The Servitude of the Flesh from the Twelfth to the Fourteenth Century

Marta Madero *

Abstract

This essay explores one of the distinctive features of Western Christian thought in the Middle Ages: medieval canon lawyers’ highly abstract and legalistic treatment of sexual intercourse within marriage, a product of their efforts to give legal meaning to the biblical injunction that spouses “shall be one flesh.” It does so by describing the lawyers’ development of a *ius in corpus*, a right of each spouse to the body of the other for the purpose of sexual intercourse. The canon lawyers treat the *ius in corpus* as a property right: either as one spouse’s ownership of the other’s body or as a real servitude—a type of easement—that the body of one spouse holds over the body of the other. Moreover, a spouse can demand that “possession” of that right be restored to him or her by court order. The canon lawyers’ reasoning “purifies” marital sex of its concrete, physical features and instead transforms it into a legal act that reifies the fiction of the one marital flesh.

“Matrimonial consent is an act of the will by which each party gives and receives a perpetual and exclusive right over the body for the purpose of acts suited in and of themselves for the creation of offspring.”
*Code of Canon Law of 1917, c. 1081, § 2*

“Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage.”
*Code of Canon Law of 1983, c. 1037, § 2*

“Antecedent and perpetual impotence to have intercourse, whether on the part of the man or the woman, whether absolute or relative, nullifies marriage by its very nature.”
*Code of Canon Law of 1983, c. 1084, § 1*

I. *ius in corpus*

Among canon lawyers and other writers with close ties to the church, one frequently finds expression of nostalgia for a better age, when love, consent, and the marital relationship—in the sense of a shared life together and a constant giving of the self—mattered much more than the legalistic regulation of sexual relations; the legal right of one spouse over the body of the other simply followed as a matter of course as one element in this larger marital harmony.

* Professor of Medieval History, Universidad Nacional de General Sarmiento, Buenos Aires, Argentina, and Associate Member of the Centre d’études des normes juridiques Yan Thomas, École des hautes études en sciences sociales, Paris, France. Translated from French by William P. Sullivan.
According to some of these scholars, a shift away from the older conception began in the fourteenth century and culminated in the sixteenth or seventeenth century. A new individualism, arising out of the nominalist movement in medieval philosophy, transformed marriage from the older conception into a mutual exchange of power of one spouse over the other for the purpose of procreation.

For other scholars, the break came with the Code of Canon Law of 1917, which defined the *ius in corpus* too restrictively as the right that marriage confers over the body of one’s spouse. Such scholars have tended to place special emphasis on the influence of Pietro Cardinal Gasparri, who directed the preparation of the Code of Canon Law of 1917. They charge Gasparri with a reductive understanding of marriage that limited its sacramental dimension to a mere effect of consummation and that turned the *ius in corpus* into a *ius ad rem* over the body of the spouse, to the point that it forced canon law doctrine to produce a definition of the “perfect copula.”

In fact, however, careful reading of the medieval sources shows that what would later be called the *ius in corpus* was already in the twelfth century—and even in theological treatises on marriage dating from as early as the 1120s—the object to which a party had to consent in order to create a valid marriage. In addition, one of the tasks of exegesis in the twelfth century, just as in the twentieth century, was to specify what constituted a *copula perfecta*. Certainty about whether or not a couple had become one flesh, thereby realizing the sign of the union of Christ with the church, was thought to depend on a proper definition of the term. The *copula perfecta* was by no means an attack on the sacrament of marriage; it belonged, on the contrary, to its legal form.

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2 On this strain of medieval philosophy, which centers around the rejection of the existence of universals, see generally Alain de Libera, La querelle des universaux (1996).
4 Carlo Fantappiè, Chiesa romana et modernità giuridica 456-57 (2008). Fantappiè analyzes the structure of Gasparri’s *Tractatus de matrimonio*, id. at 463-519. Gasparri’s *sistematica matrimoniale*, id. at 476, was adopted in the 1917 Code and later left its imprint on the 1983 Code. See also Arturo Carlo Jemolo, Il matrimonio nel diritto canonico 127 (1941). On the tradition of scholarship concerning the *ius in corpus* and the topic of marriage in the preparation of the Code of Canon Law of 1917, see Edoardo Dieni, Tradizione “juscorporalista” e codificazione del matrimonio canonico (1999). Impotence continues to be recognized as a natural-law impediment, regardless of the will of the would-be spouses, in the 1983 Code. Indeed, in June 2008 the Italian newspaper *Corriere della Sera*, repeating a story that had appeared in *Il Messaggero* the day before, ran an article under the headline, “Forbidden Marriage in Viterbo: When the Church Excludes the Disabled.” The bishop of Viterbo had refused to marry a young couple because the man had become paraplegic in a car accident. Faced with public indignation over the decision, the Roman Curia expressed its support for the bishop on the ground that impotence is an impediment to marriage under natural law. Consent of a potential spouse does not remove the prohibition if one’s body is incapable of the acts that the church considers necessary for the perfection of the sacrament. Gian Antonio Stella, Nozze vietate a Viterbo: Quando la Chiesa esclude i disabili, Corriere della Sera (Milan), June 8, 2008 (http://goo.gl/1PqOic).
Indeed, a key feature of the Christian legal tradition of marriage emerges from an analysis of the corpus of canon law texts produced from the mid-twelfth to the mid-thirteenth century and of the *summae*, glosses, and commentaries that developed around these texts in the late Middle Ages: the canonists’ concept of marriage is not based on metaphors or analogies to ownership or possession. Their application of the vocabulary of “real rights” to sexual relations is not figurative. It is, on the contrary, quite literal. Although the necessary comparative research remains to be done, the systematic unmetaphorical application of the concepts of real rights to sexual relations between spouses may very well constitute one of the distinctive features of Western Christianity in the Middle Ages.5

This conception of marriage is of course a different matter from the idea of the purchase of the bride, her womb, or her fertility, which is a common feature of a great number of cultural spheres; the vocabulary of purchase in that context is nothing unusual. But what is at issue in canon law is something different. In canon law, the marital union of humans is governed by a meaning that transcends it: the sexual act is the sign of God made man. This led the jurists to speak at length about sexual relations, but to do so in a way that purified them, as it were, of desire and sex, since the logic of the bodies in the marital act becomes something else. And to detect this transformation, one must take seriously the learned montages, clarify the normative fragments that comprise the working framework of the interpreters, and show how the phrase from Genesis 2:24—“and they shall be one flesh”—became a legal fiction, the fiction of the unity of the flesh of the two spouses, that was deployed in complex, highly technical constructions in which, in the medieval period, the mechanisms of real servitudes dominate.

II. Formation of the Marital Bond

Before I present a casuistic analysis of medieval doctrine, I must first introduce my subject—the formation of the marital bond. Beginning in the eleventh century, the church asserted a jurisdictional monopoly over questions concerning marriage and began producing a vast doctrinal literature on marriage that mobilized the efforts of both theologians and canon lawyers. Two major texts appeared around the middle of the twelfth century: the *Decretum* of Gratian (ca. 1139-58) and the *Sentences* of Peter Lombard (ca. 1158-60). Gratian and Peter Lombard are identified with two opposing views on marriage and, more specifically, on the formation of the marriage sacrament. The *Decretum* makes physical consummation the key requirement for the formation of the marital bond. The *Sentences*, on the other hand, hold that words of present consent—as opposed to words of future consent, which give rise to betrothal—suffice to perfect the sacrament.

5 This assertion remains to be tested comparatively. For evidence from Islam see, for example, Kecia Ali, Marriage and Slavery in Early Islam 25-26 (2010) (discussing metaphors used in the Jewish and Islamic scholarly traditions to describe the position of the wife within the marriage). In this respect canonist thought on marriage is guided by the usual dependence of medieval canon law on Roman law. The canon law of marriage does not track its Roman equivalent in this context, but it *does* apply the Roman law of real rights quite literally, not by way of analogy or metaphor.
A recent article by Philip Reynolds unveils a more nuanced panorama by highlighting the features that the two conceptions of marriage have in common. In an analysis of the so-called sentential literature on marriage produced by medieval theological schools in the 1120s, Reynolds finds that the theologians recognized the necessity of a union of bodies for the sacrament to serve as a sign of the union of Christ with the church. Moreover, for these theologians, the object of consent was the sexual act. It is thus necessary to distinguish the pragmatic views of Peter Lombard and the moderni magistri (the anonymous authors of sentential literature)—all of whom accept that impotence is an impediment to marriage—from the view of Hugh of Saint Victor, who idealized marriage without physical consummation.

Reynolds's analysis strikes me as entirely convincing, and my own reading of later texts shows the continuity of what he calls “a perennial coital ‘undertow’ that persisted despite the dominance of the consensual dossier in the canonical tradition.” In fact, a “middle way” won out, most notably in the decretals of Alexander III (d. 1181). This midway position holds that marriage by words of present consent, without consummation, is indissoluble unless one of the parties is impotent or takes religious vows. A final point: within the theory of the formation of the marriage bond, there existed also the notion of matrimonium praesumptum—the name derives from the decretals of Innocent III—which holds that marriage contracted by words of future consent, followed by physical consummation, is as indissoluble as a marriage contracted by words of present consent.

