*

37. This story is well told by Harold J. Berman in LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983). On the construction of the new marital ideal and its enforcement, see *id.* at 226-30.

38. *See id.*

39. REBECCA MOORE, JEWS AND CHRISTIANS IN THE LIFE AND THOUGHT OF HUGH OF ST. VICTOR 9 (1998).

40. *See id.* at 9-21.

Although Hugh lived and taught in France, he describes himself as being in "exile"[41] most of his life; in all likelihood, he was born abroad.[42] As a young man, he arrived at the Abbey of St. Victor by the year 1118, and died in 1141.[43] Based on the tone he adopted in his theological works, Moore surmises that Hugh enjoyed "a conciliatory temperament."[44] His theological interests were diverse: he wrote biblical commentary, history, and mysticism.[45] Writing before a later generation of scholastic writers explained the sacraments in terms of seven sacred acts and symbols that conferred God's grace upon believers, Hugh was willing to speculate broadly: "His allegorical interpretation of nature enables him to see all of human history as a sacrament, or sign, of God's activity. Sacramentality invests history with meaning."[46]

This is not to say that Hugh was outside the theological tradition of the Church. Indeed, it is noted that Hugh, who stood at the very beginning of scholastic analysis of sacramental theology, proposed "the first definition of the sacraments, properly so-called."[47] Even though Hugh's work was theological in orientation, it was also imbued with the sorts of rights-talk that was then first emerging among more legalistically-inclined writers. A concern with both theological principles and individual rights is evident in Hugh's treatment of the marital rights of non-Christians.

A discussion of Hugh's theory of universal marital rights draws one necessarily into his larger sacramental theology. He opened his discussion of infidel rights by observing that some thinkers were of the opinion that pagans and other unbelievers did not have marriage.[48] These thinkers reached their conclusions, Hugh suggested, because they denied the possibility of sacramental

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41. *See id.* at 17.

42. *See* Jerome Taylor, The Origin and Early Life of Hugh of St. Victor: An Evaluation of the Tradition 66-68 (1957).

43. *See* Moore, *supra* note 39, at 18.

44. *Id.* at 20.

45. *Id.*

46. *Id.*

47. Damien Van Den Eynde, Les Définitions des Sacrements [On the Definitions of the Sacraments] 32 (1950).

48. *See* Hugh of St. Victor, *De Sacramentis Fidei Christianae* [*On the Sacraments of the Christian Faith*], *in* 176 Patrologiae 183, 504 (1880) (1216) [hereinafter Hugh, *De Sacramentis Fidei*].

marriage among unbelievers.[49]   Hugh, however, rejected this line of reasoning: "Blessed Augustine says that the sacrament of marriage is common to all nations, even though the sanctity of the sacrament is not available except in the City of God, on God's holy mountain."[50]

Hugh's distinctions between a sacrament available generally to all persons and the sanctity of a sacrament available only to Christians requires explanation. St. Augustine, who was Hugh's inspiration, understood the concept and vocabulary of sacraments and sacramentality in very broad terms. Sacraments, to St. Augustine, were signs of God's presence and promise in the world, of His gifts to His creation, and of salvation through His Word.[51]   They embodied and made manifest the mystery of God.[52]   The Jews of the Old Testament were thus given certain sacraments: temple rituals, circumcision, the Passover, and many other signs of God's assurance to His people.[53]   The New Testament and the life of the Church also contained a rich variety of sacraments:

> Easter, the octave of Easter, Pentecost, the sign of the cross, spiritual songs, bowing of the head, contemplation, the great fasts, penitential garments, taking off of shoes, the rites of the catechumenate, entry into the period of being *competentes*, exorcisms, transmission of the *symbolum*, the font, salt, penance, laying on of hands, reconciliation, the eucharistic prayer, the Lord's Prayer, and many other things.[54]

Hugh of St. Victor was an heir to this rich understanding of sacramentality and he developed it in some important and unique ways. To begin with the most basic element of Hugh's vocabulary, consider the Latin word *sacramentum*: this term, best understood as

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49.   Hugh writes, "Et hac ratione contendant sacramenta Dei non posse ad infidelium participationem venire, si sacramentum conjugii habere infideles non possunt . . . ." ("And by this reason they might contend that the sacraments of God do not allow for participation by infidels, if infidels cannot have the sacrament of marriage."). *Id.* at 505.

50.   Hugh's words are, "Dicit beatus Augustinus quod sacramentum conjugii omnibus gentibus commune est; sanctitas autem sacramenti non est nisi in civitate Dei nostri et in monte sancto ejus." *Id.* at 506.

51.   *See* Emmanuel Cutrone, *Sacraments*, *in* AUGUSTINE THROUGH THE AGES: AN ENCYCLOPEDIA 741-42 (Allan D. Fitzgerald ed., 1999).

52.   *See* C. Couturier, *Mysterium et Sacramentum* [*Mysteries and Sacraments*], *in* 28 ÉTUDES AUGUSTINIENNES 272 (H. Rondet et al. eds., 1953) ("c'est ainsi que nous trouvons comme équivalent de sacramentum, l'expression 'mysteriorum signacula,' 'signes des mystères' . . . .") ("we thus find as the equivalent of sacrament the expression 'signs of mystery'").

53.   *See* Cutrone, *supra* note 51, at 742.

54.   *Id.*

"sign," might be "a material element, physical action or spoken words."[55] *Sacramentum* therefore meant principally a symbol—it was something that pointed to a larger metaphysical reality.[56] Hugh filled his sacramental theology with a variety of distinctions: "profane" sacraments, which pointed to mere physical realities,[57] and "sacred" sacraments, which conferred grace.[58] Using this analysis, non-Christians might possess sacraments.[59] Indeed, even the devil himself revealed his presence through sacraments.[60]

Hugh's theology of non-Christian marriage must be fitted within this framework of sacramentality. Among the distinctions he drew when discussing the meaning of the word *sacramentum* was that between the "sacraments of faith" and sacraments of the "natural law."[61] By "sacraments of faith," Hugh intended to capture the double meaning of the Latin word *fides*: faith in God was itself a sacrament, and the means that God established for sanctification, such as baptism, were also sacraments.[62] He compared this sacramental category with sacraments "of the natural law," and as examples of this latter category listed tithes, sacrifices, and offerings.[63] These were sacraments, Hugh explained, because they were "sacred signs of a sacred thing," namely, external evidence of the interior remission of sins achieved in reconciliation and penance.[64] Sacraments were thus complex in nature. They might reflect one's interior faith-life or the demands of external, universal law: they might be symbolic; they might be efficacious.

As the above examples demonstrate, Hugh's sacramental theology was enriched by subtle distinctions and a nuanced feel for the many ways in which God made His reason and will manifest in the world.

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55. Michael T. Girolimon, *Hugh of St Victor's* De Sacramentis Christianae Fidei: *The Sacraments of Salvation*, 18 J. RELIGIOUS HIST. 127, 128 (1994).

56. *See id.*

57. *See id.* at 128-29.

58. *See id.* at 129.

59. *See id.*

60. *See id.*

61. *See id.* at 128-29.

62. *See id.* at 129-31; *see also* HUGH OF ST. VICTOR, *De Sacramentis Legis Naturalis et Scriptae* [*On the Sacraments of the Natural Law and Scripture*], *in* 176 PATROLOGIAE 17, 36 (1880) (1216) (discussing the sacrament of faith) [hereinafter HUGH, *De Sacramentis Legis*]. The "sacraments of faith" included "eucharist, water baptism, confirmation, penance, holy orders, matrimony, and the anointing of the sick." Girolimon, *supra* note 55, at 131.

63. HUGH, *De Sacramentis Legis, supra* note 62, at 37-38.

64. *Id.*

Furthermore, a deep dualistic tendency is detectible throughout Hugh's thought about the sacraments. One catches a glimpse of Hugh's instincts for dualistic reasoning in his argument that a sacrament's symbolic presence was "visible and material," as contrasted with its essence, its force (*virtus*), which was "inward, invisible, and spiritual."[65] The signification—the symbolic strength of the sacrament—arose from its visible institution in Scripture; its inner power was derived from God's saving grace. Thus, for example, water was the visible sign of the inner cleansing of sins and stains accomplished by washing/baptism.[66]

This richness and inherent dualism were both evident in Hugh's treatment of the universal sacramentality of marriage. Marriage, Hugh stressed, was sacramental for non-Christians and Christians alike, but it was sacramental in different ways. Seamus Heaney described Hugh's approach to marriage as representing a theory of double sacramentality.[67] First, marriage was sacramental in the sense that the parties were bound by love for one another, a love that signified and reflected the spiritual relationship of the human soul with its Creator God.[68] But it was sacramental in a second sense also, in the duty of conjugal relations (*officium conjugii*) that it imposed on the parties.[69] Of the two, Hugh took the first sacrament, the unconsummated love of the soul for God, as the more powerful symbol; his successors, however, would reverse this significance.[70]

Christians and non-Christians alike shared in the sacrament of marriage understood in the first sense of that term.[71] Hugh sought to support the sacramentality of non-Christian marriage through an argument from Scripture: when Jesus mentioned fornication by one of the parties as the sole ground of divorce,[72] He intended—and could only have intended—to bind non-Christians.[73] Furthermore, Jesus must have meant in this passage to condemn fornication as sinful. And if the Lord prohibited fornication among the gentiles, then gentiles must be capable of marriage, since otherwise all sexual

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65. *See* HUGH, *De Sacramentis Fidei, supra* note 48, at 317.

66. *See id.* at 318.

67. *See* HEANEY, *supra* note 30, at 14.

68. *See id.* at 15.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See Matthew* 19:9.

73. *See* HUGH, *De Sacramentis Fidei, supra* note 48, at 506.

relations among non-Christians would have to be classified as fornication and thus prohibited.[74]

Hugh moved from this starting point to give careful consideration to a teaching, which he mistakenly attributed to Pope Gregory the Great, that "injury to the Creator dissolves the right of marriage" (*jus matrimonii*).[75] Where such an injury has occurred, where the Creator has been treated contemptuously by an unbelieving spouse, the blameless Christian party might freely leave his or her spouse and move on to a new relationship.[76]

Hugh sought to use this mistakenly-attributed text to respond to an argument of St. Ambrose that there could be no "ratified" marriage *praeter Deum*, "aside from God."[77]   At issue were the marriages of non-believers. Hugh answered St. Ambrose's claim that there could be no marriages among unbelievers:

> And so therefore he denies that there is marriage, because he says that it is not ratified. And because he says that injury to the Creator dissolves the *jus matrimonii*. But pay attention that in this he who has called it marriage, but says that it has not been ratified, has affirmed that it is marriage. And in like manner he who has said that injury to the Creator dissolves the *jus matrimonii* has asserted that there is a marriage there and that it has rights. And that this right ought to be understood as firm and that it should not be denied under penalty of sin, unless it has been dissolved through the intervention of some greater cause.[78]

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74.   *See id.*

75.   *Id.* Hugh uses the expression "Injuria enim Creatoris solvit jus matrimonii." He, like Gratian, attributed this text to Gregory the Great. The footnotes to Emil Friedberg's edition of Gratian's *Decretum* suggest that this passage should properly be attributed to St. Ambrose (with the most pertinent passages under the *notationes correctorum* for C.28 q.2 c.2). *See* CORPUS IURIS CANONICI col. I, cols. 1089-90 (Emil Friedberg ed., 1879). John Noonan demonstrated that this text probably should be attributed instead to a certain Isaac, also known as the Ambrosiaster, "a fourth-century Roman lawyer and convert from Judaism." JOHN T. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA 343 (1972).