III. Real Rights, Servitudes

Marriage confers on each spouse a right to the body of the other. I have said that the canonists’ concept of marriage is not based on metaphors or analogies to ownership or possession, but rather the direct application of these concepts to relations between husband and wife. Before proceeding any further we must explain the specific terminology and concepts that the canonists and civilians employed, in particular, those of “real rights,” “real servitudes.” In the civil law tradition, a real right is a right over a thing, corporeal or incorporeal, realty or personality. By contrast, a personal right is a right to demand that a person do or refrain from doing something. Ownership is one type of real right, but the category of real rights also includes other types of relationship to a thing. In this essay, the real rights most frequently under discussion belong to a subcategory called predial servi-

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7 This literature has generally been attributed to Anselm of Laon and his followers, a group of scholars usually known as the “School of Laon.” As Reynolds notes, though, the existence of such a school has been called into question by Valerie Flint. See Valerie I.J. Flint, The “School of Laon”: A Reconsideration, 43 Recherches de théologie ancienne et médiévale 89 (1976).

8 Consent is given in carnalem copulam. Reynolds, supra note 6, at 56. According to Reynolds, the phrase comes from the second recension of the treatise Cum omnia sacramenta.

9 On matrimonium praesumptum, see especially Joannes Mullenders, Le mariage présumé (1971).
A predial servitude is a real right that burdens a thing belonging to another person. It permits a field or building (the servient estate) to be placed in a relation of dependency vis-à-vis another piece of property, the dominant estate. The servient estate must either provide some benefit to the dominant estate, for example by permitting transit over (iter) or the drawing of water from (aquae haustus) the servient estate or by allowing the placement of a beam in a shared party wall (ius tigni immitendi), or else abstain from disadvantaging the dominant estate in some way, for example by building a structure that blocks the dominant estate’s view and light (ius ne prospectui vel luminibus officiatur). A personal servitude (the two types are use and usufruct) creates a relationship between a person and a thing over which the person is granted a right of use or a right to extract fruits. In any case, every servitude, whether predial or personal, is a right over a thing. This feature distinguishes the servitude from the obligation, which creates a relationship between two persons: an obligor, who is under a duty to do or give something vis-à-vis an obligee by reason of a contract.

Yet once one begins to ask specific questions about this right, a whole series of casuistic problems arises. Can one say, for example, that it is a right exercised over an object? If so, is the object in question the body or parts of the body relevant to the union, implying continuous possession of the physical object? Or is it a matter of possession of an incorporeal thing—that is to say, possession of a right and not of the thing itself; hence, possession of a servitude that one spouse’s body holds over the body of the other, as one says that an estate has a servitude granting right-of-way over a neighboring estate? Or are we concerned with a personal servitude—that is to say, a servitude exercised by a person over the property of another, such as a usufruct\(^{10}\) or a use? Or could one treat the conjugal duty as being defined not as a real right, but as a legal obligation that arises out of a contract and that permits the obligee to require that the obligor perform or not perform a service? The answer is not clear-cut, but during the period under consideration, the last option seems practically absent from the literature despite the fact that it seems to suit the notion of a “marital debt.”\(^{11}\) One must recall, however, that the clear distinction in classical Roman law between property rights and rights arising out of the law of obligations was blurred in the Middle Ages. Finally, in speaking of the possession of incorporeal things—

\(^{10}\)The language of usufruct is rare in this context; however, Magister Honorius (d. 1213), a canon lawyer of the Anglo-Norman school, applies the concept of usufruct to assert that a spouse has the right to demand sexual relations once words of consent have been exchanged. Citing a passage of the Decretum that discusses the right of a possessor to take the fruits of property (C.2 q.6 c.26), he asserts: “Fructus coitus est unde et coitus sequestrari debet” (“Coitus is a fruit; hence coitus may be the object of sequestration”). Benno Grimm, Die Ehelehre des Magister Honorius 285 (1989).

\(^{11}\)See James A. Brundage, Implied Consent to Intercourse, in Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies 245, 249 (Angeliki E. Laiou ed., 1993) (asserting that the canon lawyers treated the “marital debt” as belonging to the law of obligations). Yet an analysis of the language that the medieval canon lawyers use shows Brundage’s assertion to be unfounded. The vocabulary of the Roman law of obligations—the equivalent of contract and tort in the common-law tradition—is not absent from these texts, but it is overwhelmed by the language of real rights. See Filippo Vassali, Del ius in corpus del debitum coniugale e della servitù d’amore 109-22 (1944).
iura (rights)—and of the reification of relations of power over and among free subjects, medieval canon lawyers transformed free persons into things of sensible substance, subject to possession, something classical Roman law did not allow. In so doing, they made it possible to treat sexual relations between spouses as falling under the heading of real rights instead of the law of obligations.

IV. Casuistry

Let us now turn to questions of method. The casuistic approach that I have chosen to take needs to be made explicit. In one of the last articles published before his premature death, Yan Thomas asserts that casuistic reasoning operates by “stabilizing the exceptional.” In casuistic reasoning “the level of generalization is at its highest,” he explains, “at the very moment of the exception, when a solution is seized upon for the most extreme circumstance.” Thomas himself showed with exceptional perspicacity how the separation between the two sexes was developed from the extreme case of the hermaphrodite; how the extent and limits of the power of a father can be seen in the way that power applies to a posthumously born son; and how the movement of goods in trade can be understood by examining rules that forbid trade and that declare goods sacred, immobilizing them and removing them from market exchange.

Thomas’s 2005 essay also offers medievalists a specific method of reading medieval glosses and commentaries. The medieval casus has four levels of analysis: the text that is being commented on; the commentary; references to other texts; and the interpretations of the cited texts in their own contexts. This narrative, pieced together from

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12 As Emanuele Conte has shown, the medieval canon lawyers began much earlier than medieval Roman-law scholars to mix together incompatible concepts of Roman law, in this case the difference between property rights and obligations. Innocent III, for example, applies the language of possession—from property law—in a wide variety of contexts. See Emanuele Conte, Servi medievali (1996) [hereinafter Conte, Servi medievali]; Emanuele Conte, Framing the Feudal Bond: A Chapter in the History of the ius commune in Medieval Europe, 80 Tijdschrift voor Rechtsgeschiedenis 481 (2012) (discussing the use of real rights to describe feudal bonds).


14 Id. Ari Bryen shows a different way of thinking about and resolving the extreme limits of a rule. See Ari Z. Bryen, When Law Goes off the Rails: or, Aggadah Among the iurisprudentes, 3 CAL 9 (2016). These different strategies are not mutually exclusive.


17 Yan Thomas, La valeur des choses, 57 Annales 1431 (2002).

18 A casus is a summary and discussion of the content of one or more fragments of Roman law, with references to and discussion of other relevant Roman-law texts. See Peter Weimar, Die legistische Literatur der Glossatorenzeit, in 1 Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte 168, 213 (Helmut Coing ed., 1973).
disparate texts and themes by means of fragmented\textsuperscript{19} analogies, makes up the warp and weft of casuistic reasoning. The resulting montages—veritable \textit{cadavres exquis}—are not, or not merely, stylistic exercises. Rather, they constitute concrete forms of legal thinking. In working with casuistic texts, I have therefore chosen to paraphrase the content of textual references instead of simply giving the citations. To be sure, this quite ordinary methodological proposal, first made by Hermann Kantorowicz,\textsuperscript{20} opens the way for a kind of fastidious digression. But it also shows how these learned bricolages are put together with bits and pieces that preserve the signs of their previous uses.\textsuperscript{21} Acts that, in their original contexts, are described in the vivid language of violence, desire, and emotion are thus transformed into specimens of juridical reasoning, eminently concrete and neutral in tone.

This way of delineating a concept by its outer edges, its limits, allows me to demonstrate two things. First, one must look to casuistic writing concerning impotence and failed attempts at accomplishing the sexual act if one wishes to find the essential element of marriage, the element without which the sacrament of marriage cannot exist, regardless of the will of the parties. Second, the rules that govern the operation of the right to the body of one’s spouse are marked out by the boundaries at which the right begins and ends. Three areas that demarcate the existence of this right therefore deserve scholarly attention: creation of a permanent servitude over the spouse’s body; remedies to recover spouse and servitude if a spouse’s body is improperly alienated; and adultery, which divides the couple’s united flesh and provides the sole grounds for extinguishing the easement, depriving the guilty spouse of a right over the other’s body. But to borrow a phrase from Yan Thomas, I shall seek to avoid the deadly boredom of generalizations that might be necessitated by treating so many topics in a paper of this scale and will focus on only one of these areas: remedies for recovery of one’s spouse. These remedies are what in the civil law tradition are called possessory and petitory actions (actions to enforce possession and ownership).

\section{V. A Civilian Discusses Canon Law}

Let us begin with a text of Roffredus of Benevento, a thirteenth-century civilian (a specialist in Roman law) who was familiar with, but was sometimes removed from or confused by, canon law procedure. The text is a canon law pleading that Roffredus drafted sometime in the 1230s. It poses the question, “How a husband should lay claim to a wife who

\textsuperscript{19} See also Natalie B. Dohrmann, \textit{Means and End(ing)s: Nomos Versus Narrative in Early Rabbinic Exegesis}, 3 CAL 30 (2016) (discussing structure dominated by “commentary, fragmentation and quotation, and a granular attention to language”). A more systematic comparative exploration of strategies of textual fragmentation and recreation in diverse historical contexts is desirable.


has left him on her own initiative and against whom he wishes to bring a possessory action.”