76.   *See* HUGH, *De Sacramentis Fidei, supra* note 48, at 506. In repeating this teaching, Hugh contributed to the development of a doctrine grounded on a reading of St. Paul's *I Corinthians* 7:10-16 that permitted a convert to leave a hostile spouse and to seek a new marriage within the faith. *See* NOONAN, *supra* note 75, at 342.

77.   HUGH, *De Sacramentis Fidei, supra* note 48, at 506.

78.   *Id.* ("Ideo ergo conjugium esse negavit, quia ratum non esse dicit. Et quia injuriam Creatoris solvere dixit jus matrimonii. Sed attendite quod in hoc potius conjugium esse dixit qui conjugium istud, sed non ratum affirmavit. Et simili modo qui dixit injuriam Creatoris jus matrimonii solvere, matrimonium illic esse et jus habere asseruit. Quod utique jus firmum staret et non sine peccato negaretur, si non majori causa superveniente solveretur.").

In this passage, Hugh sought to accomplish two goals. He sought first to demonstrate by means of simple logic that one who asserted that contempt for the Creator dissolved the rights of marriage must also be held to assert, under pain of self-contradiction, that a real marriage existed and that it had rights. St. Ambrose, in short, was in error when he denied that infidels might enjoy real marriage.

Secondly, Hugh sought to attribute to the marital right of unbelievers a certain stability and firmness. It was wrong—indeed, it was sinful—to deny the existence of infidel marital rights. Nevertheless, Hugh conceded that even though infidels enjoyed rights that were ordinarily strong and stable, they might be lost for a sufficiently great cause.[79]

Furthermore, in asserting that rights could be lost only for some great cause, Hugh was drawing upon nascent ideas of due process then under development in legal circles. A favorite maxim of canonists was that rights could not be lost *sine culpa*—without fault.[80] In essence, one was ordinarily entitled to have one's rights respected by those in authority unless one had committed an offense that merited their loss.

There were, however, exceptions to this rule: in special cases, when there was cause, a right might be "trumped" or abridged.[81] A special *causa*, or cause, might carry sufficient weight to defeat a claim of right in a particular circumstance. In essence, the canonists proposed a balancing of interests: rights should ordinarily be respected, but where grave reasons of policy were at stake, they might not be enforced.

Hugh was making a similar argument. The marital rights of non-Christians should be considered as well-established, but the highest form of supervening cause—respect for the Creator—might take precedence where a spouse has converted to Christianity.[82] In such circumstances, the contempt an unbelieving spouse shows his or her Creator by mistreating the newly-converted spouse dissolves the marital right.

Hugh related this understanding of marital rights to his theory of sacramental marriage. Some have contended, Hugh observed, that

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79.   *See id.*

80.   *See* CHARLES REID, RIGHTS IN THIRTEENTH-CENTURY CANON LAW: AN HISTORICAL INVESTIGATION 428-34 (1995).

81.   *See id.* at 430, 433-34.

82.   *See* HUGH, *De Sacramentis Fidei, supra* note 48, at 508-09. Hugh explains further that a Christian spouse can leave an infidel spouse, but that staying with an infidel is an act of charity. *Id.*

marriage is illegitimate without faith.[83]   They have contended, in effect, that it is impossible for infidels (*infideles*) to participate in the sacraments of God.[84] But an infidel can participate in the sacrament of baptism, which is a special sign of faith, and an infidel may participate in the sacrament of baptism even though he is in other respects an unbeliever, provided that he has observed the proper form.[85] Baptism, furthermore, is a sacrament that is a special sign of faith (*signaculum fidei*).[86] How can it be, Hugh asked rhetorically, that infidels may not have the sacrament of marriage, which is not so much a sign of faith as a sign of nature (*non tam fidei signum est quam naturae*)?[87] Marriage, Hugh noted, is not so much a judgment as to one's inner virtue as it is an instrument of propagation in which faithful and unfaithful alike may participate.[88] This line of argument led Hugh to articulate what he understood the content of the *jus matrimonii* to be, insofar as it applied to infidel marriages:

> And I say that when an infidel has taken a wife for the sake of bearing children, keeps faith with the marital bed, loves her as a companion and protects her, and, so long as she is alive, does not seek out the company of other women, then even though he is in other respects an infidel, because he does not believe, nevertheless, in this matter he has not acted contrary to the faith or to divine institution.[89]

A little later in his argument, Hugh elaborated on both the firmness of infidel marital rights and the narrow set of circumstances that led to their loss:

> Now, moreover, because the obligation of marriage is true, it cannot be denied without cause. For a man is obliged to his wife, and the wife to her husband, nor may one depart from the other. And if, perchance, one does depart, then he who is deserted nevertheless

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83. *See id.* at 504-05.

84. *See id.* at 505.

85. *See id.* Hugh seems to make the case that an infidel may licitly administer the sacrament, provided they observe the proper form.

86. *See id.*

87. *See id.*

88. *See id.*

89. *Id.* ("Et ego dico quod quando infidelis uxorem propter propagationem filiorum ducit, fidem toro conjugali servat, sociam diligit et custodit, et illa vivente ad alienam societatem non transit: quamvis in alio infidelis sit, quia scilicet non credit, in hoc tamen neque contra fidem neque contra divinam institutionem facit.").

retains inviolate the right and obligation of marriage. But there is the greater cause of God, against which no other cause may prevail. When this is injured, the obligation is discharged. In every instance, whoever acts against the cause [of God] has destroyed his entire right.[90]

As with the canonists, one sees rights juxtaposed with cause. Ordinarily, rights are inviolate. An abandoned spouse, even an infidel spouse in an infidel union, retains his or her marital right. But where one of the parties has converted, a greater cause intervenes. This cause—the cause of God Himself—trumps the marital rights of the individual.[91] Rights, in short, should ordinarily be respected, but no one may assert a right against the irresistible cause of God.

Hugh provided a final support for his claims about infidel marriage by invoking the universal character of marriage as an essential feature of God's plan of creation. In this respect, as in much else of his marital theology, Hugh essentially followed and expanded upon Augustinian premises.[92] "God is the author of marriage," Hugh wrote, "for He decreed marriage to come into being when He made woman as man's helper in the propagation of the human race."[93] God further revealed Himself to be the *institutor* and *ordinator* of marriage when He admonished His new creation to increase and multiply and to fill the earth.[94] This also contributed to marriage's sacramentality, Hugh stressed, because man was created in the image of God, and marriage allowed human fecundity to flourish.[95]

What one sees in this treatment of the marital rights of non-Christians is Hugh of St. Victor's conciliatory nature at work. Sacramentality might be a sign of faith, but it might also be a sign of the demands of nature, as God intended nature to work. And this sacramentality carried certain rights and duties. These marital rights and duties can be described only as "natural." They pertain to all

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90. *Id.* at 506-07 ("Nunc autem quia debitum sacramenti conjugalis verum fuit, sine causa omnino negari non potuit. Debet enim vir uxori et uxor viro, ut alter ab altero non discedat; et si forte discesserit alter, ille qui deseritur, conjugii tamen jus et debitum inviolatum custodiat. Sed est causa Dei major adversus quam nulla stare debet causa. Haec cum laeditur, contra eam nulli aliquid debetur. In omni causa jus suum perdit qui huic causae adversatur . . . .").

91. *See* HUGH, *De Sacramentis Fidei, supra* note 48, at 506-08.

92. *See, e.g., id.* at 481.

93. *Id.* ("Conjugii auctor Deus est. Ipse enim conjugium esse descrevit, quando mulierem ad propagationem generis humani homini in adjutorium fecit.").

94. *See id.*

95. *See id.*

persons in virtue of their common humanity—their status as creatures of God who share in the birthright of Adam and Eve and seek to fulfill the divine command to replenish the earth. These rights and duties, Hugh makes clear, can be lost only for grave cause—the conversion of one of the parties to Christianity.[96]

C. *Other Early Scholastic Authors*

Hugh was not alone among early twelfth-century theologians to have held such views. One might consider two of Hugh's near-contemporaries, one somewhat older than Hugh, the other somewhat younger. Anselm of Laon, Hugh's slightly older contemporary, advanced arguments similar to Hugh's in the 1110s, although Anselm's theology was less well developed.[97]

Looking at the same scriptural and patristic texts as Hugh, Anselm challenged those who said that marriage was impossible among infidels.[98] These writers mistakenly relied on St. Ambrose's claim that there could be no marriage "aside from God" (*praeter Deum*) and on St. Augustine's claim that it was not sinful for a believer to depart from a marriage to an unbeliever.[99] But, Anselm

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96. *See id.* at 506-08. At one point in his treatise *De Sacramentis Fidei*, Hugh suggests that the non-Christian spouse had to show real hostility to the Christian spouse in order to be deprived of his or her marital right:

> Your wife says to you: "You have become a Christian, I will not follow you. Because you do not worship idols, because you have thrown away the rights and customs of your parents, I go another way, or at least I do not go with you. I do not acknowledge you as husband unless you deny Christ." You understand this: injury to the Creator dissolves the *jus matrimonii.*

Id. at 507. Elsewhere, Hugh added that unbelief standing alone might be sufficient to dissolve the marital right when one party has converted, writing that "[t]here is sin in an infidel who refuses the faith, whose fault dissolves the *jus matrimonii.*" *Id.* at 508. One notes here Hugh's use of the word *culpa*—"fault." The infidel here is understood to lose his or her marital rights, not because of the intervention of some supervening cause, but by reason of fault. The verb that I have translated as "refuses," *respuit*, means literally a violent spitting out or vomiting. Hugh, however, added that a Christian convert was not obliged to abandon his or her unbelieving spouse, and stressed that remaining with such a partner in order to bring that person to the faith might itself be a "work of perfection" (*perfectius opus*). *See id.* at 509.

97. Regarding Anselm of Laon, see Teresa Olsen Pierre, *Marriage, Body, and Sacrament in the Age of Hugh of St. Victor, in* CHRISTIAN MARRIAGE: A HISTORICAL STUDY 213, 217-18 (Glenn W. Olsen ed., 2001).

98. ANSELM OF LAON, *Systematische Sentenzen* [*Systematic Sentences*], *in* BEITRÄGE ZUR GESCHICHTE DER PHILOSOPHIE DES MITTELALTERS 137 (Georg Graf von Hertling et al. eds., 1919) (1915).