22 We must pause once again to explain the meaning of possession. In Roman law, possession is clearly distinguished from ownership (dominium). Possession is a matter of fact, designating actual control over a thing, whereas ownership is a matter of law. Possession requires two elements: physical control of the thing (corpus) and the will (animus) to possess the thing. In principle, possession can be held only over corporeal things, but one finds in the Roman texts a quasi possidere ius that applies to certain servitudes and that undergoes a notorious expansion in the Middle Ages. This tendency to apply the rules of possession to things lacking physical substance is a fundamental feature of medieval legal thinking concerning relations of power and subordination.

Let us return now to Roffredus. His argument runs as follows. It often happens that a husband whose wife has left his house wishes to bring an action to establish ownership over her. But he should be advised to bring an action to establish possession over her instead, since it is better to be already in possession of whatever one is claiming; that way, the opposing party will be forced to bring a petitory action (Dig. 6.1.24; an action to establish ownership). The pleading must state that so and so (say, Titius) has contracted marriage with so and so (say, Bertha); that he has cohabited with her for a long time; and that the said Bertha showed him all the signs of respect (obsequia) that wives ought to show toward their husbands. Yet the said Berta has left him on her own caprice (propria temenitate); and fearing that he will be dispossessed of his marital or wifely possession, he asks that his wife be returned to his possession. In this connection, one may cite the decretals X 2.13.13 and 2.13.8, which discuss a possessory claim brought by a husband.

A wife’s claim against her husband is similar. If a husband leaves his wife on his own initiative (propria auctoritate), she must plead that her husband has abandoned her after a long life together; that he has performed all the duties (servitia) that a husband owes; and that, fearing she will be dispossessed, she petitions that her husband be restored to her possession. The wife can cite the decretals X 2.13.10, X 1.29.16, and X 4.19.3, which establish the validity of a possessory action for both the wife and the husband. For his part, the husband seeking to regain possession of his wife can cite the general norm of X 2.6.1,23 which provides for immediate restitution of the person who has left the marriage, save in certain cases: first and foremost, if one suspects the husband of wanting to compel

22 Roffredus, Qualiter debeat maritus petere uxorem que propria auctoritate ab eo divertit et vult agere possessorio, in Solemnis atque aureus tractatus libellorum, at fol. 8v (Centro di studi di storia del diritto italiano, Università di Torino 1968) (1500).

23 See Emanuele Conte, Gewer, vestitura, spolium: Un’ipotesi di interpretazione, in 1 Der Einfluss der Kanonistik auf die europäische Rechtskultur 169 (Orazio Condorelli et al. eds., 2009), reprinted in Mélanges en l’honneur d’Anne Lefebvre-Teillard 267 (Bernard d’Alteroche et al. eds., 2010) (discussing this rule of canon law and in particular the history of the famous canon Redintegranda (C.3 q.1 c.3)—originally aimed at protecting bishops but later applied as a general rule—which required restitution of possession before the beginning of trial). The text in question is as follows (C.3 q.1 c.3): “Redintegranda sunt omnia expoliatis uel eiectis episcopis presentaliter ordinatione pontificum, et in eo loco unde absesserant, funditus reuocanda, quacumque conditione temporis, aut captituatione, aut dolo, aut uiolentia malorum, et per quacumque iniustas causas, res ecclesiae, uel proprias, id est suas substantias perdidisse noscuntur.”
a false confession of adultery, or if he publicly has a concubine (X 2.6.1); or if one suspects abuse on his part (X 2.13.8, 13). In those cases, the husband is required to swear under oath not to do harm to his wife. He must also post security, which Roffredus calls “the best remedy” (\textit{optimum remedium}). If the husband turns out to be so cruel that it is unsafe to return his wife to him despite the “fragile remedy of security” (as the \textit{Digest} puts it in a different context), or if he harbors a mortal hatred for her, the wife cannot be returned to his possession. She is instead entrusted to a group of honest women chosen to keep her away from her husband and his parents until the end of the trial. At the end of this discussion, however, Roffredus asks himself: what protection can one call upon as regards possession when one is confronted with a spouse who has gone away, without a judgment regarding separation or of annulment having being pronounced? In truth, he confesses, none.

In fact, the possessory interdicts of Roman law, which protect one party’s possession until a court can rule on title, are ill suited to the claim of a spouse. Roffredus first mentions the interdict \textit{unde vi}. This interdict protects the possessor of a piece of real property whose land was taken from him by violence. It also protects the quasi-possession of a real servitude. But Roffredus does not take into account that, for him, a spouse is a movable good. The interdict \textit{unde vi}, meanwhile, protects only immovable goods—that is to say, it applies only to a piece of land, a building, an unimproved plot, or, as a general matter, something that forms a unity (literally, a body) with the soil (\textit{qui de re solo cohaerenti deiciuntur}). Under the principle of \textit{superficies},\footnote{The rule of Roman law whereby objects attached to the surface of land are deemed to form part of the land itself. If I plant trees or build a building on land, the trees or building will form part of the land under the principle \textit{superficies solo cedit}.} the interdict can apply to a house but not to movable property, unless that property is attached to (“forms a body with”) an immovable that one wishes to recover. Thus as a Roman-law text (Dig. 43.16.1.7) cited by Roffredus explains, if someone is thrown by force (\textit{deiectus}) from a ship, the interdict \textit{unde vi} will not lie. The same is true if someone is dragged from (\textit{detractus}) a vehicle.\footnote{The twelfth-century jurist Placentinus adds to these case studies the example of the person pulled from his horse. See Placentinus, \textit{Summa Codicis} 373 (Francesco Calasso ed., 1962) (1536) (\textit{vel de navi, vel vehiculo, vel de equo non interdicit}).} The interdict is thus not operative except for objects such as trees, which form a unity (“a body”) with the soil, or for the fruits produced by those trees. It does not lie for other objects that a possessor may find himself inside or on top of.

This textual reference to Dig. 43.16.1.7 is important. It allows Roffredus to test the boundary between movable and immovable property and to consider objects that, although movable, have in common with immovables that they carry persons, like the land on which humans tread. The spouse partakes analogically of the nature of vessels and vehicles (and horses), insofar as they carry persons, without, however, being assimilable to immovables. One cannot exclude the possibility that his intent is ironic, since Roffredus elsewhere describes the consequences of assimilating the right over the body of one’s spouse to the
category of real rights in ironic tones. Husband and wife are not immovable things, says Roffredus. Rather, they are “movable and self-moving” things (\textit{mobili[a] et se moven[tia]}).\textsuperscript{26}

If one attempts to reconstruct the argument Roffredus is making with his references to Roman law, one sees that spouses are, for legal purposes, comparable to slaves—except that spouses are free persons. Spouses are not immovable property that one can lose possession of. Nor do spouses belong to the problematic category of things that carry persons yet can also be trodden on like the soil. Like ships and vehicles, spouses are movable things. They can be assimilated to the category of things that move on their own. In any case, a dispossessed spouse cannot have the benefit of the interdict \textit{unde vi}, which in Roman law lies only for the recovery of possession of immovable property. Unlike his contemporary Odofredus,\textsuperscript{27} Roffredus refuses to extend the interdict to cover movable property, particularly slaves and animals. He also apparently rejects, at least in this context, the theory that what is being recovered is a real servitude. Yet even if he refuses to grant an interdict \textit{unde vi}, Roffredus does grant a spouse a cause of action under the decre- tals that he cites. In canon law, this form of action is called a \textit{condictio ex canone}. When a law specifies that a party may bring a claim but fails to specify the form of action, the party may bring a \textit{condictio}. A \textit{condictio} may be \textit{ex canone}, pursuant to one of the decre- tals Rof- fredus cites; \textit{ex lege}, pursuant to book 13, title 2 of the \textit{Digest}; or \textit{ex canone Redintegranda}.\textsuperscript{28} All three types of \textit{condictio} make it possible to extend the application of the possessory inter- dicts to situations that Roman law did not contemplate.

Roffredus thus concludes that a spouse technically has no recourse to the possess- sory interdicts of Roman law. This conclusion follows naturally from his understanding of a spouse as movable, not immovable property, since in his view, spouses cannot have re- course to the interdicts protecting possession of movable goods. The route of granting an action under canon law, however, was open thanks to a number of decreitals compiled in

\textsuperscript{26} Roffredus’s assertion refers to a passage of the \textit{Codex} and two fragments of the \textit{Digest}. See Code Just. 7.34.2; Dig. 50.16.93; Dig. 50.16.115. The \textit{Codex} passage affirms that it is unnecessary to invoke \textit{longi temporis praescriptio} to establish ownership of slaves (which are considered movable property); usucapion suffices. The \textit{Digest} fragments, on the other hand, come from the title \textit{De verborum significatione} in book 50. It is possible that Roffredus is using these two references to allude to the opposition between movable and immovable property. The first fragment discusses the distinction between ownership and possession as well as the differences among \textit{fundus, ager, and praedium}—all types of immovable property. The second describes both movable things (\textit{mobilia}) and things that move on their own (\textit{moventia}), such as animals. \textit{Mobilia} and \textit{moventia} are deemed to mean the same thing. An exception is made, however, for a testator who intends to refer in a will clause only to animals “quia se ipsa moverent”; in such a case, the two terms are not identical. But Roffredus may also be alluding to things, such as a person, that one can possess but cannot own. See Dig. 50.16.115 (“Quidquid enim adprehendimus, cuius proprietas ad nos non pertinet, aut nec potest pertinere: hoc possessionem appellamus.”). See also Glos. ord. ad Dig. 50.16.115, v. \textit{Nec potest pertinere} (adding the explanation “ut homo liber quem quandoque possidemus”).

\textsuperscript{27} Odofredus, Lectura super Codicem, ad Code Just. 3.6.3, n.13, at fol. 137v (Arnaldo Forni 1968) (1552). In the case of a fugitive slave, for example, I can bring a claim for possession because it is difficult to prove ownership. The same is true for \textit{militis} who seek to recover falcons, horses, or dogs. Odofredus concludes: “Et haec omnia probamus per legem illam, [Code Just. 11.48.14].” Jurists regularly cite Code Just. 11.48.14 when discussing real servitudes. See Conte, Servi medievali, supra note 12.

\textsuperscript{28} On the canon \textit{Redintegranda}, see supra note 23.
the *Compilationes antiquae* and later published in the *Liber Extra*. These decretals discuss the circumstances under which one spouse may bring an action for *restitutio* of the other spouse. They often also reflect on whether petitory or possessory actions ought to be available to spouses. Four of these decretals are found in the title *De restitutione spoliatorum*, which forms part of book 2, on procedure, of the *Liber Extra* and the *Compilationes antiquae*. Others, scattered elsewhere in the *Liber Extra*, touch incidentally on the same subject. Altogether, three date from the pontificate of Alexander III (1159-81), one each from the reigns of Lucius III (1181-85) and Clement III (1187-91), and six from the reign of Innocent III (1198-1216).

Overall, systematic use of possessory and petitory actions for spousal restitution claims can therefore be said to have begun in the 1170s at the earliest and become noticeably more frequent in the time of Innocent III. Six decretals date from the period 1198 to 1209. These decretals confirm the canon lawyers in their tendency to interpret the most varied types of relations in terms of real rights.

**VI. Possession with a Taste of Ownership**

Within this sizable set of decretals on recovery of a spouse, we shall concentrate on three decretals in particular drawn from the title *De restitutione spoliatorum* in the *Liber Extra*. The first, *Ex transmissa nobis* (X 2.13.8), is undated but belongs to the pontificate of Alexander III. It describes the following fact pattern: a soldier requests restitution of his wife, alleging that he is legally married to her and has had carnal knowledge of her. Alexander holds that if these allegations are true, the wife must be restored to him provided that it is certain that he will do her no harm. But if there is reason to believe that the husband is motivated by mortal hatred, the wife must remain under the protection of honest women in order to prevent her husband or his parents from having contact with her or hurting her.

We can now look at the *casus*, the framework of understanding of a given rule. The *casus* begins: we do not know the grounds on which the wife left her husband. Since abuse does not constitute sufficient grounds for leaving one’s husband, one must suppose that the wife answered her husband’s claim with the allegation that the marriage was void.

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29 2 Comp. 2.7.3 (X 2.13.8) (*Ex transmissa nobis*, Alexander III); 1 Comp. 2.9.8 (X 2.13.10) (*Ex conquisitio*, Lucius III); 3 Comp. 2.7.3 (X 2.13.13) (*Litteras tuas*, Innocent III, 1201); 3 Comp. 2.7.4 (X 2.13.14) (*Ex parte*, Innocent III, 1209).

30 1 Comp. 1.21.21 (X 1.29.16) (*Caussam matrimonii*, Alexander III); 3 Comp. 2.3.1 (X 2.6.1) (*Ad boe Deus*, Innocent III, 1198); X 2.6.4 (*Acedens*, Innocent III, 1200); 1 Comp. 2.5.un. (X 2.10.1) (*Intelleximus*, Clement III); 1 Comp. 4.20.3 (X 4.19.3) (*Pern*, Alexander III (1170-71); 3 Comp. 4.14.2 (X 4.19.8) (*Gaudemus*, Innocent III, 1201); 3 Comp. 5.8.10 (X 5.16.6) (*Intelleximus*, Innocent III, 1208).


by reason of consanguinity. In addition, the proviso “insofar as you have established” (quatenus, si vobis constiterit) indicates that restitution may be refused if the husband lacked possession of his spouse before she left him (cum nondum ipsius possessionem habuerit)—that is to say, if the couple had not already had sexual relations. If on the other hand possession had been established (i.e., if sexual relations had taken place), the wife must be restored to her husband after he posts security. This is, the casus goes on to explain, a special type of restitution, since it is necessary to prove three things: ownership (“that is to say that the marriage was legally entered into” [sic et matrimonium contractum esse legitimum]), possession (obtained through sexual relations), and dispossession.

The gloss explains that there is possession only if a valid marriage has been contracted beforehand. De facto possession alone, without valid marriage, is not enough, since one cannot possess a free person. In marriage, however, “the possessor is possessed.” Thus the words of present consent required to create a valid marriage also create an ownership interest, whereas sexual relations establish possession. As a result, a spouse who wishes to escape from the marital bond must raise an exception, such as an impediment of consanguinity that renders the marriage void. In this decretal, the wife attempts to prove that no property relationship exists between her and her purported husband and that therefore his claim of possession is without foundation in law, since the law of marriage does not recognize de facto possession—only possession based on legitimate ownership. The possessory interdicts normally protect a party’s actual possession of property until the question of ownership can be settled. But in the case of marriage, the party who wishes to claim possession must always prove that he or she also has ownership. The interdict for marriage thus belongs to the set of possessory interdicts that “include a question of ownership” (proprietatis causam continent). As the fourteenth-century jurist Baldus put it, the interdict for marriage “smacks of an ownership case.”

VII. Perpetual Alienation of the Body

The second decretal, Litteras (X 2.13.13), dates from 1201. In it, Innocent III tries to resolve a conflict between two earlier decretales, the Ex conquestione (X 2.13.10) of Lucius III and the Causam matrimonii (X 1.29.16) of Clement III (r. 1187-91), about whether restitution can be ordered before the validity of the marriage has been determined. Lucius III says yes, Clement III no. The fact pattern is as follows: a woman named Guglielma has left her husband, B., alleging that they are related in the fourth degree of consanguinity and offer-

33 Gl. ord. ad X 2.13.8 v. ab eo cognita (“[N]ec est simile hoc possessorium alius possessoriis de recuperanda possessione: quia ibi non est necesse probare de iure. [X 1.19.10.] Hic non sufficit sola possessio: quia possesso hic haberis non potest sine iure: ut [X 2.13.14]. Quare non sufficit sola possessio? Quia liber homo possideri non potest. Hic est talis possessio, quod qui possidet, possidetur. [X 2.14.13; X 2.13.14; X 5.17.6].”)

34 Baldus de Ubaldis, Lectura super Decretalibus ad X 2.12 (Milan, Ulrich Scinzenzeler 1489) (“Quaero utrum aliquod possessorium sapiat causam proprietatis, respondes sic, ut quando possessorio debet esse iustificatum et fundatum titulo et iure aliquo quod non sit momentaneum . . . .” (citing Dig. 43.2.2; Dig. 43.19.3.13)).
ing to furnish proof of her allegation. For his part, the husband asks that his wife be restored to his possession. The wife claims that she fears her husband’s cruelty and asks that restitution not be made before evidence as to the non-validity of the marriage is presented. The archdeacon asks the pope to rule on whether immediate restitution may be granted when the defendant is ready to offer proof of a prohibited degree of consanguinity for which no ecclesiastical dispensation is possible. In other words, is the rule that applies here different than the one that applies in situations in which an ecclesiastical dispensation would be possible, as when a degree of kinship, or some other obstacle is alleged but is susceptible to dispensation—provided that the evidence is immediately presented?

Pope Lucius III had held in *Ex conquestione* that immediate restitution is permissible even when a blood relationship is too close to allow ecclesiastical dispensation. There is, he held, no danger of incest if an order of restitution is granted. The party who refuses to return to his or her spouse on grounds of consanguinity may simply refuse to fulfill the marital debt. In *Causam matrimonii*, on the other hand, Clement III had held that restitution was futile in a case of consanguinity, because once an impediment of consanguinity has been proved, he reasoned, the court could not possibly order restitution to possession: the right of possession depends on ownership. Finally, some jurists had taken a compromise position by deciding on a case-by-case basis. If the degree of consanguinity was one that divine law prohibits and for which no human dispensation was allowed—i.e., consanguinity within the second degree, or either affinity or consanguinity by a relationship of descent—restitution had no place. But if dispensation was possible, immediate restitution of possession could be granted because, in such an instance, the spouse had no grounds for refusing to fulfill the marital debt.