99. *Id.* at 137-38.

responded, St. Ambrose never intended to deny marriage among non-believers, only that such marriage could not be "ratified," that is, given unbreakable firmness.[100]   Similarly, Anselm continued, St. Augustine never meant to say that infidel marriage was sinful, only that it was not sinful for a Christian convert to leave such a union in the proper circumstances.[101]   Thus, Anselm concluded, God never intended to bar two infidels from joining in marriage, although He did forbid a Christian from marrying a non-Christian.[102]

Like St. Augustine and Hugh of St. Victor, Anselm asserted that it must therefore be concluded that marriage "is common to all peoples, believers and unbelievers alike."[103]   Following Isidore of Seville, Anselm further asserted that such marriage came into being when a man and a woman consented to lead a common way of life.[104] Following St. Augustine, while also anticipating Hugh's arguments, Anselm stressed that marriage and reproduction were parts of God's plan for the world.[105] After the Fall of Adam and Eve, Anselm added, marriage served two fundamental human needs—the requirement to bring into being a new generation, and the basic human impulse toward sexual coupling.[106]

Anselm also identified the features that set Christian marriage apart from other forms of matrimony. Perfect marriage, he stressed, had to conform to the Church's teaching.[107] For Christians, this meant that a consummated marriage acquired an unbreakable bond that signified the marriage of Christ and the Church because Christ and the Church form one body that is inseparable.[108] "This, therefore," Anselm wrote, "has been called, with merit, the sacramental bond."[109] As a sacrament, it revealed to the visible world an otherwise hidden, sacred fact.[110]

In Anselm's world, as in Hugh's, marriage among unbelievers was not considered perfect but was nevertheless permissible; indeed,

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100. *Id.* at 138.

101. *Id.*

102. *Id.* at 138-39.

103. *Id.* at 140.

104. *Id.* at 139-41 (quoting Isidore of Seville and repeating the language about consent and adding that consummation should ordinarily follow marriage).

105. *Id.* at 129-30.

106. *Id.* at 130.

107. *Id.* at 140.

108. *Id.* at 135.

109. *Id.*

110. *Id.*

infidel marriage constituted part of the natural order of the world, as decreed by God Himself.[111] Anselm spoke less frequently than Hugh about the *ius matrimonii*, the marital right, although he did make use of such language.[112] Such a right was a feature of the natural law, and could not be lightly disregarded.

Robert Pullen, an Englishman who moved to the University of Paris around 1135 and closed his career as a member of the papal curia and a Roman cardinal, was slightly younger than Hugh.[113] Writing around 1130, he adopted a very different tone from that struck by Hugh and Anselm. "Among the nations," he wrote in the opening line of his treatment of the marriages of non-Christians, "there are whores (*pellices*) and there are spouses, but by the law of the nations they may be dismissed."[114] Because Jews and infidels allow for divorce and because they marry "outside the tradition of the Church" (*praeter Ecclesiae traditionem*), the "law of matrimony" among infidels is "incomplete" (*inchoata*).[115] Since a completed marriage is only possible in the "Christian faith" (*in fide Christiana*), Pullen argued that unbelievers lacked the special bond that accompanied Christian marriage.[116]

Pullen's treatment of the right of the infidel party who converts to Christianity to move to a new relationship was oriented toward the practical. He began with the premise that faith in Christ might summon all persons of whatever station. Thus in the New Testament one sees Christ calling St. Matthew from his tax collecting tables and St. Peter from his fishing nets.[117] So also, faith in Christ might summon the non-Christians of Pullen's own day from infidelity and impurity. For Christ's faith might be found at work in all marriages, gently moving the parties away from unfaithfulness and vice, and toward a life of devotion and duty.[118] Thus St. Paul admonished the believer not to depart from the unbelieving spouse unless the

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111.   *Id.* at 138.

112.   *Id.*

113.   Edwin Burton, *Pullen, in* 12 THE CATHOLIC ENCYCLOPEDIA 563 (1911).

114.   ROBERT PULLEN, *Sententiarum Libri Octo: Book VII* [*Eight Books on the Sentences*], *in* 186 PATROLOGIAE 947 (1880) (1216).

115.   *Id.*

116.   *Id.*

117.   *Id.*

118.   *Id.*

unbeliever did not wish to cohabit peacefully. The believing party, by remaining in the union, could thus sanctify the unbeliever.[119]

But, Pullen continued, the law of matrimony among unbelievers is always incomplete, although it might become a true and permanent union where it is subsequently consummated according to the law of Christ after one of the parties to the marriage has converted to Christianity.[120] A party might thus follow St. Paul's admonition and remain with his or her unbelieving spouse, or chose to move to a new relationship.[121] Such a party might move to a new relationship, furthermore, regardless whether she had been dismissed by the unbelieving spouse or had herself dismissed him. This was because marriages among infidels were, in their essence, dissoluble. Pullen also added a practical reason why this should be so: if this were not the rule and a new convert was required to practice continence, the spread of the faith might be impeded and the progress of conversion slowed.[122]

These commentaries by Hugh, Anselm, and Pullen are important today for the light they shed on medieval thinking about universal rights. Medieval theologians and philosophers were forced, by the expansion of Europe and the reality of on-going contact with non-Christian peoples, to consider the rights of non-Christians.[123] Marriage, which was a requirement of the natural law insofar as there were no other legitimate means by which to propagate the species, understandably became a focus of their concern. In the writing of someone like Hugh of St. Victor, the analysis could become quite dense and theoretical. God was immanent in the world, according to Hugh, and revealed His presence everyday through countless *sacramenta*—signs and symbols attesting to transcendent realities.[124] Non-Christians, as much as Christians, participated in the sacrament of marriage and enjoyed certain marital rights. A few years before, Anselm of Laon had similar things to say, but in a less developed form. Robert Pullen's terse commentary, on the other hand, marked the future path of development, which would be focused on the

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *See id.*
124. *See* HUGH, *De Sacramentis Legis, supra* note 62, at 36.

practical questions entailed by marriages in which one party had become Christian.[125]

III. THE CANONISTS ON THE MARITAL RIGHTS OF NON-CHRISTIANS

A. *Introduction*

Gratian is commonly considered the founder of the systematic study of canon law, in large part because of his great work, *The Harmony of Discordant Canons*, which appeared around 1140 and is now commonly known as the *Decretum*.[126] In that work, he established what would come to be the essential framework for canonistic consideration of the marital rights of non-Christians.