Innocent III declines to reverse either of his predecessors’ decretals. He instead holds as follows. If the degree of consanguinity alleged is prohibited by divine law and the evidence is ready to be examined, restitution of possession will be ordered; however, the parties will be required to swear that they will refrain from sexual relations while the case is still pending. If, on the contrary, the evidence is not ready to be examined, there will be a presumption against her, as one who “left her husband purely on her own caprice” (*sua tantum temeritate recessit a viro*). She will be required to return to her husband, all the while humbly declining to satisfy the marital debt until she is able to furnish proof of the couple’s degree of consanguinity. Restitution of possession will be withheld only when the husband’s cruelty is manifest, which is a sufficient ground to refuse restitution pending final judgment. But even in such a case, if the claim of ownership is proven and the bond declared legitimate, there is no obstacle to the wife being restored to the husband’s possession.

The gloss to this decretal raises a further problem that deserves discussion. Can a spouse refuse the marital obligation? The gloss reads as follows:

According to some authorities, if he has chased her out of his house, he cannot ask for her restitution, since he has dispossessed himself. See C.27 q.2 c.21. I believe, though,

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35 See Gl. ord. ad X 2.13.13 v. *divina* (“Dicas quod Levitico prohibetur secundus gradus in descendentibus, non in collateralibus: unde in secundo collaterali dispensare potest ecclesia.”).
that if he wants to have her back, it is not an obstacle that he has driven her away, because he is considered to have been deprived of possession by the very fact that he seeks her back but she does not want to return. But could an exception lie for an agreement not to bring suit? It is apparent, for example in C.33 q.5 c.4, that a pact or agreement is not valid in such cases. See the end of the chapter on transactions, X 1.36.11. As long as both spouses remain on this earth, no pact is valid, and they cannot release themselves from the marriage, even if they were to swear an oath—see concerning the oath X 2.24.11—and even if they took vows, see X 3.32.14, because a vow has no force against a marriage. See C.35 q.6 c.4. See also, concerning a man who has had relations with a relative of his wife, X 4.13.5. Nor does an exception of res judicata lie, since the will is inconstant. On res judicata, see X 2.27.7; X 2.27.11.36

We must now try to reconstruct the party allegations that underlie the gloss, in order to understand the web of juridical reasoning in it. One of the canons that the gloss cites (the canon Agathosa [C.27 q.2 c.21]) consists of a letter of Gregory the Great to a certain Hadrian, a notary in Palermo. The text recounts the claim of a wife who had alleged that her husband had entered into a monastery without her consent. A husband was permitted to join a monastery if his wife had accepted his decision to take vows and had promised herself to take the veil. Bernard of Parma, author of the ordinary gloss on the Liber Extra, rejected the position taken in this canon. In his view, if the wife later decided that she wanted her husband again and he refused, she was dispossessed and had a ground for claiming restitution. Another canon suggests, however, that two spouses may in fact agree not to demand sexual relations from one another. In this text, Saint Augustine advises a married woman who has taken a vow of chastity with the consent of her husband: “If you have made a promise to God by mutual agreement, you must persevere in keeping it until the end.”37 For Bernard, on the other hand, no agreement concerning marriage or the marital debt is permitted, even if made under oath, even if one spouse takes vows (since a vow cannot be kept if it contradicts the words of present consent to marriage), even if certain canonists—especially Johannes Teutonicus, says the ordinary gloss to X 3.32.14 v. propositum castitatis—claim that a spouse may escape his words of present consent by living as a hermit,38 or even if one spouse has leprosy. Confessions of impediments to marriage do not break the marital bond, since it often happens that spouses collude to try to remove a yoke that they can no longer bear on the pretext of consanguinity or impotence.

36 Gl. ord. ad X 2.13.13 v. divertit (“Alias si eam repulisset, non potest petere restitutionem, cum seipsum expoliasset, arg. [C.27 q.2 c.21]. Sed contra credo: quod hoc non obstaret, si velit ipsam rehabe, qui eam expulit, quia eo ipso quod repetit ipsam, et ipsa non vult ad eum redire, intelligitur eum spoliass. Sed nunquid haberet locum pactum de non petendo? Videtur quod sic [C.33 q.5 c.4] in talibus non valet pactum, vel compositio. Supra [X 1.36.11] ita quod uterque remaneat in seculo, nullum pactum ibi valet, nec absolvere se posseunt, etiam si iurarent, [X 2.24.11] et etiam si voverent arg. de convers. coniuv., [X 3.32.14] quia confessio etiam ibi locum non haberet contra matrimonium: ut [C.35 q.6 c.4] et infra de eo qui cogn. consangui. uxo. suee, super eo [X 4.13.5]. Nec etiam exceptio rei iudicatae locum habet ibi, unde voluntas ibi deambulatoria est. infra de re iud. [X 2.27.7; X 2.27.11].”).


38 Gl. ord. ad X 3.32.14 v. propositum castitatis (“De vita eremitica dicunt quidam, quod soluit sponsalia de presenti. arg. [C.27 q.2 c.26]. Alii dicunt quod non, unde si eremita contraferet matrimonium, teneret: quia potest habere proprium. [C.19 q.3 c.7.] Io.”).
One must not be fooled. Even an earlier judgment has no force against the marital bond or the marital debt, since in marriage cases earlier judgments never become res judicatae. The absolute impossibility of escaping the marital debt has a dizzying aspect to it. But to the canonists cited here, it is this unconditional alienation of one’s body to another that gives legal meaning to the fiction that the couple becomes one flesh.

**VIII. Intermezzo: A Quaestio of Bartholomeus Brixensis and an Extreme Example of Huguccio**

One can find an example of this (almost) unlimited obligation in the work of the thirteenth-century canon lawyer Bartholomeus of Brescia. In one of his *quaestiones dominicales*, Bartholomeus discusses a question of the sort often debated in the universities. A married convict who has been sentenced to decapitation begs the judge to spare his life as he is walking to the scaffold. The judge consents on condition that the condemned enter into a monastery; however, he warns the condemned that if he ever emerges from the monastery he will be decapitated. The condemned accepts the condition, but shortly thereafter his wife asks that he be restored to her possession. Two questions then arise for debate. Should the husband be returned to his wife? If so, should he be decapitated?

Speaking in favor of restitution, Bartholomeus asserts that one spouse cannot divide the one flesh of a married couple against the other spouse’s will while both are living. To allow such a division would risk the moral downfall of the spouse who would be deprived of his or her right to the other’s body. Moreover, to live a cloistered life one must be motivated by free choice, not inspired by fear. Next, not ordering restitution would effectively punish an innocent party—the wife—who would be deprived of her *ius in corpus* even though she committed no offense. Finally, the spousal servitude can be terminated only on the ground of adultery. Now, once the husband leaves the monastery, what are the arguments against his decapitation? First, in leaving the monastery he will have acted “under the authority of the law” (*iuris auctoritate*) and thus does not deserve punishment. Second, he was the object of the decision, rather than the one who requested it. Third, he did not leave the monastery of his own free will; rather, his movement was his own, but it was not voluntary, as he was acting under the order of a judge.

Moving on to the opposing argument: in favor of the non-restitution of the spouse, Bartholomeus notes that the wife arguably consented to the couple’s separation at

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39 Bartholomeus Brixensis, *Quaestiones dominicales* 89-90 (Cologne, Gervinus Calenius et Haeredes Iohannis Quintelii 1570).

40 For the text, see Gérard Fransen, Les “questiones” des canonistes (III), 19 Traditio 516, 525 (1963) (“Pro maleficio quidam tractus ad mortis supplicium impetravit a principe uitam sub hac conditione ut monasterium intraret et addidit princeps quod si exiret capite puniretur. Tandem eum ingressum repetit uxor. Quaeritur an reddi debeat et si reddatur an debeat occidi.”). For the “solutio” to the problem, see Gérard Fransen, *Les Quaestiones Cusanae*: Questions disputées sur le mariage, in *Convivium utriusque iuris iuris* 209, 214 (Audomar Scheuermann et al. eds., 1976) (“Puto enim posse reuocare maritum siue ignorauit eum taliter convenerunt fusisse [siue non]. Nam perseverare [non] intelligitur qui resistere non potuit et quamuis [non] redeat non incidit in penam quam semel euasit. Voluntarius egressus interdictus sibi ar. vi. [C.7 q.1. c.35; C.22 q.4 c.22].”)
the outset, without even a display of disagreement. She cannot prevail on the basis of ignorance of the law, since the condition imposed on her husband was publicly announced. Furthermore, one should not credit a wife who seems to wish for her husband’s death. If, therefore, the husband leaves the monastery, he must be decapitated, since he was aware of the consequences of leaving. He might have claimed that he had not left the monastery “because of fear for his person,” or he might simply have claimed that he refused because when someone enters a monastery and then leaves again right away, it is as though that person had never entered the monastery in the first place. But he made no such claims.

Now, finally, Bartholomeus’s solution to the *quaestio*: the husband must be restored to his wife’s possession because of the servitude she holds over his body. For this reason he did not leave the monastery voluntarily, and he should therefore not be decapitated. If in his decision the judge stands at the threshold of imposing capital punishment and admonishes the husband about his impending death, he can still interpose an exception in favor of the woman demanding that the defendant be restored to her. Only death itself is effective as an escape from the obligations of the body.

According to the canon lawyer Huguccio, a slightly older contemporary of Bartholomeus, not even a pope has the power to deny a spouse’s request for restitution. Even if a married man becomes bishop, or for that matter pope, he must be restored to his wife’s possession if he took vows without persuading his wife to do the same and she later seeks restitution. The wife may present her request to a church council, the cardinals, or even to the pope. Indeed, if her husband happens to be pope, he will be required to order himself to return to the possession of his wife. On the other hand, a husband who has taken vows no longer has the right to demand sexual relations from his spouse; he permanently alienated his *ius in corpus* by taking vows. Yet he is required to submit to his wife’s request for sex, since no one has a right to renounce a right that belongs to someone else.41

**IX. In possessione carnalis copulae**

The third decretal that we need to examine, *Ex parte* (X 2.13.14), describes the following fact pattern: a young woman who has reached the age of eligibility for marriage comes to the bishop of Siena. While she was still in puberty, a paternal uncle had promised her in marriage to a citizen of Siena who was less than seven years old; she was “led across” (*transducta* = formally transferred) into the house of the betrothed. Not wishing to follow her uncle’s choice, she asks to marry someone else. Innocent III’s decision, dated 1209, holds that the request for the restitution of the young woman should be rejected, because the *traditio*, the “transfer,” could not give rise to possession, as it was neither preceded nor

41 Huguccio, Summa, MS 10247, ad C.27 q.2 c.21, fol. 233va, Codices Latini Monacenses, Bayerische Staatsbibliothek, Munich (“Quid si sit episcopus factus? Quid si papa? Respondeo: si illa non potest induci ad continentiam, credo de iure esse reddendum, etiam <si> papa. Sed coram quo repetetur? Coram concilio, vel cardinalibus, vel coram ipso papa, et sicut de alio faceret rationem, ita faciat de se, et exigat a se ipso quod debet reddere . . .”).
followed by “a betrothal or legitimate consent” (sponsalia vel consensus legitimus), which was impossible in any event in view of the boy’s age.

The notabila that discuss this casus lay stress on the mode in which possession is to be acquired: “When one claims restitution of this type, it is necessary to prove that the marriage is legally valid and that there has been physical possession—i.e., by means of sexual intercourse—in order to obtain restitution. Possession does not arise unless the marriage is valid.”42 The ordinary gloss,43 meanwhile, gives examples of cases in which possession does not give a right to restitution because the de facto possession was illegal. Thus restitution is refused in cases in which a heretic claims possession of property belonging to a church, a layman claims possession of a right to receive a tithe, and a man claims as his wife a close female relative.

Concerning his predecessor’s decretal, Innocent IV later observed that some commentators centered their arguments on the absence of possession. He preferred for his part to base the decision on the fact that the young woman could not be restored because she had never been the wife de iure of her would-be husband. In fact, she was not even in his de facto possession. The couple showed none of the usual signs of possession: she did not wear a ring, he never called her sponsa or treated her as if they were married, and above all there was no physical possession. Only someone who has been “in possession of carnal relations” (in possessione carnalis copule) can claim restitution. The grammar of the phrase deserves comment. The word “possession” is here construed with a genitive, “of carnal relations,” with the result that “carnal relations” becomes the object of possession. This may have been necessary because the word for “possession” is itself in the ablative; one can imagine an alternative construction with “carnal relations” in the ablative, in which case it would be instrumental: one takes possession “by means of carnal relations.” The existing phrasing may result from a desire not to juxtapose two distinct uses of the ablative. But the resulting language is clear: one takes possession of one’s spouse through an act of the flesh, and the act of sexual intercourse is the factual predicate for possessio.

42 Notabilia ad X 2.13.14 (“In tali restitutione petenda, necesse est probare ius matrimonii, et possessionem corporalem, scilicet per carnalem copulum ad hoc ut detur restitution. Item ista possession non procedit sine iure.”).
43 Gl. ord. ad X 2.13.14 v. commodo destituta (“Sic [Dig. 32.1.9] quia per solam traditionem nihil egit. ubi enim nulla praecedunt sponsalia, vel matrimonium, nulla habetur possessio . . . unde ex sola possessione facti nulla servitus vel obligatio hincinde contrahitur, nec restitutioni peteti potest, cum nulla possessione iuris hic fuerit, unde haereticus non potest in iure petere rerum ecclesiasticarum restitutionem, [C.23 q.7 c.1, C.23 q.7 c.2] nec laicus restitutionem decimarum, licet de facto possideat: quia aliius est possidere, et aliius detinere. Quandocque tamen petitur restitutioni, ubi nulla potest esse possession: ut cum petitur restitution consanguineum. Supra [X 2.13.13]. Sed illud est, quia possessor iuris praecessit, de qua constat. sic infra [X 3.5.7] arg. [X 1.38.3]. Item servus petit restitutionem rerum domini absentis, quas de iure non potest possidere. [Code Just. 8.5.1.] Similiter uxor restitutur ad res datas sibi a viro, quas de iure possidere non potest. [Dig. 43.16.1.9.] De hoc scilicet an possit repeti quod non licet possidere, traditur [C.14 q.1 c.1] in text. et glos. 2. Et nota quod licet aliqua appareat traducta, non tamen praesumendum est statim pro sponsalibus vel matrimonio, ut hic patet . . . .”).
The gloss, for its part, speaks of the possession of servitudes. But in the language of Innocent IV, it is neither a question of *quasi possessio*, which is the proper term for possession of a servitude, nor a question of a servitude at all. Rather, the question concerns the possession of sexual intercourse, which is treated like the possession of a thing. Although the betrothed cannot claim restitution of the young woman, as she was not in his possession (an assertion always grounded by reference to *Ex parte* [X 2.13.14]), canon law does allow him to claim his future wife *adiecta causa*, “a claim being appended” (or more elaborately: “justification for a claim to property having been adduced”). By contrast, in Roman law one could employ the legal action of *vindicatio* (an assertion of ownership) in respect of things one could not normally own (e.g., a son in power) or where some procedural failing prevents it (e.g., having made an error in an earlier *vindicatio* as regards the same piece of property), so long as one “appends a claim”—i.e., advances persuasive justification that the object should in fact be subjected to one’s possession. This action, *vindicatio*, normally lies “for all movable property, both animate and inanimate, and for property attached to the soil” (*in omnibus rebus mobilibus, tam animalibus quam his quae anima carent, et in his quae solo continentur*). The reason one must grant the *causa* for possession, says Innocent, is that one might equally claim possession of a woman on the ground that she is the plaintiff’s slave. Restitution must be made “in accordance with the mode and specific form of possession” (*secundum modum et speciem possessionis*). If, however, a plaintiff tries to claim restitution of a woman on the ground that she is his concubine—alleging that “he was in possession of her by keeping her in his bed”—his claim must be rejected and the pleading must be ripped up; his claim is akin to that of a heretic who demands restitution of property belonging to a church.

X. From Roffredus to Baldus and Joannes Andreae by Way of William Durant the Elder

Let us return now to the treatises of Roffredus that served as our point of departure. Roffredus’s texts ultimately gained currency well beyond their original audience of Roman-law-trained lawyers who needed to learn the basics of canon law procedure. They were in fact taken up in a practical manual that won an extraordinarily wide readership in the late Middle Ages: the *Speculum iuris* of William Durant the Elder, initially composed between 1271 and 1276 and revised between 1287 and 1291. Durant’s grand synthesis of procedural law in turn inspired *additions* of Joannes Andreae, a great canon lawyer of the first half of the fourteenth century, and later Baldus, the most famous jurist of the second half of that century.

Let us see how William Durant deals with the problem of the dispossessed spouse. His *Speculum iuris* makes a two-part distinction: between corporeal and incorporeal

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44 Dig. 6.1.1.1-2; Innocent IV, Apparatus super quinque libros decretalium, ad X 2.13.14 (Venice, Bernardinus Stagninus de Tridino 1495) (“Per hanc autem actionem liberae personae, quae sunt iuris nostri, ut puta liberi qui sunt in potestate, non petuntur: petuntur igitur aut praedictis aut interdictis aut cognitione praetoria, et ita pomponius libro trigensimo septimo: nisi forte, inquit, *adiecta causa quis vindicet*: si quis ita petit ‘filium suum’ vel ‘in potestate ex iure romano’, videtur mihi et pomponius consentire recte eum egisse: *aet enim adiecta causa* ex lege quiritum vindicare posse.” (emphasis added)).
property and between possessory and petitory actions. In discussing the general category of *restitutio spoliatorum*, Durant provides different pleading language depending on whether one is claiming corporeal property, incorporeal property, or both. The vocabulary of possession dominates throughout.