At the beginning of *Causa* 28, *quaestio 1*, Gratian asked, "Can there be marriage among infidels?"[127] Proceeding in his customary dialectical fashion, Gratian first reviewed the arguments against infidel marriage. St. Ambrose understood the biblical book of Esdras to require the dismissal of "foreign wives" (*uxores alienigenas*).[128] St. Augustine, furthermore, claimed that marriage is impossible without God.[129] Gratian pointed out the irony of pursuing these claims to their logical conclusion—namely, that infidels cannot marry.[130]

Gratian went on to cite another line of authorities, one that pointed in a different direction. These other authorities used as their foundation the letters of St. Paul. St. Paul certainly allowed converts to depart from their old relationships, but he also encouraged Christians to remain with their non-Christian spouses for the unbelieving partners' "sanctification."[131] Hence, Gratian conceded, the story was more complicated than he first intimated. The same Augustine, for instance, who seemed to deny the possibility of infidel marriage could also be read as supporting its existence.[132]

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125.   PULLEN, *supra* note 114 and accompanying text.

126.   For an indispensable starting point for understanding what we know—and what we do not know—about Gratian, 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). Also indispensable is ANDERS WINROTH, THE MAKING OF GRATIAN'S DECRETUM (2000).

127.   GRATIAN, DECRETUM C.28 q.1 pr.

128.   *Id.*; *cf.* REID, *supra* note 2, at 107.

129.   GRATIAN, *supra* note 127, C.28 q.1.

130.   *Id.*

131.   REID, *supra* note 2, at 107.

132.   GRATIAN, *supra* note 127, C.28 q.1 d.17.

In the final analysis, Gratian distinguished among three types of marriage. The first type, "legitimate marriage" (*legitium coniugium*), was found most frequently among unbelievers.[133] This type of marriage conformed to the necessary legal forms but allowed for the right of divorce.[134] Where both spouses were unbelievers, and one of them converted to Christianity, the convert might freely depart from such a union.[135]

But two other types of marriage were also possible: Christians might have a type of ratified (*ratum coniugium*) marriage; and might also enjoy legitimate and ratified marriages (*legitimum et ratum coniugium*).[136] A merely legitimate, but not ratified marriage, for a Christian, was one that had not been consummated. Such a union lacked the permanence and stability of a ratified marriage in that a party might freely depart from a non-consummated union.[137] But where the union had been "ratified" (*ratum*), that is, consummated, an unbreakable bond had come into existence which no earthly power could sever.[138]

On this analysis, the rights of infidels always remained essentially insecure.[139] Indeed, subsequent canonistic analysis largely neglected the question of infidel rights, preferring instead to concentrate their efforts on the impact of this teaching on the rights of the newly-Christian spouse.[140] One can nevertheless identify a few canonists—among them, Rufinus and Master Honorius—whose commentaries echoed some of the themes of theologians whose works have already been considered.

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133.   REID, *supra* note 2, at 107.

134.   *Id.*

135.   *Id.* at 108.

136.   *Id.*

137.   *Id.*

138.   *Id.*

139.   *Id.* Infidel marital rights were insecure, it seems, in two respects—since the canon lawyers came to define the essence of infidel marriage as including the right of divorce and remarriage, the marital rights of non-Christians were always insecure even within their own systems, at least as the canonists understood these systems to operate. Infidel marital rights were also insecure where one party converted to Christianity. Should that happen, the newly-converted Christian spouse might be able, in the appropriate circumstances, to leave the non-Christian party and seek remarriage within the Church. *Id.* at 108; *see also* HUGH, *De Sacramentis Fidei*, *supra* note 48, at 507-08.

140.   REID, *supra* note 2, at 108.

B. *Rufinus*

Gratian's work was so well received that his *Decretum* became the focal point of canonistic study and commentary for roughly the next seventy years.   Among the most important of this period's commentators was Rufinus, whose commentary on Gratian's *Decretum* appeared around the year 1160.[141]

Rufinus continued to accept Hugh of St. Victor's account of the double sacramentality of marriage and used it to analyze the relative security of rights in infidel and Christian marriages. The first marital sacrament, represented the soul's union with God and occurred when the person agreed to marriage and to be bound by the "habit of love."[142] This first sacrament however, was not secure. One or the other of the partners to a marriage could always break their union with God and thus withdraw from this sacrament.[143] Rufinus was not surprised that this should be so. The union of the soul and God was potentially unstable—it often happens that the "soul abandons God, or apostasizes from God."[144]

Rufinus then turned his attention to the second sacramental aspect of marriage. This was Christian marriage, properly consented to by the parties and subsequently consummated. Consummation made such a marriage "completely unbreakable" (*omnino . . . irrumpibile*) because it was through the act of consummation that the unbreakable union of Christ and the Church was symbolized.[145]

Like Hugh of St. Victor, Rufinus quoted the passage from St. Augustine that declared the sacrament of marriage to be common among all nations.[146] This passage, Rufinus admitted, seemed to stand against his effort to distinguish unbreakable Christian marriage from less stable infidel unions: after all, read literally, the passage

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141.   For a short sketch of Rufinus's career, see JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 225 (1995). Rufinus worked at a time when canon law was first separating itself from theology as a distinct discipline. Indeed, Rufinus described his work as a "prolix volume for theologians." RUFINUS VON BOLOGNA, SUMMA DECRETORUM [SUM OF THE DECRETAL] 9 (Heinrich Singer ed., 1963) (1901) (citation omitted).