Take for example the first paragraph, which places recovery of a spouse under the heading of corporeal property:

I bring an action against P., my superior, who dispossessed me of my church without having first received a judgment: consequently, moreover, on the same point, X 2.13.7; C.2 q.1 c.10. But a wife who demands the restitution of her husband, and vice versa, shall formulate her request as indicated below in the title *De sponsibus*. Finally, if you possess a house, a piece of land, or other immovable property, and someone chases you from your possession, the interdict *unde vi* will lie for recovering the property: this interdict permits restitution in possession and for any loss, Dig. 43.16.1.pr.; Dig. 43.16.1.1; X 2.13.15; X 2.19.9.45

This first part of the pleading compares the wife who asks for her husband back and vice versa with the recovery of churches by a prelate and recovery of a house, piece of land, or any other immovable property.46 For pleadings concerning restitution of spouses, Durant also reuses formulas drawn from his discussion *De sponsalibus et matrimoniis*.

Durant’s second category is the restitution of incorporeal property. A claim for restitution of incorporeal property concerns such things as rights, rents, and servitudes. In the example pleadings, he always speaks of *possessione, vel quasi*, as is customary for incorporeal property. The first legal citations in these pleadings serve as the legal basis for this type of claim. They refer to two important canon law texts on possession of incorporeal property: the decretales *Querelam* (X 1.6.24) on the possession of personal services (a subject that aroused the strong opposition of the jurist Jacques de Révigny47) and *Quum ecclesia Sutrina* (X 2.12.3) on the possession of a right of election (*ius eligendi*). But Durant also aduces fragments of the *Digest* on other topics: regarding rights of enjoyment (Dig. 47.10.14); on the fact that possession of a servitude cannot be obtained by *traditio*, since

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45 Gulielmus Durandi, Speculum iuris, pts. 3-4, 158 (Venice, Iunctae 1585) (“Ago contra P. praelatum meum, qui me sine iudicio tali ecclesia spoliauit: unde, etc. extra, [X 2.13.7; C.2 q.1. c.10]. Mulier vero petens virum sibi restitui, et econtra, sic libellum concipiet, ut infra, de sponsal. §. Porro. Porro si te possidente domum, vel fundum, vel aliam rem immobilem, alquies te de possessione expulit, ad eam recuperandam datur tibi interdictum Unde vi: per quod fit restitutio possessionis et omnis damni [Dig. 43.16.1.pr.; Dig. 43.16.1.1; X 2.13.15; X 2.19.9].”)

46 Id.

47 The opinion of Jacques de Révigny is reported by Cino da Pistoia in his commentary on Code Just. 2.3.28. The canon lawyers, Cino says, assert that either a petitory or a possessory action will lie for recovering personal services, as is apparent from the decretal *Querelam*. But Jacques de Révigny, he notes, argues that it has never been permissible to grant a possessory action to obtain some personal performance that arises out of an obligation. “Dicit Iacob. de Rauen: hic adversus querelam opus est querela, nam quod in personalibus actionibus locum habeat possessorium nusquam auditur, nusquam relatum praeterquam a Saturnino.” Cino then makes fun of those civilians who deviate from the strict letter of Roman law in favor of the intellectual errors of the canon lawyers: “Ad decretalem Querelam [X 1.6.24]. Respon. quod ibi non loquitur de personali obligatione, sed de reali praestatione, ut de praestatione census, et ista est veritas, licet et in foro civili canonistarum servetur erroneus intellectus etiam per illos legistas qui manus habentos extra gazophilatium Iustiniani thesauri apud mendicantes vadunt merito mendicatam.” Cynus de Pistoia, Lectura super Codice, ad Code Just. 2.3.28, at n.17 (Frankfurt am Main, Ioannes Feyerabendt 1578).
servitudes are incorporeal, though Durant admits that a common usage speaks of *traditio* in establishing possession of a servitude (Dig. 8.1.20). A third fragment holds that in certain cases, such as for a lease of property for smoking cheeses, the right to let smoke escape into a house next door can be protected by an interdict (Dig. 8.5.8.5). As in his discussion of corporeal property, here, too, Durant takes account of marital matters, and refers to sample pleadings in his chapter *De sponsalibus et matrimoniis*. But the very fact that claims concerning marriage can, in certain situations, involve incorporeal property raises questions that need to be considered in depth.

To understand the logic that governs claims for restitution of incorporeal property, we must go to the heart of a debate that pitted canonists against civilians in the twelfth and thirteenth centuries. The civilians believed that a contract right (in the terminology of Roman law, a subjective right arising out of an obligation) did not constitute incorporeal property and was not subject to possession or acquisitive prescription (in common-law terms, adverse possession). Canon lawyers, on the other hand, frequently allowed the use of possessory and petitory actions, even to protect rights for which the Roman lawyers allowed only actions *in personam*. In other words, the canonists readily applied concepts of real rights to relations between people. This disagreement between Roman and canon lawyers continued up through the end of the fourteenth century. The debate was especially active in the school of Orléans and in the writings of Cino da Pistoia.

The topic was therefore central to all discussion of rights, which had in common that they were all incorporeal things: feudal homage, tolls, advowsons, election rights, rights to receive tithes and fixed rents, and “other similar rights” (*alia iura similia*), as Roffredus puts it. According to Azo, the possessory interdicts—the most commonly cited were the *unde vi* and *uti possidetis*—lie for recovery of incorporeal rights. In such cases, he says, the plaintiff must be able to prove that “the right was granted to him by an agreement *inter vivos* or by the last will of someone, or [that] he acquired it with time, since said

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48 Durandi, supra note 45, at 162.

49 On this point I follow the work of Emanuele Conte. See Conte, Servi medievali, supra note 12.

50 See the *additio* of Baldus to the *Digest* titled *De restitutione spoliatorum*, quoted in Durandi, supra note 45, at 165 (“Reditus et servitia inter immobilia computantur, et ideo quasi possidentur, et habent locum quasi interdicta, versiculo, consilium ergo G. Hic nota quod iusta iura non habent propriam naturam servitutum, quae in patiendo, non in dando consistunt, [Dig. 8.1.15.1]. Nam omnis servitus aut debitetur a re rei, aut a re personae, ut ususfructus, aut a persona non omnino libera, sed quasi subiecta alterius personae, ut vasallus dominio, vel a colono glebae annexo, [Code Just. 11.48.20], et facit, quod not. [J. Inst. 1.3]. Quod autem a libero homine debitetur non est servitus vel quasi, sed personalis obligatio: [Dig. 33.2.38; Dig. 33.1.12; Dig. 7.1.20]. Si quis ergo personalen obligationem dixerit quasi possideri, male loquitur, quia nec per patientiam cadit quasi traditio huic, et adde quod not. [Dig. 5.3.9]. Idem esse dicere quod idem est servitus et personalis obligatio, quod falsum est. Quomodo ergo ius reddituum quasi possidetur? Resp.: quaedam sunt obligationes simplices absolute, quaedam respecte seu connotative: in simplici obligatione non cadit quasi possessio, sed in obligatione relativa ad quasi scrutitutem vel subiectiorem vel dominium.”). Emanuele Conte claims that in the fourteenth century “tutte les situazioni stabili, cioè quasi tutti i rapporti economici operanti nella società cetuale che si è ormai affermata, sono risucchiati nell’ambito della realitas, si sottomettono alla disciplina delle cose.” Conte, Servi medievali, supra note 12, at 49.
servitude has a permanent cause." But treating an obligation of a free person to perform personal service as if the obligation were a thing runs up against two obstacles: reifying an obligation into a "thing," on one hand, and taking possession of free persons, on the other.

Roffredus, for example, comes up with an initial solution by drawing an analogy to causes of action that protect a plaintiff's right to an obligation performed by a colonus, or serf. These actions treat a colonus who owes personal services or money as immovable property, since the colonus cannot be separated from the land where he works. In another passage, however, Roffredus modifies his argument: the basis for treating a right to performance as a real (property) right is not that the obligor is tied to the land but that, as had already been suggested by the canon lawyer Huguccio, a "right over a free person" (ius in homine libero) can be exercised like a real right over someone else's property:

Therefore, if they are free, they cannot be possessed. See Dig. 41.2.23.1; Dig. 41.3.6. Response: it is true that one cannot possess a free person, provided that he be completely free. But if he is free but I exercise some right over him, I then have a right to bring a possessory action against him by reason of this right. Take for example the case of a man bought from his enemies; although he is free, he is nonetheless in my possession because of the ransom payment that attaches him to me. See Dig. 49.15; Code Just. 8.50.10. We also say that my son is in my possession because of the right over him that the father's power gives me.

Roffredus's example is the case of a ransomed captive. He grants to the person who pays the ransom a right over the freed captive that continues as long as the ransom debt has not been repaid. He analogizes this right to the right of a father over his son by reason of the patria potestas. But he reasons that rights over the body of a free individual can be conceptualized in different ways depending on whether the partial alienation of the person's body counts as corporeal property or incorporeal property, i.e., a thing that is or is not corporeal.

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51 Roffredus, supra note 22, at fol. 32r (“Constitutum est mihi inter vivos vel in testamento alicuius; vel acquisitum est mihi tempore, quia servitus illa habet continent causam.” (quoting Azo)).

52 Id. at fol. 34b (“Quaestio: Quaeritur an hoc interdictum competat pro ascripticiis seu censitis nostris, seu huusmodi rusticis qui nobis colonaria conditione detinentur. Respondeo: credo quod sic, nam isti tales inter immobilia computantur, ut [Dig. 44.3.3].”).