142.   Consent to marriage was the "sacramentum anime ad Deum . . . ita intelligatur anima Deo coniungi per dilectionis habitum." RUFINUS, *supra* note 141, at 442.

143.   *Id.*

144.   *Id.* ("Quia vero primum sacramentum violabile est—frequenter enim anima que adeserat Deo apostata a Deo . . . .").

145.   *Id.*

146.   *Id.* at 442-43.

seemed to support the proposition that marriage was always and everywhere the same.[147]

Rufinus responded to this seeming objection by distinguishing, as Hugh of St. Victor had done, between different meanings of the word "sacrament."[148] Marriage might be sacramental in the sense that God called it into existence as the means by which the human species reproduces; in this sense, all marriage somehow represents the divine plan.[149] But marriage might also be sacramental in a more specialized sense of that term. Fully-consummated Christian marriage fell into this latter category because it represented the transcendent reality of the Christian faith—God's promise that Christ would remain always with His Church.[150]

Rufinus concluded this line of reasoning by proposing three terms to describe these differing realities. Marriage might be initiated (*initiatum*), that is, the parties might have consented to the union but have not yet consummated it.[151] It might be consummated (*consummatum*), that is, the parties, who might or might not be Christian, have sexually completed the union.[152] And it might be "ratified" (*ratum*), that is, it might be a specifically Christian marriage agreed to by the parties and subsequently consummated.[153]

Infidels, on this analysis, could never partake in the highest form of marriage—fully consummated *ratum* marriage. Rufinus subsequently used these ideas to address the question Gratian had put, "Can there be marriage among infidels?"[154] Infidel marriage differed from Christian marriage, Rufinus noted, chiefly with respect to the question of divorce. For this reason, infidels could have legitimate marriage—by which Rufinus meant a marriage validly consented to and properly consummated by the parties—but they could never have *ratum* marriage.[155] Their marriages might never be considered *ratum* because they simply cannot signify the "sacrament of Christ and His Church."[156]

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147. *Id.*

148. *Id.* at 443.

149. *See id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* In developing this vocabulary, Rufinus re-worked the categories devised by Gratian. *See* GRATIAN, *supra* note 127 and accompanying text.

154. RUFINUS, *supra* at 141, at 452-54.

155. *Id.* at 453.

156. *Id.* ("non est ibi Christi et ecclesie sacramentum").

Hence the marital rights of infidels were necessarily less secure than the rights of Christians. Rufinus recalled that Christ had permitted the innocent spouse to separate from a spouse guilty of fornication.[157] There were, Rufinus asserted, two types of fornication: "physical" (*corporalis*) and "spiritual" (*spiritualis*).[158] Spiritual fornication included such crimes as heresy and apostasy.[159] It also embraced marriages that became mixed, that is, marriages in which one party converted to Christianity.[160]

An infidel might commit both types of fornication. An unbeliever might withdraw from the union and seek sexual relations with other parties. In so acting, the non-Christian sinned "diabolically," and the Christian party was thereby freed from her or his former marriage.[161] Similarly, where an infidel spouse sought to force his or her newly converted partner to worship idols or to commit other crimes, the Christian party could freely separate from the unbeliever.[162] Hence, although infidels might, in some respects, enjoy legitimate marriage, the marital rights thereby produced were never absolutely secure. They were always subject to abridgement where one partner chose to follow the Christian faith and the other partner subsequently misbehaved.

C. *Master Honorius*

Master Honorius, who was English in origin, taught between the years 1185 and 1195 and composed his *Summa quaestionum* around the years 1185-1188.[163] Writing at the close of the period that is examined in this article, Honorius reviewed some of that period's principal themes. Honorius recognized that St. Augustine had attributed sacramental marriage to every nation, but he sought to

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157. *Id.*

158. *Id.*

159. REID, *supra* note 2, at 147.

160. RUFINUS, *supra* note 141, at 453-54.

161. *Id.* at 453.

162. *Id.* at 453-54.

163. For a summary of what is known about Honorius, see Charles J. Reid, Jr., *Die Ehelehre Des Magister Honorius: Ein Beitrag Zur Ehelehre Der Anglo-Normanischen Schule* [*The Marriage Teaching of Master Honorius*: *A Contribution to the Marriage Doctrine of the Anglo-Norman School*], 53 JURIST 443 (1993) (book review).

condition the Bishop of Hippo's broad assertion.[164]   Honorius acknowledged that it was possible, though unlikely, that St. Augustine had made a misstatement and used the word "sacrament" when he properly should have used the less theologically significant word "marriage" (*coniugium*).[165]   Honorius thought it more likely, however, that Augustine intended to refer to some deeper sacramental reality.[166]   Honorius thus proposed that the most plausible explanation for Augustine's choice of words is that one should see the sacrament of marriage as arising in the union of Christ with the soul of the faithful believer.[167]   This was an awkward restatement of Hugh's and Rufinus's earlier claims that sacramental marriage in its extended sense represented the soul's union with God.[168]   Honorius never explained how one could attribute sacramentality to unions where the couples had not even heard of Christ, let alone shared in the Christian faith.