53 Huguccio speaks instead of “some right over a person” (aliquod ius in personam). He uses the term when discussing persons who are excluded from holy orders because they are under a perpetual obligation to perform personal services for their masters. See Conte, Servi medievali, supra note 12, at 159 n.31 (“quod locuntur de perpetuo oblatis suis dominis, ut de curialibus, seruis, libertis, ascriptis, originariis, manentibus, et his in quorum personis dominus aliquod ius habet” (quoting MS 7, fol. 76vb, Stiftsbibliothek Admont; MS 11, fol. 69va, Archivio del Capitolio di San Pietro, Bibliotheca Apostolica Vaticana)).

54 The fragments that discuss the debt created by buying a captive are Dig. 49.15.12.12; Dig. 49.15.15; Dig. 49.15.19.9. The idea is that payment of a ransom for a captive free person is treated as a priority debt that can be levied against the goods of the free person when he returns. If the ransomed captive is a slave, a ransom payment by a third party limits the power of the slave’s owner to recover him.

55 Roffredus, supra note 22, at fol. 34vb (“Si ergo sunt liberi, ergo possideri non possunt, ut [Dig. 41.2.23.1; Dig. 41.3.9]. Respondeo: verum est quod liber homo possideri non potest, qui sit ex toto liber; at si sit liber et habeo aliquod ius in eo, ratione illius iuris illum libellum possideo, sicut in redemptio ab hostibus, qui licet sit liber, nihilominus tamen eum possideo propter vinculum pignoris, ut [Dig. 49.15; Code Just. 8.50.10]; et filium quem dicor possidere ratione iuris quod habeo in eo ratione patris potestatis.”).
XI. Real Right over the Property of Another, or Possession of an Incorporeal?

Consider now a passage from the ordinary gloss on X 2.13.8. In this decretal, a nobleman requests that his wife, who has left him, be returned to him. The pope holds that restitution is unavailable unless the husband already held possession—that is, unless there had been a valid marriage followed by sexual relations (desponsata fuisset, et ab eo cognita). The gloss Ab eo cognita opines that possession acquired through sexual intercourse gives rise to a servitude. From the gloss’s point of view, the plaintiff requests restitution not of the spouse’s body, but of the servitude over the body:

> And so he acquired possession in this way. Thus it is obvious that the party seeking restitution must prove two things, viz., legitimate betrothal, actual or presumed, and sexual intercourse. And the same is true for servitudes, where the plaintiff must prove two things, namely that the servitude was established and that he used it. Dig. 43.19.3.6.56

Hence, in marriage cases, *possessio* can be understood as possession either of a corporeal thing (the body of the spouse; this is Roffredus’s position, which in the text of William Durant requires the classification of marriage itself among the corporeal things) or of an incorporeal thing (the servitude, the right to use the thing, in this case the body of another person). The jurists’ different conceptions of the right to the body of one’s spouse, as the object of possessory or petitory interdicts, therefore oscillate between two conceptualizations that each partake of a paradox: either treating a free person as susceptible of alienation or treating personal obligations as a real right (at least this was a paradox in the eyes of purists in the Roman tradition).

We must return now to the *Speculum* of William Durant the Elder. Durant devotes a long discussion to incorporeal property, gathering together the various strands of debate that had arisen concerning the possession of rights. One strand of debate in particular interests us. In introducing the debate, Durant first mentions Roffredus and the interdict *unde vi*, which was applicable only to immovable property; he also discusses the special case of a person who gets “dragged” from a vehicle or vessel (Dig. 43.16.1.7). Durant then asserts, following Roffredus, that incorporeals such as *reditus, servitia, vel quasi, et iura*, are strictly speaking neither movable nor immovable property. Nonetheless, in spite of everything, these rights can be classified under the category of *immobilia* because they are comparable to “legal words” (*nominibus*), which are “neither movables nor immovables, as in Dig. 42.1.15.”57 The *Digest* fragment, drawn from the title *De re indicata*, discusses the order in which different types of property of a debtor are to be seized in satisfaction of a judgment: one should first seize and sell that movable property that is endowed with life, then other movables; next, after all the movable property has been sold, one moves on to

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56 Gl. ord. ad X 2.13.8 v. *ab eo cognita* (“Et ita per hoc habuit possessionem. Et sic patet quod duo debet probare qui petit restitutionem videlicet legitimam desponsationem vere vel presuntive et carnalem copulam. et est simile in servituibus ubi quis debet probare duas res. scilicet servitutem constitutam fuisse et se usum fuisse. [Dig. 43.19.3.6].”).

57 Durandi, supra note 45, at 164.
immovable goods; and finally, to *iura* ("rights"). The ordinary gloss clarifies the meaning of *iura: iura, id est nomina*—"rights, that is, words."

The gloss, "that is, words," is clearly itself an attempt to surmount a metaphysical problem, namely, the seizure of something immaterial, a right, which is at once not reducible to the legal instruments on which it is recorded, nor captured in its particularity by the gloss, "words." Indeed, one should also note that only particular "legal words" acquire a stable ontology susceptible to seizure, one derivative from their referent, the *iura*, whose status within this juridical-metaphysical hierarchy depends on the position of those *iura* in a passage in the *Digest* where the word *nomina* does not appear.

Roffredus's argument, followed by Durant, is that in a certain sense all incorporeal rights can be thought of as immovable property and that it is thus legitimate to grant the interdict *unde vi* to recover possession of them. In his view, just as it is impossible to move a building, it is impossible to "move" incorporeal *nomina*. Durant is aware of the debates he is weighing into; in his time there was still sharp disagreement between civilians and canonists around the proper interpretation of incorporeal rights. He thus reminds readers skeptical of his logic that other approaches are available.58

**XII. Conclusion: Personal Status and Alienation of the Body**

In one part of his gloss on the *Tertia compilatio*, composed between 1213 and 1218 while he was teaching at Bologna, the canonist Johannes Teutonicus discusses the decretal *Ad hoc Deus* of Innocent III (1198).59 The text describes the peculiarities of marriage cases, noting:

On the other hand, the parties do not go before arbitrators here, since in marriage cases what is at issue is a reciprocal servitude, and in a servitude dispute the parties do not go before arbitrators. See [Dig. 4.8.32.7].60

The text that Johannes cites is a *Digest* fragment holding that an arbitrator cannot be required to pronounce sentence in a case brought to determine the free status of someone or the source of that status (by birth, by manumission, or from a *fideicommissum*). Such status cases are of such importance that they ought to be heard before the highest magistrates. The ordinary gloss on this fragment states that this rule also applies to *adscripticiis et similibus*, as can be seen in Code Just. 11.48.21.pr.,61 as well as to marriages, religious

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58 Id. ("Vel si times hanc obiectionem, propone const.si quis tantam, quae competit pro mobilibus, sicut et actio Vi bonorum raptorum, [J. Inst. 1.4.2]. Posset quoque dici secundum Ino. IIII quod pro huiusmodi iuribus subtractis competit conductio ex decretalibus praedictis, Querelam [X 1.6.24] et Cum ecclesia [X 2.13.3].").

59 3 Comp. 2.3.1 = X 2.6.1.

60 "Item non itur hic ad arbitros, cum enim in matrimonio agatur de mutua servitute, et in causa servitutis non itur ad arbitros, ut [Dig. 4.8.32(37).7]. Bernard of Parma's gloss on X 2.6.1 v. *servetur* also discusses the peculiarities of marriage cases. Bernard notes that "nec transactio siue compositio potest in matrimonio interuenire. supra [X 1.36.11], item nec arbitrium."

61 Code Just. 11.48.21.pr. ("Ne diutius dubitetur, si quis ex adscripticia et servo vel adscripticio et ancilla fuisset editus, cuius status sit, vel quae peior fortuna sit, utrumne adscriptione an servilis, sanctimus ea quidem, quae in anterioribus legibus cauta sunt pro tali progenie, quae ex mulieribus adscriptionis et viris liberis progenita sit, in suo statu relinqui, et sit adscriptione proles ex tali copulatione procreata. Iust. a. ad senatum. <a 530>.").
conversions, and the taking of monastic vows.\textsuperscript{62} Marriage thus belongs to the category of personal statuses—along with slavery, serfdom, monastic vows, and the taking of holy orders—that involve a total or partial alienation of one’s freedom and one’s body.

What Michel Foucault called the \textit{scientia sexualis} could be said to have reached its greatest height in the canon lawyers’ definition of the \textit{ius in corpus}, a concept that belonged first to the domain of real rights, later to the law of obligations. Classical canon law accomplished this conceptual feat by discussing sex as if it were something else entirely. In doing so, medieval canon lawyers purified their legal concept in much the same way as medieval alchemists separated the dross from a purified element. The right over the body of one’s spouse was the canonists’ \textit{magnum opus}.

\textsuperscript{62} Gl. ord. ad Dig. 4.8.32.7, v. \textit{idem dicendum} ("[S]ed an idem in adscripticiis et similibus: respondeo sic. ut habetur [Code Just. 11.48.21]. Idem de matrimonio. idem de conversione et monachatione. ut de his non possit compromitti. idem forte de qualibet causa in qua uertitur merum vel mixtum imperium.").