Honorius also explored how it was that contempt for the Creator (*contumelia Creatoris*) dissolved the *jus matrimonii*.[169]   Honorius acknowledged that some argued that the act of conversion, by itself, dissolved the rights of marriage.[170]   Since it was forbidden to a Christian to marry a non-Christian (such a marriage was blocked by the impediment known as "disparity of cult"), it was equally forbidden for a newly-converted Christian to remain in a marriage with a non-Christian, or so the reasoning went.[171]

Dryly, Honorius responded that "if these reasons were satisfactory, which is impossible, we might perhaps acquiesce."[172]   He meant by this that it was simply an inadequate answer to attribute the dissolution of all Christian/non-Christian marriages to the impediment of disparity of cult.   The consequence of such an attribution might be to allow all parties to such unions the freedom to

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164. HONORIUS, *Studia Gratiana* [*Studies of Gratian*], *in* DIE EHELEHRE DES MAGISTER HONORIUS: EIN BEITRAG ZUR EHELEHRE DER ANGLO-NORMANNISCHEN SCHULE 321-22 (Benno Grimm ed., 1989).

165.   *Id.* at 321.

166.   *Id.* (summarizing Augustine).

167.   *Id.* at 322.

168.   It was awkward precisely because an unbeliever would not have known of Christ's mission of salvation but would nevertheless be expected to know the natural law written on his or her heart by God.

169.   HONORIUS, *supra* note 164, at 324.

170.   *Id.*

171.   *Id.*

172.   *Id.* at 325.

move to new relationships. Instead, Honorius proposed a distinction between the convert who dismissed his or her former spouse and the convert dismissed by the former spouse.[173] In the former case, the new Christian was prohibited from moving to a new relationship.[174] In the latter case, however, the Christian party was free to move to a new marriage.[175]

In making this claim, Honorius was essentially rejecting the teaching of Robert Pullen, who argued that the Christian party was free to move to a new relationship whether or not the unbelieving spouse had actually dismissed the believing partner.[176] Honorius, however, expanded on the reasons why he believed his position to be correct: contempt for the Creator dissolved the right of marriage, he concluded, but only where the contempt made manifest its presence in "hatred for the Christian faith" (*in odium fidei christianae*).[177] In making this claim, Honorius recognized, at least tacitly, the possibility that some form of marital right endured in the non-Christian spouse, even after the other party's conversion.

CONCLUSION

Many Christian medieval writers agreed upon certain propositions concerning marriage. Marriage was a natural phenomenon and was part of God's plan for His creation. Marriage was a regular feature of life before the coming of Christ. It was governed by basic precepts of the natural law. In His earthly ministry and teaching, Jesus Christ gave marriage new form and definition. He was understood to forbid His followers divorce with the right of remarriage. Christian marriage conferred upon those who entered such a state certain fundamental rights and duties.

This article is concerned with medieval writers' recognition of legitimate marriage with its attendant rights and obligations among non-Christians. This analysis is important for what it says about medieval conceptions of universal natural rights. The focus of this article is the early scholastic period, especially the early and middle decades of the twelfth century.

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173. *Id.*
174. *Id.*
175. *Id.*
176. PULLEN, *supra* note 114, at 947.
177. *Id.*

Earlier scholastic writers were creative in the answers they provided to this question. Indeed, most of the authors considered in this article relied upon a categorization of the sacrament of marriage that would prove evanescent. They identified a two-fold character to the sacrament of marriage. Marriage's first sacramental aspect was universal in character; it represented God's plan of creation and the union of the soul with God. Marital rights in such unions could only be lost for "great cause," understood especially to be the conversion of one of the parties to Christianity. The second sacrament pertained exclusively to Christians in legitimate, consummated marriages. These unions represented Christ's unbreakable union with the Church; the bonds thus created are dissolved by no earthly power.

The thirteenth century would prove to be a period of greater standardization and definitional certainty in the disciplines of theology and law. The double character of the marital sacrament, as described by Hugh of St. Victor, Anselm of Laon, Rufinus, and others, would eventually disappear. But the effort to use this manner of speaking about the sacraments to describe the natural reality of marriage among all peoples represents an important experiment in the discourse of natural and universal rights.

The attempt to apply to alien societies claims of rights thought to be universal typically produces mixed results, because the proposed universal nature of the rights clashes with the member-other distinction inherent in a society's self-understanding. The efforts of a thoughtful, creative theologian like Hugh of St. Victor to apply the universal rights of marriage to non-Christians display both the strengths and weaknesses that consistently characterize such efforts. Hugh endorsed a strong notion of non-Christian marital rights. He was conciliatory and respectful in his discussion of these rights. The marital rights of non-Christians were ordinarily secure; to deny their existence was sinful; they could be lost only for a "great cause." But non-Christian marriages were nevertheless expected to conform to Christian marital ideals. Because they could never conform in an absolute sense, they were also dissoluble under appropriate circumstances. This sort of polarity has, of course, remained a steady feature of rights-talk through the ages.

This article assists in the recovery of the medieval natural rights tradition and its integration into the larger historiography of rights in the Western tradition. It is commonly but mistakenly supposed that human rights are a product of the Enlightenment that arose in opposition to the Christian order that preceded it. Even so eminent a

churchman as Walter Cardinal Kasper, Secretary of the Pontifical Council for Promoting Christian Unity, repeated this error when he wrote that "[h]istorically considered, modern human rights are phenomena of crises, arisen from the collapse of the medieval order."[178] This article and the other articles in this symposium stand in contradiction to this mistaken assumption about the origin of human rights. Human rights, properly understood, are rooted in the Christianity of the Middle Ages.

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178.   Walter Kasper, *The Theological Foundations of Human Rights*, 50 JURIST 148, 151 (1990) (footnote omitted).